



## **FACTUAL HISTORY**

On October 29, 2008 the employee, then a 46-year-old pipefitter, filed an occupational disease claim alleging that his exposure to cadmium, chromium and dust particles caused a respiratory/pulmonary disease and aggravated and worsened his preexisting pulmonary sarcoidosis, bronchial asthma and sleep apnea conditions.

On December 22, 2008 OWCP received a detailed statement from the employee, numerous diagnostic test studies, a bioenvironmental hygienists report, a February 7, 2008 incident report and medical reports from several physicians. In an August 18, 2008 report, Dr. Hatem Asad, a Board-certified pulmonologist and sleep specialist, indicated that the employee had pulmonary sarcoidosis, bronchial asthma, chronic respiratory failure and obstructive sleep apnea with alveolar hypoventilation and hypoxemia, nocturnal and that he should avoid any occupational exposure and irritants that might exacerbate his symptoms, including solvents and paints as well as heavy metal dust and non organic dusts.

In a January 5, 2009 letter, OWCP requested further factual and medical information. In a February 26, 2009 report, Dr. Asad stated that the employee's asthma was aggravated by his exposure to heavy metal dust including cadmium and chromium. He also stated that the employee's preexisting condition of pulmonary sarcoidosis and bronchial asthma was also exacerbated and worsened by his exposure to such heavy metal dust.

OWCP referred the employee to Dr. Gerald Adler, a Board-certified pulmonologist. On April 22, 2009, Dr. Adler reviewed a statement of accepted facts<sup>3</sup> and noted examination findings. He diagnosed pulmonary sarcoidosis, pulmonary hypertension and sleep apnea. Dr. Adler opined that the employee's chromium dust exposure could have aggravated his condition to some degree but there was no evidence of further deterioration after his removal from the work site. He stated that the employee's pulmonary hypertension and sleep apnea were not worsened by chromium or cadmium dust exposure. In a May 6, 2009 addendum, Dr. Adler advised that the cause of sarcoidosis was unknown. He noted that the employee had underlying sarcoidosis and underlying pulmonary condition. While toxin exposure or air pollutants could generally worsen an underlying lung condition, heavy metals were not the cause of sarcoidosis per se and the employee's sarcoidosis was not aggravated, worsened or accelerated by heavy metals. While overall lung function could be aggravated by heavy metals exposure in addition to an underlying lung condition, the employee's sarcoidosis was not worsened by such exposure. The employee's two pulmonary function tests taken a year apart were similar and showed no great deterioration in his pulmonary function over that time. Thus, heavy metals exposure did not seem to aggravate his lung condition. Dr. Adler stated that, the cause of pulmonary hypertension was unknown and, while it could be related to underlying sleep apnea, he did not believe heavy metal exposure caused it or aggravated the sleep apnea. He stated that the employee's exposure to heavy metals and the aggravating effect was temporary.

Due to the medical conflict between Dr. Asad and Dr. Adler, OWCP referred the employee to Dr. Ram Puri, a Board-certified pulmonary specialist, for an impartial medical

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<sup>3</sup> The statement of accepted facts reflected that the employee was exposed to cadmium and chromium and dust for a seven-month period from June 2007 through January 2008.

evaluation. In an August 24, 2009 report, Dr. Puri reviewed the statement of accepted facts, the medical record and provided findings on examination. He diagnosed pulmonary conditions of chronic respiratory failure, pulmonary sarcoidosis, asthma, moderate to severe pulmonary hypertension and obstructive sleep apnea. Dr. Puri opined that the employee's exposure to cadmium, chromium and dust from June 2007 through January 2008 resulted in his asthma condition and that such condition was permanent. However, he advised that the employee's other conditions of chronic respiratory failure, pulmonary sarcoidosis, pulmonary hypertension and sleep apnea were not caused or aggravated by his exposure to cadmium, chromium and dust during the period June 2007 through January 2008.

In September 23, 2009 decisions, OWCP accepted the claim for asthma but denied that chronic respiratory failure, aggravation of pulmonary sarcoidosis, pulmonary hypertension and obstructive sleep apnea were work related.

On September 22, 2010 the employee, through counsel, requested reconsideration. He included reports of diagnostic testing, an October 21, 2008 emergency room report with progress reports and medical reports and office notes from Dr. Asad dated October 2008 and 2010 addressing the employee's condition. Also submitted was a list of chemicals to which the employee alleged that he was exposed at work.

