

claim for further merit review on the grounds that it was speculative or equivocal in nature. He contends that the standard it applied was the standard applicable for merit review. Counsel argues that OWCP erred in finding that a new report submitted by appellant was previously of record and considered by the Board in its prior decision in the case. He contends that evidence submitted by appellant after a final OWCP decision cannot be considered by the Board.

FACTUAL HISTORY

This case has previously been before the Board.² In a May 6, 2010 decision, the Board affirmed OWCP's decisions dated October 29, 2008 and March 13, 2009. The Board found that the medical evidence was insufficient to establish that appellant sustained a fungus condition caused or aggravated by his accepted work exposure to bird droppings. The history of the case as provided in the prior Board decision is incorporated herein by reference.³

By letter dated March 6, 2011, appellant, through counsel, requested reconsideration before OWCP. In a May 21, 2009 medical report, Dr. Robert M. Rakita, a Board-certified internist, advised that appellant had *Cryptococcus neoformans* variety *gattii*. He noted that appellant worked in a warehouse at the employing establishment. There were a large number of birds present inside and around the warehouse. In addition, there were a large number of wood products moved through and around the warehouse. Dr. Rakita agreed with the opinion of Dr. Lois J. Weaver, an OWCP medical adviser, that *Cryptococcus gattii* could be found in a variety of places. He stated that there was much less known about this condition compared to well-recognized *Cryptococcus neoformans*. Studies in the northwest and elsewhere in the world showed that *Cryptococcus neoformans* variety *gattii* may be isolated in a variety of places including, wood surfaces, soil, trees and water. However, it had also been found in excreta of birds in places such as, Brazil. Dr. Rakita stated that *Cryptococcus neoformans* variety *gattii* was still a relatively rare infection in the Pacific Northwest United States although its presence had increased over the last few years, perhaps due to the spread of the infection from British Columbia, where an outbreak was originally identified. He concluded that, although it was not certain as to where appellant acquired this infection, it was reasonable to assume that it was related to his warehouse work.

In a July 27, 2009 report, Dr. Paul A. Zaveruha, a surgeon, advised that appellant's *Cryptococcus neoformans* variety *gattii* infection of the lung was likely or probably caused, acquired or contributed to by his warehouse work area and exposure. His work environment and activities within the environment clearly had the potential for exposure to this type of infection. Dr. Zaveruha concluded that it could not be reasonably denied that this rare infection may well have been precipitated by appellant's work environment.

In an undated report, Dr. Steven H. Kirtland, a Board-certified internist, stated that appellant had Cryptococcal disease of the lungs and central nervous system. After extreme

² Docket No. 09-1193 (issued May 6, 2010).

³ On February 6, 2007 appellant, then a 60-year-old supply technician, filed a traumatic injury claim alleging that on December 6, 2006 he developed fungus in his lungs, spine and brain due to bird droppings and dust while working in a warehouse that was over 50 years old.

questioning regarding appellant's recent travel, home and work environment, Dr. Kirtland advised that his exposure most likely came from working in the employing establishment's warehouse where he was exposed to a significant amount of bird guano and assorted wood products. He stated that the epidemiology of *Cryptococcus gatti* was not completely understood. It remained a relatively rare infection in the United States, but had an increasing occurrence in the Pacific Northwest over the past few years. *Cryptococcus gatti* had been isolated from soil, wood, trees and even bird guano.

In a March 24, 2011 decision, OWCP denied appellant's request for reconsideration, finding that he did not submit any new legal argument or relevant medical evidence not previously considered and, thus, it was insufficient to warrant a merit review of his claim. It determined that Dr. Zaveruha's July 27, 2009 report was previously of record and considered by the Board in its May 6, 2010 decision. OWCP further determined that Dr. Kirtland's and Dr. Rakita's reports were repetitious of their prior opinions.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP 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.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

In the most recent merit decision, the Board affirmed OWCP's finding that the medical evidence was insufficient to establish that appellant sustained a fungus condition caused or aggravated by the accepted work exposure to bird droppings. On March 6, 2011 appellant's attorney requested reconsideration and submitted medical evidence. In a March 24, 2011 decision, OWCP denied appellant's request for reconsideration without a merit review of his claim, finding that he did not submit any new legal argument not previously considered and the medical evidence submitted was repetitious of evidence previously considered by the Board and not relevant.

Dr. Zaveruha's July 27, 2009 report found that appellant's *Cryptococcus neoformans* variety *gattii* infection of the lung was likely or probably caused, acquired or contributed to by his warehouse work and exposure. He stated that appellant's work environment and activities

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, 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).

⁵ 20 C.F.R. § 10.606(b)(1)-(2).

⁶ *Id.* at § 10.607(a).

within the environment clearly had the potential for exposure to this type of infection. Contrary to OWCP's finding that Dr. Zaveruha's report was not previously reviewed by the Board in its May 6, 2010 decision, the Board finds that this medical evidence is new and addresses the relevant issue of whether OWCP properly found that appellant's fungus condition was not causally related to the accepted work exposure. Appellant submitted Dr. Zaveruha's report following the issuance of OWCP's March 13, 2009 nonmerit decision which denied his February 2, 2009 request for reconsideration of its October 29, 2008 decision, finding that the medical evidence was insufficient to establish that his fungus condition was causally related to the accepted work exposure. The Board did not previously review this evidence in the May 6, 2010 decision as the Board may not consider evidence for the first time on appeal which was not before OWCP at the time it issued the final decision in the case.⁷ As such, the Board finds that Dr. Zaveruha's report constitutes relevant and pertinent new evidence and is sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Although the reports of Dr. Kirtland and Dr. Rakita reiterated their prior April 2, 2007 and December 8, 2008 opinions, respectively, that appellant's *Cryptococcus neoformans* variety *gattii* was likely caused by the accepted work exposure and were of record and considered by OWCP in its prior decisions, they provided new rationale in support of their opinions on causal relation. Dr. Kirtland determined that appellant was exposed to a significant amount of bird guano and assorted wood products from which *Cryptococcus neoformans* variety *gattii* had been isolated based on appellant's responses to his extreme questioning regarding recent travel and home and work environment. Dr. Rakita advised that studies in the northwest and elsewhere in the world showed that this organism may be isolated from a variety of places including, wood surfaces, soil, trees, water and excreta of birds in places such as, Brazil. Both physicians stated that, while the epidemiology of *Cryptococcus neoformans* variety *gattii* was not completely understood and it remained a relatively rare infection in the United States, its occurrence had increased over the last few years. Dr. Rakita stated that the occurrence of the condition in the Pacific Northwest was perhaps due to the spread of the infection from British Columbia, where an outbreak was originally identified. The reports of Dr. Rakita and Dr. Kirtland provide new medical rationale in support of their opinion addressing the relevant issue of whether OWCP properly found that appellant did not sustain a fungus condition resulting from the accepted work exposure. The Board finds that the evidence submitted in support of appellant's request for reconsideration constituted relevant and pertinent new evidence not previously considered.⁸ Therefore, OWCP improperly refused to reopen his case for further review of the merits.

To obtain merit review, appellant is not required to submit evidence sufficient to establish his claim. He need only provide evidence that is relevant and pertinent and not previously considered by OWCP.⁹ The reports of Dr. Zaveruha, Dr. Rakita and Dr. Kirtland meet these requirements. The case will, therefore, be remanded for consideration of these physicians'

⁷ *Id.* at § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁸ *Id.* at § 10.606(b)(2).

⁹ *Billy B. Scoles*, 57 ECAB 258 (2005).

reports, together with the previously submitted evidence of record, and a decision on the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a) in its March 24, 2011 decision.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: December 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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