

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

MARIA V. ORTIZ, Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Hato Rey, PR, Employer)

**Docket No. 04-1320
Issued: September 28, 2004**

Appearances:
Maria V. Ortiz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 22, 2004 appellant filed a timely appeal from a nonmerit Office of Workers' Compensation Programs' decision dated January 14, 2004. Because more than one year has elapsed between the last merit decision dated January 16, 2003 and the filing of this appeal on April 22, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On May 24, 2001 appellant, a 48-year-old bankruptcy specialist, filed a Form CA-2 claim for benefits based on occupational disease, alleging that she developed sinusitis, rhinitis,

pulmonary fibrosis, bronchial asthma and bronchitis causally related to exposure to second-hand smoke at her worksite.

By letter dated July 11, 2001, the Office advised appellant that it would not consider any medical evidence regarding any alleged medical condition which developed prior to February 7, 1994, as that pertained to a previous claim appellant filed which was denied in several Office decisions and by Board decision dated December 17, 1999.¹

Appellant submitted a statement dated July 19, 2001. She asserted that, although her alleged asthma condition was part of her previous claim in 1994, her smoker's bronchitis, which caused her asthma condition, was not diagnosed until May 15, 2001 by her current treating physician, Dr. Mario Espinosa-Garcia, Board-certified in pulmonary medicine. Appellant stated that the mere fact that she had not been aware in 1994 of her bronchitis -- the alleged cause of her asthma -- should not preclude her from receiving compensation for this condition, as she did not become aware that she had this condition until 2001. Therefore, she asserted that she should be allowed to submit, with her current claim, any medical evidence which pertained to these conditions, including evidence which existed prior to February 1994. Appellant further stated that she had no smoking history of her own, but had submitted copious evidence of cigarette smoking by coworkers at her workplace, which caused her work-related respiratory conditions.

Dr. Espinosa-Garcia submitted a report dated July 22, 2001 which documented appellant's history of exposure to cigarette smoke at the employing establishment dating back to 1980. He diagnosed acute bronchial asthma, chronic bronchitis (smoker's bronchitis), pulmonary fibrosis and oxygen's deficiency caused by exposure to second-hand smoke. Dr. Espinosa-Garcia stated that, based on the above diagnoses, appellant's symptoms, the physical examinations, clinical findings, past medical history, test results and the fact that her respiratory illnesses are emblematic of active and passive smokers, he had concluded that appellant had smoker's bronchitis and consequential asthma. He advised that these conditions were employment related based on the fact that she had never been an active or passive smoker, with the exception of her exposure to second-hand smoke at her worksite since 1980, which had continued in an uninterrupted manner since that time.

By decision dated January 16, 2002, the Office denied appellant's claim for compensation based on a work-related respiratory condition. The Office stated that in light of the factual evidence which indicated that appellant was not exposed to smoke as of April 1994, and given her history of nonwork-related sinus and bronchial infections which could have contributed to or caused her respiratory conditions, Dr. Espinosa-Garcia had based his conclusions on an inaccurate medical history. The Office concluded that the medical evidence did not show that appellant's alleged conditions resulted from exposure to second-hand smoke at her worksite.

By letter dated January 29, 2002, appellant requested an oral hearing, which was held on August 29, 2002.

¹ Docket No. 98-1551 (issued December 17, 1999).

By decision dated January 16, 2003, an Office hearing representative affirmed the January 16, 2002 Office decision.

By letter dated February 12, 2003, appellant requested reconsideration. Appellant submitted photocopies of articles from medical journals and periodicals pertaining to respiratory conditions and the effects of exposure to secondary smoke, but did not submit any additional medical evidence along with her request. She noted that she would “support” the request with medical evidence to be subsequently submitted. On October 13, 2003 appellant submitted another request for reconsideration.

By decision dated January 14, 2004, the Office denied appellant’s applications for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act² does not grant a claimant the right to a merit review of his case. Rather, this section vests the Office with discretionary authority to review prior decisions. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under this section of the Act.

Pursuant to 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁴

ANALYSIS

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. Appellant’s representative’s argument in support of the request for reconsideration: that appellant was exposed to second-hand smoke at work, was cumulative and repetitive of contentions that were presented and rejected by the Office in previous decisions.

Furthermore, appellant did not submit any additional medical evidence in connection with her February 12, 2003 or October 13, 2003 reconsideration requests. Rather appellant submitted articles from medical journals and periodicals regarding the effects of second-hand smoke. However, materials from periodicals, journals and magazines are of no probative value to support a claim for compensation. Medical evidence must be in the form of rationalized

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁴ *Howard A. Williams*, 45 ECAB 853 (1994).

opinion by a qualified physician based on a complete and accurate medical and factual history.⁵ Thus, the request did not contain any new and relevant evidence for the Office to review.

The Board finds that the Office properly refused to reopen appellant's claim for merit review.⁶

CONCLUSION

The Office properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ *John D. Baskette*, 30 ECAB 761 (1979).

⁶ The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002) provides that the Office's delay in issuing a decision may jeopardize a claimant's right to a merit review and thus may require issuance of a merit decision. In this case, the lapse in time was due to appellant's request that she be permitted to subsequently submit evidence.