

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On April 13, 2009 appellant, the employee's widow, filed a claim for survivor's benefits due to the death of her husband, the employee, who passed away on September 19, 2008. She indicated that the employee could not breathe due to pulmonary asbestosis. The record indicates that the employee was employed by the employing establishment as a temporary boiler maker welder intermittently from February 10, 1970 to July 25, 1983. The employee stopped work on July 25, 1982. The cause of death listed on the death certificate was pneumonia.

In support of her claim, appellant submitted a May 11, 2009 statement; records from St. Thomas Hospital dated May 16 to September 1, 2008; progress notes from Veterans Administration dated September 11 to 19, 2008; and a February 11, 2009 report from St. Thomas Medical Group.

In a March 5, 2009 report, Dr. Carl E. Mitchell, a Board-certified family practitioner, advised that the employee was under his care from 1994 to April 1, 2005. He noted the employee's employment history and that the employee had stopped smoking cigars prior to his employment with the employing establishment. Dr. Mitchell stated the employee had no history of pulmonary problems or examination changes. In March 2002, the employee exhibited rough breath sounds on lung examination, but no symptoms. In January 2004, he complained of chronic coughing. Chest x-ray at that time showed hyperinflation and evidence of pulmonary emphysema, which had not been apparent on a January 13, 2000 x-ray. The employee was advised a lung needle biopsy revealed a "plugged bronchi" and asbestosis. With regards to his asbestosis, Dr. Mitchell stated that the employee had histologic demonstration of pulmonary asbestos; he welded through and around asbestos; he had limited smoking history; and development of progressive obstructive and restrictive pulmonary disease by chest x-ray and clinical presentation and eventual history of the lung.

The Office referred the employee's medical record, a statement of accepted facts and a list of questions, to Dr. Leonard Y. Cosmo, a Board-certified internist with a subspecialty in pulmonary disease, for a second opinion medical review. In a September 19, 2009 report, Dr. Cosmo indicated his review of the employee's records and that the employee had a complex clinical course with multiple problems and issues. He advised there was a lack of objective medical documentation in the medical record to support a causal relationship between the employee's lung cancer, pneumonia, sepsis, respiratory failure, cardiac arrhythmias and ultimately death and exposures related to his intermittent work period from February 10, 1970 through July 25, 1982. Dr. Cosmo further noted there were no records from physicians which supported causal relationship of the employee's lung cancer to the prior history of exposures at the workplace. He opined that the employee's cause of death was from a combination of aspiration, bacteremia or cardiac failure superimposed on his debilitated weakness state associated with multiple medical conditions, which included chronic respiratory failure, poor nutritional status and arrhythmias.

By decision dated September 25, 2009, the Office denied appellant's claim for survivor benefits. It determined that the medical evidence was insufficient to meet her burden of establishing that the employee's death was due to factors of his employment.

On October 23, 2009 appellant requested reconsideration. In an October 15, 2009 report, Dr. L. James Wudel, Jr., a Board-certified thoracic surgeon, noted that the employee was admitted to St. Thomas Hospital on May 16, 2008 and a routine chest radiograph indicated a right upper lobe lung lesion, which was identified as nonsmall cell lung cancer. Following surgery, the employee was found to have metastatic melanoma in his right upper lobe. Dr. Wudel noted that during the employee's employment as a temporary boilermaker welder from February 10, 1970 to July 25, 1982 with the employing establishment, the employee had significant exposure to asbestos, heavy metals and other carcinogenic substances, all of which were known to cause various forms of cancer. He opined that the employee's exposure history may have contributed to the development of his cancer.

By decision dated November 18, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative of information already submitted. It found that Dr. Wudel's report was speculative and lacked medical rationale.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.⁴

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁵ The claimant need only submit relevant, pertinent evidence not previously considered by the Office.⁶ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁷

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

⁵ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

⁷ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

Appellant filed a survivor's claim alleging that factors of the employee's federal employment caused or contributed to the employee's death. The Office denied the claim on September 25, 2009 due to insufficient medical evidence. Appellant requested reconsideration on October 23, 2009. She submitted a new report from Dr. Wudel, Jr., in which he opined the employee's exposure history may have contributed to the development of his cancer.

The Office denied reconsideration on November 18, 2009, finding Dr. Wudel's report cumulative of information previously submitted. However, Dr. Wudel's report addressed causal relationship between the employee's cancer and subsequent death as it related to factors of his federal employment. He opined that the employee's workplace exposure history may have contributed to the development of his cancer. Because this medical evidence is new and goes directly to the basis of the Office's September 25, 2009 merit denial, the lack of medical evidence supporting causal relationship, the Board finds that appellant's October 23, 2009 request for reconsideration satisfies the third standard for obtaining a merit review of her claim.⁸ Although the Office found that Dr. Wudel's opinion was insufficient to warrant a merit review because it was speculative and unrationalized, this pertains to the standard for weighing the probative value of medical evidence when the Office is conducting a merit review. To require it to conduct a merit review, the evidence need only be new and relevant.⁹ The Board will set aside the Office's decision denying reconsideration and remand the case for an appropriate final decision on the merits of appellant's survivor's claim.

On appeal, appellant asserted that the employee's death was contributed to by his employment. As noted, the Board only has jurisdiction regarding whether the Office properly denied a merit review of the claim. In light of the disposition of this appeal, the Office shall issue a decision that addresses the merits of the claim.¹⁰

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration.

⁸ V.B., 58 ECAB 725 (2007).

⁹ See *supra* notes 5, 6. See also *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ Appellant submitted new evidence on appeal. The Board notes that it cannot consider new evidence on appeal as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2009 is set aside. The case is remanded to the Office for further action consistent with this decision.

Issued: February 23, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board