

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 5, 2007 appellant, then a 63-year-old retired branch chief program analyst, filed a claim for occupational disease alleging that she sustained asbestosis on September 5, 2006 as a result of her federal employment. She claimed that the employing establishment removed asbestos from within the building from 1993 to 2004. Appellant remembered asbestos being removed from different areas on the seventh floor and that, when she was in the process of reviewing and archiving old files that were sent to the repository, the office next to the room where the old records were stored was draped with plastic while they were removing materials and remodeling. She stated that sometimes it was necessary for her to work in the basement of her office and at the other offices, where she noticed white dust when she opened several old safes. Appellant claimed exposure to asbestos from 1993 to 2004. She retired on May 31, 2004. In a September 11, 2007 decision, OWCP denied the claim as the medical evidence did not demonstrate that appellant's claimed condition was related to her employment.

Appellant continued to submit evidence and, on December 27, 2011, requested reconsideration. On January 26, 2012 OWCP issued two decisions. One decision found that the request for reconsideration was untimely filed and did not establish clear evidence of error. The other decision found that the basis for denial of the claim in the September 11, 2007 decision was incorrect. OWCP found that it acted prematurely in denying the claim on the basis of causal relationship as it did not have sufficient evidence to support that there was asbestos exposure. On February 7, 2012 appellant appealed to the Board.

In an April 26, 2012 decision, OWCP denied appellant's claim finding that the factual component of fact of injury was not established as the evidence did not support appellant's assertion that she was exposed to asbestos as alleged. It relied on the factual evidence from the employing establishment, which noted that appellant worked almost exclusively on the seventh floor, which had no history of asbestos and the area of the eighth floor, which she occasionally accessed for filing, never conclusively tested positive for asbestos or other harmful material. OWCP also relied on the March 22, 2012 memorandum from a certified industrial hygienist, which indicated that the sampling results for the seventh floor from 1993 and 2004 were negative for harmful asbestos and the environmental testing results in the eight floor/attic were questionable and not competent to have exposed appellant to harmful asbestos particles given the time appellant spent working on the eighth floor. Appellant did not appeal this decision to the Board.

In a June 22, 2012 electronic mailing, appellant requested reconsideration. In several letters received by OWCP on June 26, July 13, 16 and 18 and November 5, 2012, she provided several arguments regarding the inadequacy of the claims process, including the abuse of authority, due process violations, displeasure regarding the review of the evidence submitted, the cover-up of asbestos contamination at the employing establishment, the falsified information from the employing establishment and the validity of the asbestos readings reported. Appellant

also submitted pages from asbestos assessment data forms from several dates in 2002 and 2003 for “Commerce Building” which noted certain readings for various areas.

In an August 15, 2012 order, the Board dismissed the appeal of OWCP’s January 26, 2012 decision finding that the second January 26, 2012 decision, vacating the September 11, 2007 decision and initiating further development, placed appellant’s claim in an interlocutory posture. The Board found that there was no final adverse decision issued by OWCP over which the Board could properly exercise jurisdiction.⁴

By decision dated November 9, 2012, OWCP denied appellant’s request for reconsideration on the grounds that the evidence and arguments submitted were insufficient to warrant a merit review of the prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁵ OWCP’s regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁶ To be entitled to a merit review of OWCP’s decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

Appellant disagreed with OWCP’s April 26, 2012 decision, which denied her claim on the grounds that she did not establish that she was exposed to asbestos as alleged. The issue is whether her June 22, 2012 request for reconsideration and numerous correspondence received thereafter met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or establish that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. The basis for OWCP’s denial of the claim was insufficient factual evidence which supported that she was exposed to asbestos at the time, place and in the manner alleged. While appellant advanced numerous arguments that the employing establishment was covering up and falsifying evidence that asbestos was present during the period claimed, her assertions do not show that OWCP

⁴ Docket No. 12-692 (issued August 15, 2012).

⁵ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application. 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(1)-(2).

⁷ *Id.* at § 10.607(a).

erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but she did not submit any new and relevant evidence in this case. Appellant submitted asbestos assessment data forms for Commerce Building from 2002 and 2003. This evidence, while new, is not relevant to the issue of whether the factual basis of the claim, asbestos exposure as alleged by appellant, has been established. These data forms note various findings in different areas of the building but there is no clear indication as to who compiled the data or the significance of any of the findings with regards to the areas where appellant worked. Of note is that OWCP previously found that appellant had restricted access to areas that may have had asbestos and there was no recorded exposure to asbestos in her work area. Thus this report, by itself, is not relevant to the fact of injury issue in appellant's claim.⁸

On appeal, appellant contends that OWCP has continued arrogance and total disregard to the factual hot asbestos fibers information and documentation submitted in declining a merit review. She argues that she has demonstrated the existence of material facts as to the issues improperly presented by OWCP and the denial of her claim is clear and convincing evidence of abuse, fraud and falsification of evidence by the employing establishment of cover-up and suppression of the continued existing asbestosis threat since 1993 using numerous types of mismanagement tactics. Appellant's arguments on appeal largely reiterate her previous statements and request for reconsideration. She focuses on evidence she believes supports her claim and numerous errors which she believed the employing establishment and OWCP committed in handling her claim. As previously noted, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen her case for further review of the merits under section 8128(a).

⁸ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000) (evidence which does not address the particular issue involved does not constitute a basis for reopening a case for a merit review).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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