

FACTUAL HISTORY

On September 26, 2012 appellant, 58-year-old claims examiner, filed an occupational disease claim alleging that her occupational exposure to multiple respiratory irritants at the Denver Federal Center, Building 53, had caused respiratory and consequential medical conditions. She first became aware of her disease or illness on February 2, 2011.

Appellant submitted office e-mails on such topics as closed bathrooms, the pulling up of wet carpeting, the digging of a hole outside appellant's window, an influx of gnats, and the smell of a coworker's hand cream or microwave popcorn.

Appellant also submitted the results of diagnostic testing. She submitted reports from physicians such as Dr. Ronald C. Balkissoon, a staff physician and associate professor in pulmonary medicine. Dr. Balkissoon diagnosed increased upper and lower airway irritation related to workplace exposures as well as possible pertussis exposure; rule out possibilities of hypersensitivity pneumonia purported workplace exposure to mold; and suboptimally managed obstructive sleep apnea due to poor tolerance of a continuous positive airway pressure mask. He related that appellant had a history of chronic cough, but began to feel dramatically worse in January 2011 when she moved into a new work environment, which she described as being "very toxic."

OWCP received an indoor air quality survey dated February 4, 2013.

In a decision dated March 13, 2013, OWCP denied appellant's occupational disease claim. It found that the evidence was insufficient to establish that the events occurred as alleged. OWCP explained that appellant must provide a factual basis for her claim by supporting her allegations with probative and reliable evidence to confirm that the employment factors actually occurred. Although appellant alleged that multiple respiratory irritants were immediately apparent, that the building was toxic and slated for destruction, that there was visible dust on work surfaces, that there were kitchen and coworkers' odors, that there was delivery truck exhaust and second-hand cigarette smoke, and that she was exposed to internal and external construction and the spraying of chemicals, the record contained no objective findings to support the exposures she described.

OWCP found that the e-mails mentioning many of the same irritants contained no probative and reliable evidence that the irritants actually existed. Similarly, medical statements based on appellant's description of workplace irritants did not establish a factual basis for her claim. OWCP noted that the General Services Administration conducted indoor air quality surveys in Building 53 in 2012 and 2013. The results of the surveys revealed that the air quality exceeded all industry standards for air quality. OWCP found that the results of these surveys contradicted appellant's claim that her workplace was toxic and raised doubt about the accuracy of her claim.

Further, evidence showed that the building in which appellant worked was a "green" building. It carried a Leadership in Energy and Environmental Design certification, an independent, third-party verification that the building was designed and built using strategies aimed at achieving high performance in the areas of human and environmental health,

sustainable site development, water savings, energy efficiency, material selection, and indoor environmental quality.

OWCP found that the factual evidence surrounding the alleged employment factors and workplace exposure was inconsistent, vague, and contradictory to much of the evidence in the file. “As a result the factual aspects of your claim cannot be established.” In addition, OWCP found that appellant did not submit any objective medical evidence to establish that the diagnosed medical conditions were causally related to the employment factors alleged. Therefore, even if appellant established the factual portion of her claim, she must still establish the element of causal relationship.

Appellant requested reconsideration, received by OWCP on March 10, 2014. She argued that OWCP ignored evidence in making its decision and failed to apply the standard of *Horace Langhorne*, 29 ECAB 820 (1978). Appellant also submitted evidence that the building where she worked was once a munitions manufacturing building. She submitted an April 18, 2006 memorandum from the Nuclear Regulatory Commission (NRC) indicating that Building 53 was not required to submit a decommissioning plan before being released for unrestricted use. The memorandum also indicated that the materials license authorized the Environmental Protection Agency (EPA) to possess small quantities of radioactive material for instrument calibration and sample analysis and that radioactive material was used at Building 53 from 1973 to 2003. Further, a Final Status Survey Report indicated that no incidents involving spills or releases of radioactive material occurred during the 30-year operational history of Building 53. Appellant also submitted a grainy black and white image purportedly showing dust that had collected on a desktop behind equipment. She submitted a similar image showing a warehouse room with cubicles. Appellant asserted that the “green” configuration caused severe coughing and respiratory illness: “There is uninhibited circulation of the building stench; coworkers’ smoking, personal scent, and eating odors; and office dust, and carpet fibers. The dust and odors are circulating from every direction into my face.”

Appellant also submitted additional medical evidence. On August 15, 2013 Dr. Francine G. Andrews, Board-certified in allergy and immunology, reported that she last saw appellant in May 2013 due to continued and worsening respiratory symptoms triggered by ongoing irritant/allergen exposures in her work environment. Dr. Andrews noted that appellant had severe tracheobronchomalachia with vocal cord dysfunction, which could not be treated with medication. Appellant also had asthma, which was difficult to treat because inhaled asthma medications trigger exacerbation of tracheobronchomalachia. Dr. Andrews recommended monitoring for possible short-term removal from the workplace to see if appellant’s respiratory infection could resolve and worsening tracheobronchomalachia condition could be stabilized, during which time she could telework as health permitted.

