

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BETTY HOLCOMB and DEPARTMENT OF THE NAVY,  
NAVAL AMMUNITION DEPOT, McAlester, OK

*Docket No. 00-2615; Submitted on the Record;  
Issued July 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an occupational disease in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of her claim under 5 U.S.C. § 8128(a).

On February 16, 1998 appellant, a 64-year-old former office clerk, filed a notice of occupational disease claim alleging that she was exposed to asbestosis that resulted in pneumoconiosis while employed at the Long Beach Naval Shipyard from August 20, 1962 through July 24, 1964.<sup>1</sup> She indicated that her office was located near a warehouse in which employees worked on shipyard equipment and as a consequence, she was exposed to various solvents and chemicals. Appellant asserted that she first became aware of the claimed condition on September 15, 1996 and first realized that the condition was caused or aggravated by her employment on October 29, 1997. She did not miss time from work due to the claimed condition. She resigned from her position on July 24, 1964.

The Office received appellant's employment history, which illustrated that she held five separate federal positions between 1955 and 1964. The positions held by appellant include a clerk/typist position at Fort McArthur, California from May 20, 1955 to February 17, 1958 and May 1 to August 29, 1958; an accounting clerk position at Long Beach Naval Shipyard, Long Beach, California from March 17 to August 29, 1958 and November 2, 1959 to April 22, 1960 and a clerk/typist position at the Naval Ammunition Depot in McAlester, Oklahoma from August 20, 1962 to July 24, 1964.

The Office also received a copy of an environmental toxicology report dated September 15, 1997 from Dr. Mark Schiefer, consulting physician, previously submitted in support of the earlier asbestosis claim. Dr. Schiefer discussed that he reviewed an asbestos

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<sup>1</sup> The record reflects that appellant filed an earlier claim for asbestosis under claim number 13-1156388 alleging that her condition was related to her previous employment at the Long Beach Naval Shipyard. This claim was denied.

screening sheet, a cover letter and x-ray films for appellant in order to complete his toxicology evaluation. He reported that appellant had discussed in the questionnaire that she had performed certain work duties including insulation, carpentry, shipyard work, painting, building maintenance and seamstress work in a factory. Appellant also discussed being exposed to various materials during her employment including mastics/cement products and asbestos gaskets/valve packing and also indicated that she had household exposure. Dr. Schiefer diagnosed appellant with asbestosis related to a number of factors including occupational exposure from 1950 to 1959 while employed as a factory laborer and a bookkeeper at naval shipyards; household contact with her husband's work clothing from 1951 through 1984 and chronic cigarette smoking.

On May 12, 1998 appellant filed two additional occupational disease claims alleging work-related exposure to asbestos. On the first claim form she alleged that, when employed at the U.S. Naval Ammunition Depot, she worked in the basement area in close proximity with employees who assembled, stored and shipped ammunition. On the second claim appellant alleged that she developed asbestosis-related pneumoconiosis while working in a disposal office at Fort McArthur for three years, disposing of paper, vehicles and machinery.

A representative of the Naval Ammunition Depot controverted the claim and stated that there were no records regarding asbestos in the basement area in which appellant worked from August 20, 1962 to July 24, 1964. The employing establishment consulted with a fire chief who worked in the basement area in 1965 and an industrial hygienist familiar with the area who both stated that no asbestos had ever been removed from that locale.

By decision dated July 27, 1998 and October 23, 2000, the Office denied appellant's occupational disease claim on the grounds that the factual evidence submitted was insufficient to establish that she had any asbestos exposure in her federal employment.

Appellant, through her attorney, requested an oral hearing, which was held on February 24, 1999. By decision dated April 28, 1999, the Office hearing representative affirmed the July 27, 1998 decision finding that appellant failed to submit the necessary factual evidence to establish that the claimed condition resulted from the alleged work exposure at any of her places of federal employment.

On April 24, 2000 appellant through her attorney requested reconsideration and submitted newspaper clippings and other publications in support of the claim. Her counsel cited various Board decisions in which it ruled that certain federal workers employed as shipyard workers, laborers, equipment cleaners and truck drivers at the Long Beach Naval Shipyard during the same time as appellant had been exposed to asbestos in varying degrees. Appellant's counsel also submitted publications, which discussed asbestos at the Long Beach Naval Shipyard and the number of employees who had worked at the employing establishment for at least 17 years who had contracted asbestosis. One publication discussed that an employee-relations director, who, worked in an office at the employing establishment with exposure to shipyard workers had contracted asbestosis.

