

**United States Department of Labor
Employees' Compensation Appeals Board**

L.D., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Brooklyn, NY, Employer**

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**Docket No. 08-1436
Issued: November 4, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 31, 2008 which denied appellant's request for merit review. Because more than one year has elapsed between the last merit decision dated November 25, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board on appeal. On April 14, 2005 appellant, then a 71-year-old former shipwright, filed an occupational disease claim, alleging that he was exposed to asbestos while a temporary civil service employee. He stated that on July 29, 2004 he became aware that he had developed lung disease as a consequence of his employment-related

asbestos exposure. By decision dated November 25, 2005, the Office denied appellant's claim finding that he was not a civil employee as defined by the Federal Employees' Compensation Act at the time of his claimed injury. It noted that the employing establishment was unable to recover appellant's personnel file. The employing establishment contact indicated that appellant was last exposed to asbestos in 1961 while employed at the U.S. Postal Service.

Appellant, through his attorney, requested reconsideration on October 10, 2006. He argued that he was a shipwright at the employing establishment in 1961. Appellant referenced the documentation from the Social Security Administration demonstrating that he was employed by the employing establishment in 1961. Counsel stated, "The record reflects that [appellant] was employed as a civilian shipwright at the Brooklyn Navy Yard, at a work location and in an employment capacity that was notorious for exposure to asbestos." He also argued that appellant's claim was timely filed and that he had submitted sufficient medical evidence to met his burden of proof. In support of his claim, appellant submitted medical bills, medical reports and resubmitted the documentation from the Social Security Administration.

By decision dated January 26, 2007, the Office declined to reopen appellant's claim for consideration of the merits. It found that the evidence submitted was repetitious, irrelevant and not sufficient to warrant review. The Office noted that appellant did not submit any new and relevant evidence regarding his employment by the employing establishment. Appellant, through his attorney, appealed this decision to the Board. In a decision dated August 6, 2007,¹ the Board affirmed the Office's January 26, 2007 decision finding that appellant failed to submit any new evidence regarding whether or not he was a federal employee for the purposes of the Act. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant requested reconsideration on October 10, 2007. He alleged that he was diagnosed with cancer and requested that the Office award him compensation benefits by placing a lien on his products liability claim. By decision dated March 31, 2008, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit relevant new evidence or argument in support of his claim.²

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that the evidence or argument submitted by 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.⁴ When a claimant fails to meet

¹ Docket No. 07-926 (issued August 6, 2007).

² Following the Office's March 31, 2008 decision, appellant submitted additional new evidence to the Board. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193, 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

The Office denied appellant's claim for compensation benefits on the grounds that he failed to establish that he was an employee within the meaning of the Act. Appellant requested reconsideration and submitted argument that he was entitled to compensation benefits as he had a products liability claim and the Office could place a lien on this claim and award him compensation benefits. He did not submit any new evidence with his request for reconsideration.

Appellant's request for reconsideration must contain evidence or argument relevant to the issue of whether or not he was a federal employee at the time of his alleged employment injury. He did not submit such evidence or argument with his request for reconsideration. Appellant's legal opinion that the Office may place a lien on his products liability claim is not relevant to the issue of whether he was a federal employee at the time his alleged employment exposure occurred. As his request for reconsideration did not contain any relevant new evidence or argument in support of his claim for compensation, the Office properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit relevant new evidence or argument in support of his request for reconsideration.

⁵ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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