



was caused or aggravated by his employment on June 12, 2006. The employing establishment advised that the employee died on January 30, 2007. It stated that the employee was exposed to dust, plaster dust, asbestos, spray paint and concrete dust in his job. By decision dated August 22, 2007, the Office denied the employee's claim finding that fact of injury was not established.

On September 4, 2007 appellant, the employee's widow, filed a claim for death benefits asserting that the employee's death was due to his job. The January 30, 2007 death certificate listed the immediate cause of death as pneumonitis, noting an onset of six months. The Office denied the claim, in a December 13, 2007 decision, finding that appellant did not establish that the employee's death was causally related to employment factors.<sup>2</sup>

On January 28, 2008 appellant requested reconsideration of the December 13, 2007 decision. In a January 28, 2008 report, Dr. Alencherry advised that the employee was initially seen in August 2006 with a history of worsening shortness of breath. He stated the employee was diagnosed with pulmonary fibrosis by thoracoscopy and a biopsy revealed advanced interstitial fibrosis with hypersensitivity pneumonitis. Dr. Alencherry noted that the employee used to work as a maintenance mechanic where he had significant exposure to dust, fumes and asbestos. He stated, "these factors certainly caused [the employee's] lung condition."

By decision dated May 8, 2008, the Office denied modification of the December 13, 2007 decision disallowing the survivor benefit claim. It found that the medical evidence was insufficient to establish causal relationship.

On April 23, 2009 appellant, through her attorney, disagreed with the Office's decision and requested reconsideration. Counsel described the employee's job as a maintenance mechanic and that the medical evidence clearly related the employee's lung condition and untimely death to his work duties. Appellant submitted a duplicate copy of the employee's job duties and an affidavit regarding her knowledge of the work-related nature of the employee's condition.

In an April 20, 2009 report, Dr. Jeffrey D. Gaber, a Board-certified internist, stated that he had reviewed numerous medical records and performed a posthumous evaluation regarding the cause of the employee's death. The pulmonary history was notable for tobacco use from which the employee quit several years prior to his death. Dr. Gaber advised that the employee's shortness of breath became prevalent in 2006 and a computerized tomography scan revealed mediastinal lymphadenopathy. A September 19, 2001 thoracoscopic lung wedge resection was interpreted as showing pulmonary fibrosis. The employee had a downhill course thereafter and died on January 30, 2007. Dr. Gaber noted the death certificate listed the cause of death as pneumonitis. He reviewed the history of the employee's work as a maintenance mechanic and custodian from 1992 through 2005. The job duties involved carpentry, painting, plumbing, pipefitting and an asbestos removal project. Dr. Gaber stated that the employee removed old drywall and old pipelines that were covered with asbestos and was not provided with proper respiratory protection. He indicated that the employee had no other employment that would have caused asbestos exposure. Dr. Gaber advised there was no indication in the medical records that

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<sup>2</sup> The record does not contain the December 13, 2007 decision but it is referenced in subsequent documents.

the employee's physicians were aware that he had asbestos exposure, nor was the reading pathologist aware of this history. He noted that pulmonary fibrosis has numerous causes, one well-known cause of which is asbestosis. Dr. Gaber stated that the employee's clinical picture was consistent with asbestosis in that he had restrictive lung disease and marked interstitial changes on chest x-ray. He opined that the employee's asbestos exposure as well as his tobacco use played a significant role in the development of the end-stage lung disease (pulmonary fibrosis) which led to his death.

By decision dated July 15, 2009, the Office denied reconsideration on the grounds that appellant did not submit new or relevant evidence or raise a substantive legal questions. It found that counsel's discussion of the medical evidence was irrelevant to the issue of causality. The Office further found that Dr. Gaber's report could not be considered relevant medical evidence, as he was not a pulmonary specialist and thus could not render an opinion on pulmonary causality.

On appeal, counsel contends that Dr. Gaber's April 20, 2009 report was new and relevant medical evidence and the Office erred by not conducting further merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</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>4</sup> To be entitled to a merit review of an Office 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.<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>

In support of a request for reconsideration, a claimant is not required to submit all evidence, which may be necessary to discharge his or her burden of proof.<sup>7</sup> The claimant need only submit relevant, pertinent evidence not previously considered by the Office.<sup>8</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine

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<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>8</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>9</sup>

### **ANALYSIS**

The Office denied appellant's claim and found that the medical evidence was insufficient to establish that the employee's death was causally related to factors of his federal employment. The last merit denial was dated May 8, 2008. Appellant, through her attorney, requested reconsideration on April 23, 2009, contending that the evidence submitted was sufficient to establish appellant's claim. Appellant submitted a duplicate copy of the employee's job duties, an affidavit addressing the work-related nature of the employee's disabling condition, and an April 20, 2009 report from Dr. Gaber.

The underlying issue is medical in nature, concerning the causal relationship of the employee's diagnosed pulmonary condition and death to factors of his federal employment. To be relevant, the evidence submitted in support of the April 23, 2009 request for reconsideration must address this issue. Appellant's affidavit and the employee's job description are not relevant to this issue. The April 20, 2009 report from Dr. Gaber, however, is medical evidence relevant to the issue of causal relation and not previously reviewed by the Office. Dr. Gaber opined that the employee's asbestos exposures from his employment and his tobacco played a significant role in the development of the pulmonary fibrosis, which led to his death. The Office found that the report, while new, was not relevant as Dr. Gaber was not a pulmonary specialist and not qualified to render an opinion on causality. This is not an appropriate standard review for determining the relevancy of evidence in a request for reconsideration. Dr. Gaber is a physician as defined under the Act<sup>10</sup> and may render an opinion on causal relation. It was improper for the Office to evaluate the probative value of the evidence submitted without merit review.<sup>11</sup> This evidence is new, relevant to the underlying issue in this claim and not previously considered by the Office<sup>12</sup>. The Board will set aside the Office's decision denying reconsideration and remand the case for further review of the merits of appellant's claim.<sup>13</sup>

### **CONCLUSION**

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration.

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<sup>9</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>10</sup> *See* 5 U.S.C. § 8101(2).

<sup>11</sup> *See E.R.*, 61 ECAB \_\_\_ (Docket No. 09-1655, issued March 19, 2010).

<sup>12</sup> *V.B.*, 58 ECAB 725 (2007).

<sup>13</sup> Upon return of the case, the Office should incorporate the December 13, 2007 decision into the case record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 15, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action consistent with this decision.

Issued: April 16, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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