

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

N.S., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
MAPPING AGENCY, Louisville, KY, Employer)

Docket No. 07-1611
Issued: November 23, 2007

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 26, 2007, denying her request for further merit review of her claim. Because more than one year has elapsed between the most recent merit decision dated February 14, 2006 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 review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 11, 2002 appellant, then a 70-year-old retired cartographer, filed an occupational disease claim alleging that her breast cancer was due to factors of her federal

employment. She first realized that the disease was caused or aggravated by her employment on May 13, 2001.¹

In support of her claim, appellant submitted medical evidence which included an October 23, 2002 report, from Dr. Charles Dannaher, a Board-certified oncologist, who noted that appellant was diagnosed with breast cancer in June 1997. Dr. Dannaher opined that appellant was exposed to a significant number of chemicals in a poorly ventilated work space during her employment with the employing establishment. He opined that her condition may be directly related to her work environment.

In a January 19, 2003 statement, appellant alleged that she became aware of her condition on May 18, 1997. She later realized that she was exposed to toxic chemicals on a regular basis while working at the employing establishment. Appellant alleged that, on May 13, 2001, she conducted an investigation to ascertain her situation.

By decision dated March 5, 2003, the Office denied appellant's claim for compensation, as the medical evidence did not demonstrate that the claimed medical condition was related to established work-related events.

On March 28, 2003 appellant requested a hearing, which was held on February 25, 2004.

By decision dated May 14, 2004, the Office hearing representative affirmed the March 5, 2003 decision. The Office hearing representative noted that appellant did not submit any detailed rationalized medical evidence to support that her breast cancer was caused by factors of her federal employment.

Appellant's representative filed an appeal with the Board. On November 1, 2005 the Board issued an order remanding case due to the Office's delay in failing to produce the case record.²

By decision dated February 14, 2006, the Office denied appellant's claim for compensation, as the medical evidence did not demonstrate that the claimed medical condition was related to the accepted injury.

On March 17, 2006 appellant requested a hearing. On April 3, 2006 her representative alleged that her cancer was related to her employment and cited as an example that 40 employees from the employing establishment either were disabled or died from cancer.

By decision dated May 3, 2006, the Office denied appellant's request for a hearing. The Office advised appellant that a previous hearing was completed by the Branch of Hearings and Review and a decision was issued on May 14, 2004. The Office advised appellant that, since she had already had a hearing, she was not entitled to a hearing as a matter of right.

¹ Appellant retired on June 15, 1984.

² Docket No. 04-2083 (issued November 1, 2005).

On February 3, 2007 appellant requested reconsideration. The Office received a copy of her July 10, 2006 letter to her congressional representative. Appellant alleged that the Office ignored her physician's suggestion to investigate the number of incidents of cancer affecting the employees at the employing establishment. She enclosed a copy of a letter that she had written on May 11, 2002 which was addressed to the Secretary of Labor. Appellant alleged that she was concerned that her workplace was not adequately ventilated and that 33 employees had contracted cancer out of approximately 175 to 200 persons. The Office also received a July 2, 2003 letter from Tom FitzGerald, the Director of the Kentucky Resources Council, who requested assistance with regard to obtaining a health assessment of the conditions at the employing establishment. An August 24, 2001 letter addressed to appellant's congressional representative alleged that she was exposed to various toxins which she believed caused her cancer. She requested that an investigation be conducted into the matter.

In a letter dated February 5, 2007, appellant alleged that Dr. Dannaher did not know that it was important to state the date of her retirement. She argued that he indicated that her breast cancer was related to her work environment. Appellant also alleged that he was aware of the toxins that she was exposed to even though he did not list any in his report. She noted exposure to shavings from the engraver that she used, and that thinner was used on a daily basis. Appellant stated that it was also established that asbestos was found at the employing establishment. She reiterated her belief that her condition was due to being exposed to these various toxins.

By decision dated February 26, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the Office; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”⁴

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

Appellant disagreed with the Office's February 14, 2006 decision, which denied her claim for an injury in the performance of duty. The underlying issue on reconsideration was whether appellant submitted sufficient medical evidence to show that she sustained breast cancer in the performance of duty. The Board notes that appellant did not provide any relevant or pertinent new medical evidence addressing whether she sustained breast cancer in the performance of duty.

On reconsideration, appellant made several arguments and submitted copies of letters she sent to her Congressional representatives. However, the Board notes that this evidence is not relevant to the underlying medical issue in her claim. Appellant did not submit on reconsideration any new medical evidence addressing the cause of her condition. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁶

Furthermore, appellant also has not otherwise shown that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied her request for reconsideration.⁷

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(b).

⁶ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁷ The Board notes that, subsequent to the Office's February 26, 2007 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

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

Issued: November 23, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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