



## **FACTUAL HISTORY**

The case was previously before the Board.<sup>2</sup> The employee filed two claims for injury: a June 25, 2002 claim alleging a respiratory condition resulting from chemical exposure during a 2001 waste treatment facility inspection, and a January 27, 2005 claim for colon cancer causally related to asbestos exposure while working at the World Trade Center (WTC) in November 2001. The Board found that there remained an unresolved conflict regarding employment-related colon cancer, and the case was remanded for further development. As to a respiratory condition, the Board found there was no conflict in the medical evidence. The weight of the evidence was represented by Dr. Thomas Beller, a pulmonologist, serving as a second opinion referral physician. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

Following receipt of a January 2, 2009 supplemental report from Dr. Michael Perry, the Board-certified oncologist, selected as a referee physician, OWCP issued a February 5, 2009 decision. It found that the medical evidence did not establish that the employee had employment-related colon cancer. By decision dated June 26, 2009, an OWCP hearing representative remanded the case for further development. The hearing representative found Dr. Perry's report did not resolve the conflict in the medical evidence.

OWCP selected Dr. Mark Hancock, a Board-certified oncologist, as a referee physician and referred the case for an opinion on causal relationship between the diagnosed colon cancer and 2001 chemical and asbestos exposure. In a report dated August 31, 2009, Dr. Hancock stated that it was possible but not probable that the employee's death was caused or hastened by employment-related exposure.

By decision dated October 1, 2009, OWCP denied the claim for compensation. It found the medical evidence did not establish employment-related colon cancer.

In a letter dated September 29, 2010, appellant requested reconsideration. She stated that the employee was a member of a lawsuit regarding WTC exposure and he was a member of the Qualify Injury Group for asthma/reactive airways disease syndrome. Appellant submitted an August 11, 2010 letter from an attorney involved in the litigation against the City of New York and its contractors. The letter stated that appellant was one of approximately 10,500 plaintiffs and there was a proposed settlement. The attorney opined that, based on information in their files, the employee's Primary Qualifying Injury would be asthma/restrictive airways disease syndrome. Appellant also submitted what appeared to be a blank claim form provided to plaintiffs.

By decision dated October 28, 2010, OWCP found the application for reconsideration was insufficient to warrant review of the merits of the claim.

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<sup>2</sup> Docket No. 08-373 (issued November 4, 2008).

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> its regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either “(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP.”<sup>4</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.<sup>5</sup>

## ANALYSIS

The Board does not, as noted above, have jurisdiction over the merits of the employee’s claim for compensation. It is noted, however, that the underlying merit issue would involve both a claim for a respiratory condition as well as colon cancer. Although appellant had filed two claims, these claims are administratively combined. Moreover, the 2005 claim was based on exposure to asbestos and other chemicals from the WTC site, and the medical evidence was developed for both colon cancer and a respiratory condition.

In reviewing appellant’s application for reconsideration with respect to the requirements of 20 C.F.R. § 10.606(b)(2), the Board finds that she did not meet any of the three standards for obtaining a merit review. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not mention a specific point of law in her application for reconsideration.

Appellant stated that there was a pending settlement in a lawsuit regarding the WTC exposure, in which the employee had been a qualified plaintiff. She submitted a letter from an attorney involved in the litigation, who expressed an opinion that the employee would be qualified to receive a settlement based on a respiratory condition. To the extent that appellant is making a legal argument that membership as a plaintiff in litigation supports a claim for compensation under FECA, there is no reasonable color of validity to the argument.<sup>6</sup> The issue of an employment-related respiratory condition involves the establishment of a factual basis for the claim and medical evidence on causal relationship between a diagnosed condition and employment. OWCP had accepted exposure to asbestos and chemicals at the WTC site in 2001.

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<sup>3</sup> 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

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

<sup>5</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>6</sup> Where the legal argument has no reasonable color of validity, OWCP is not required to reopen the case for merit review. *See Norman W. Hanson*, *supra* note 5.

The employee's status as a possible beneficiary of a litigation settlement is not relevant to the underlying merit issue of compensation under FECA.<sup>7</sup>

The evidence submitted is not relevant and pertinent to the compensation issue presented. The August 11, 2010 letter does not provide any relevant factual or medical evidence with respect to the underlying merit issue in the claim for compensation. The submission of evidence that does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>8</sup>

The Board accordingly finds that appellant was not entitled to a merit review of the claim. She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for review of the merits of the claim for compensation.

On appeal, appellant refers to the medical evidence and states that OWCP did not properly consider the evidence from Dr. Nuray Bilir, a gastroenterologist. The Board does not have jurisdiction over the merits of the underlying claims for compensation by the employee. The only issue was whether appellant's application for reconsideration was sufficient to warrant a merit review of the claim by OWCP. For the reasons noted above, the Board finds that OWCP properly denied the application for reconsideration.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's application for reconsideration without merit review of the claim.

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<sup>7</sup> See *Pearl Lewis (Walter H. Lewis)*, 54 ECAB 507 (2003) (where the employee's widow submitted evidence of a settlement offer from an asbestos manufacturer in an action filed by the employee, and the Board found this was insufficient to warrant reopening the claim for merit review).

<sup>8</sup> *Id.*; see also *D. Wayne Avila*, 57 ECAB 642 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 28, 2010 is affirmed.

Issued: April 13, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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