In a merit decision dated May 23, 2000, the Office denied modification of its prior decision on the grounds that the evidence submitted failed to support that appellant, a clerk/typist who worked in an office setting was exposed to occupational-related asbestos.

On May 31, 2000 appellant again through her attorney requested reconsideration and discussed again the periodicals and publications previously considered by the Office in the May 23, 2000 decision. Her counsel argued that the publications previously submitted on reconsideration were provided to support the fact that appellant worked in an area or in a surrounding in which she would have been exposed to asbestos, not as evidence establishing that she had contracted asbestosis.

By decision dated June 29, 2000, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a review of the merits. The Office found that the evidence submitted was repetitious of evidence already in the case record, that it had no evidentiary value and did not constitute a basis for reopening the case.

The Board finds that appellant failed to establish that she sustained an occupational disease causally related to factors of her federal employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>2</sup> The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.<sup>3</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>4</sup> must be one of reasonable medical certainty<sup>5</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup>

In this case, appellant submitted a medical report from Dr. Schiefer dated September 15, 1997, which diagnosed asbestosis. The Board finds, however, that appellant has submitted insufficient evidence to establish that she was exposed to asbestos in the course of her federal employment, which caused the diagnosed condition.

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<sup>2</sup> See *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>3</sup> The Board held that, in certain cases, where the causal connection is obvious, expert testimony may not be necessary; see *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not one of obvious causal connection.

<sup>4</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>5</sup> See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>6</sup> See *James D. Carter*, 43 ECAB 113 (1991); *George A. Ross*, 43 ECAB 346 (1991); *William E. Enright*, 31 ECAB 426, 430 (1980).

Appellant asserted that, during her federal employment, she was exposed to asbestos and that she developed a pulmonary condition related to her exposure, however, she provided no evidence to support her claims and the employing establishment has denied appellant's allegations that she sustained any asbestos exposure while employed.

In regard to the medical evidence, Dr. Schiefer's report in which he diagnosed asbestosis does not establish a causal relationship between appellant's condition and the alleged exposure to asbestos at work. First, the report is based on an inaccurate history and nature of appellant's exposure and therefore are of diminished probative value.<sup>7</sup> Dr. Schiefer reported that appellant had performed carpentry, shipyard work, painting, building maintenance and seamstress work while federally employed and was also exposed to various materials including mastics/cement products and asbestos gaskets/valve packing and had household exposure. The record reflects however that appellant performed duties as an office clerk from 1955 to 1964, as opposed to those duties outlined by Dr. Schiefer. Moreover the employing establishment submitted evidence contending that there was no asbestos removed in the area in which appellant worked. Second, Dr. Schiefer did not report that occupational exposure was the proximate cause of appellant's condition but instead listed various other factors including household exposure and cigarette smoking as contributing causes.

Consequently, appellant has failed to establish that she sustained asbestosis in the performance of duty as alleged, as she did not submit sufficient evidence to establish the claimed work factor of asbestos exposure as factual.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>8</sup> 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 relevant legal argument not previously considered by the Office; or
- (3) Submit relevant and pertinent new evidence not previously considered by the Office.<sup>9</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>10</sup>

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<sup>7</sup> See *Marilyn L. Howard*, 33 ECAB 683 (1982).

<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> 20 C.F.R. § 10.606(b).

<sup>10</sup> 20 C.F.R. § 10.608(b).

In the present case, appellant's counsel filed a request for reconsideration of the May 23, 2000 decision on May 31, 2000. Her counsel argued that the publications submitted and references made to previous Board decisions in the April 24, 2000 request for reconsideration was offered to support the fact that appellant was exposed to asbestos at work and not that she actually developed asbestosis as a result of work factors, as interpreted by the Office. The argument made on reconsideration, essentially repeated the content of the previous request and discussed evidence previously considered by the Office. The submission of evidence, which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.<sup>11</sup> Appellant's counsel did not address the issue of whether appellant was actually exposed to asbestos while federally employed or whether her pulmonary condition was caused by the implicated employment factors in any manner different from his earlier request for reconsideration. As his arguments and discussion of the previously submitted evidence in the request is repetitive, they do not warrant reopening of appellant's claim.

Consequently, appellant is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b). Accordingly, the Board finds that the Office did not abuse its discretion in denying appellant's May 31, 2000 request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated October 23, June 29 and May 23, 2000 are affirmed.

Dated, Washington, DC  
July 23, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>11</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).