



The employing establishment responded on May 4, 2005 and stated that appellant's most recent employment was with the U.S. Postal Service and that he should file his claim through that agency. It requested appellant's personnel file from National Archives and Records Administration on April 12, 2005 and his medical file on April 22, 2005.

Appellant provided medical records from November 3, 1961 listing his occupation as shipwright. He also submitted a medical report dated August 8, 1961 signed and stamped by the New York Naval Shipyard.

In a report dated July 29, 2004, Dr. Coleman Boyd, a pulmonologist, stated that appellant was exposed to asbestos while working for the U.S. Postal Service from 1951 through 1960 and while working for the employing establishment as a shipwright for six months in 1961. He noted that appellant's chest x-ray demonstrated definite bilateral interstitial fibrosis in the mid and lower lung zones with irregular linear interstitial markings delineated. Dr. Boyd stated that these findings were typical of previous asbestos exposure and indicated asbestosis. However, he noted that appellant did not have asbestosis based on low exposure history and the low perfusion of interstitial opacities in the absence of asbestos-related pulmonary physiologic impairment.

On May 13, 2005 appellant submitted documentation from the Social Security Administration (SSA) indicating that he was employed by the postal service from 1957 through 1961 intermittently. He was employed by the employing establishment from July through December 1961.

Appellant submitted a report from Dr. Edward Eden, a Board-certified pulmonologist, dated July 12, 2005 diagnosing pulmonary asbestosis secondary to occupational exposure.

The Office responded to appellant's claim on August 30, 2005 and stated that the evidence failed to support that he was a federal employee at the time of the alleged employment injury. The Office requested additional information regarding appellant's employment status at the time of the alleged employment exposure.

Appellant responded on September 7, 2005 and stated that he was certified to work at the employing establishment by the Civil Service Commission. He denied working for a private employer and stated that he was employed by the employing establishment. Appellant resubmitted the documentation from the SSA.

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 SSA 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 meet his burden of proof. In support of his claim, appellant submitted medical bills, medical reports and resubmitted the documentation from the SSA.

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 insufficient to warrant review. The Office noted that appellant did not submit any new and relevant evidence regarding his employment by the employing establishment. The Office stated:

“The SSA report pertains to Social Security taxes being reported by any given employer. The report outlines that for the quarter April to June 1961 the U.S. Navy Department reported to [S]ocial [S]ecurity taxes of \$1,002.55. This represents [appellant's] employment in a civilian capacity and not as a federal employee of the government. Please note that, based on the time frame involved, that being 1961, the federal government only had one retirement system known as [Civil Service Retirement System] (CSRS). Under the CSRS retirement program, [f]ederal employees did not pay into the Social Security system. As such, this form substantiates that you were not a federal employee with the Navy Department. It gives credence that [appellant] was hired by the Navy Department in a civilian capacity, but not as a federal employee which would provide him coverage under the Act.”

The Office concluded that the employing establishment could not locate any official personnel file for appellant and that he was not an employee for the purposes of the Act.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>2</sup>

The Act generally defines an employee as a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States or an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Juanita Pitts*, 56 ECAB \_\_\_\_ (Docket No. 04-1527, issued October 28, 2004).

nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual.<sup>3</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>4</sup> 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.<sup>5</sup> 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 on the merits.<sup>6</sup>

### **ANALYSIS**

The Office denied appellant's claim on the initial element of his burden of proof that he had failed to establish that he was an employee within the meaning of the Act. Appellant then requested reconsideration and submitted argument and evidence regarding the additional elements of his burden of proof including the timeliness of his claim that his claim occurred in the performance of duty and the causal relationship between his condition and his employment. The Board finds that the Office properly concluded that arguments and evidence regarding these elements of appellant's claim were not relevant as he had not established that he was an employee.

Appellant also failed to submit any new evidence regarding whether or not he was a federal employee for the purposes of the Act. He resubmitted the SSA documentation regarding payment by the employing establishment. Appellant argued that this established that he was a federal employee. As this evidence had previously been considered by the Office in determining that appellant failed to meet his burden of proof that he was an employee for the purposes of the Act, this does not constitute new evidence and cannot require the Office to reopen appellant's claim for consideration of the merits.

### **CONCLUSION**

The Board finds that appellant failed to submit relevant new evidence or argument which required the Office to reopen his claim for consideration of the merits. The Office properly denied his request for merit review.

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<sup>3</sup> 5 U.S.C. § 8101(1)(A) and (B).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 26, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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