Counsel argued that the September 23, 2009 decision was not valid as the employee's treating physician was not provided with the second opinion report prior to referral to the impartial specialist and that the second opinion amended report should have resulted in the acceptance of a "temporary aggravation" of the employee's preexisting conditions. He contended that the impartial medical specialist's report supported the aggravation of the employee's other pulmonary conditions and that further medical development was necessary to determine if the work-related asthma aggravated the employee's other pulmonary conditions. Counsel contended that the evidence supports that an aggravation of the employee's preexisting conditions directly resulted from work exposure and the work-related asthma condition. He asserted that the employee was exposed to more than just cadmium and chromium and that further development was necessary to verify if exposure to other chemicals caused the other denied conditions.

In a December 1, 2010 decision, OWCP denied the employee's reconsideration request finding it insufficient to warrant a review of its prior decision. It noted that a new occupational disease claim may be filed for alleged exposure to other chemicals that were not addressed.

On appeal, appellant argues that OWCP's December 1, 2010 decision should have been a merit decision. She also noted that a claim for survivor benefits was being filed.<sup>4</sup>

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<sup>4</sup> The employee died on January 12, 2011 after OWCP's December 1, 2010 denial of reconsideration. On appeal, appellant requests that the Board remand the current matter so that it may be considered with the survivor claim. The Board's jurisdiction is limited to review of final adverse OWCP decisions. 5 U.S.C. § 8149; 20 C.F.R. §§ 501.2(c) and 501.3(a). As there is no final decision from OWCP with regards to appellant's survivor claim, the Board has no jurisdiction over her survivor claim and cannot act on that matter.

## LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at anytime on its own motion or upon application.<sup>5</sup> An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup>

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>9</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>10</sup>

## ANALYSIS

The Board does not have jurisdiction over the merits of the employee's claim. The issue presented on appeal is whether his September 22, 2010 reconsideration request met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for a review of the merits.

In a September 22, 2010 request for reconsideration, the employee disagreed with OWCP's September 23, 2009 decision, which denied that the conditions of chronic respiratory failure, aggravation of pulmonary sarcoidosis, pulmonary hypertension and obstructive sleep apnea were causally related to his accepted exposure to cadmium, chromium and dust from June 2007 through January 2008.

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606.

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608.

<sup>9</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>10</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

The employee, however, did not show that OWCP erroneously applied or interpreted a specific point of law. He argued that the medical evidence, including that of the second opinion physician, was sufficient to support that the other pulmonary conditions were aggravated by the employee's workplace exposures, that there was no medical conflict and that the employee also had exposure to other workplace chemicals that caused injury. As noted, the Board does not have jurisdiction over the merits of the claim. These assertions are without merit with regard to showing that OWCP erred in denying a merit review. Dr. Adler, the second opinion physician, specifically stated in his May 6, 2009 addendum that heavy metals did not cause or worsen the sarcoidosis and that the employee's pulmonary hypertension and sleep apnea were not aggravated or worsened by his exposure to such heavy metals. In any event, the employee was merely on one side of a medical conflict that was resolved by Dr. Puri, the impartial medical specialist,<sup>11</sup> who also did not support that such conditions were caused or aggravated by the accepted workplace exposures. Counsel's assertions regarding whether there was a medical conflict lack a reasonable color of validity as counsel's assertions do not establish that OWCP erred in applying a point of law in the manner that it developed the medical evidence.<sup>12</sup> Likewise general assertions that there was workplace exposure to other particular chemicals that caused injury do not establish any error by OWCP. Thus, the employee's interpretation of the medical evidence and OWCP's development of the evidence does not establish that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.

The Board notes that the underlying issue is medical in nature but that, while appellant made arguments about the interpretation of the medical evidence, she did not submit new and relevant medical evidence to support her assertions. The medical reports from Dr. Asad and other medical evidence submitted on reconsideration are new to the record but they are not relevant as they fail to address the issue of causal relation between the employee's nonaccepted conditions and his accepted work-related exposure. Likewise, the listing of chemicals provided by appellant on reconsideration is also not relevant since, as noted the underlying issue is medical in nature. Thus, the employee did not provide any relevant and pertinent new evidence to establish that his other pulmonary conditions were aggravated or worsened by his seven-month exposure to cadmium, chromium and dust during the period June 2007 through January 2008.

Consequently, the evidence submitted by the employee on reconsideration does not satisfy any of the three regulatory criteria for reopening a claim for merit review. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant alleged that OWCP abused its discretion in not issuing a merit decision on December 1, 2010. As noted, the arguments and evidence submitted on reconsideration do not meet any of the three regulatory criteria for reopening a claim for merit review.

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<sup>11</sup> See 5 U.S.C. § 8123(a); *Richard R. LeMay*, 56 ECAB 341 (2005).

<sup>12</sup> See *Jennifer A. Guillary*, 57 ECAB 485 (2006) (while a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

**CONCLUSION**

The Board finds that OWCP properly denied the employee's request for further review of the merits of the employee's claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board