On May 6, 2014 Dr. Andrews noted that appellant’s symptoms improved in her home environment where she was able to strictly control her environment. Appellant’s work efficiency improved as well. Dr. Andrews commented that OWCP’s denial of compensation was invalid. She noted that air tests were irrelevant to appellant’s condition: “Even small amounts of dust, odors, and allergens trigger paroxysmal coughing episodes because of tracheobronchomalachia. Again, it is impossible for [appellant] to avoid these triggers in the open office environment.” Dr. Andrews explained that this was a condition that was uncommon and different from asthma

and typical allergy patients. It was obvious from the descriptions of the work environment supplied by appellant, as well as pictures of the work environment, that there were numerous sources of irritants and allergens.

In a decision dated June 2, 2014, OWCP denied appellant's reconsideration request. It found that the evidence did not show that OWCP erroneously applied or interpreted a point of law, as the *Langhorne* case did not involve the issue of whether the work factor occurred. OWCP found that the evidence such as the picture of her desk and cubicle, the descriptions of the buildings use nearly 70 years ago, and the NRC report showing compliance with all standards of radioactivity was cumulative and thus substantially similar to evidence or documentation that was already contained in the case record and previously considered. This evidence was not relevant in establishing a work factor such as airborne exposure actually occurred. OWCP also found that Dr. Andrews' reports did not present any new and pertinent evidence to support that a work factor had caused injury. It found this evidence to be cumulative and repetitive of previous medical reports submitted.

Appellant argues on appeal that OWCP ignored evidence in its March 13, 2013 and June 2, 2014 decisions. She asserted that the *Langhorne* standard was applicable. Appellant also asserted that the new factual and medical evidence was not repetitive, but was responsive to the bases for denial. The NRC report, she asserts for example, proved the stench and filth of a building used as an EPA laboratory for 30 years, a building that should have been demolished.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.² 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.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.⁴ 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.⁵

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606.

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608.

ANALYSIS

OWCP received appellant's reconsideration request within one calendar year of its March 13, 2013 merit decision denying her occupational disease claim. The request is therefore timely. The question that remains is whether the request met at least one of the three standards for obtaining a merit review of her case.

Appellant did not argue that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or explain how OWCP erroneously applied or interpreted it. Appellant alleged that OWCP ignored evidence, but this is not apparent from OWCP's decision.

Appellant instead advanced the legal argument that OWCP should have applied the Board's holding in *Langhorne*. In *Langhorne*, however, the issue of occupational exposure was not at issue. OWCP accepted that all employees with shipboard duties were exposed to variable noise levels up to 126 decibels for different lengths of time. The question in *Langhorne* was whether this exposure caused the claimant's hearing loss. The claimant's physician supported a causal relationship between occupational exposure to loud noise and the claimant's hearing loss as evaluated in 1976, but he provided no rationale for his conclusion. An OWCP medical adviser negated causal relationship, noting that the claimant's exit audiogram, prior to his retirement in 1960, revealed normal hearing. Although the medical evidence supporting that the claim was insufficient to discharge the claimant's burden of proof, the Board found that it constituted sufficient evidence in support of the claim to require further development of the record by OWCP. As a medical adviser negated causal relationship, the Board remanded the case for referral to an impartial medical specialist.

Appellant's case differs significantly. OWCP did not accept the alleged occupational exposure. Indeed, it found that the evidence was insufficient to establish that the events occurred as alleged. OWCP explained that appellant must provide a factual basis for her claim by supporting her allegations with probative and reliable evidence to confirm that the employment factors actually occurred, but the record contained no objective findings to support the exposure she described. It found that the factual aspect of appellant's claim was not established.

OWCP also found that the medical opinion evidence was insufficient because physicians relied on the unestablished history that appellant was reporting to them. The Board finds that the circumstances of this case are sufficiently distinguishable from *Langhorne* and therefore she has failed to advance a relevant legal argument.

A claimant may obtain a merit review of his or her case by submitting relevant and pertinent new evidence not previously considered by OWCP. Evidence that appellant's building was once a munitions manufacturing building does not establish that she was exposed to any respiratory irritants arising from that prior use. Likewise, the fact that small quantities of radioactive material were once authorized for instrument calibration and sample analysis in Building 53 does not establish that she was exposed to any radiation arising from that use, particularly when evidence also indicated that no incidents involving spills or releases of radioactive material occurred during the 30-year operational history of Building 53.

The pictures that appellant submitted are not relevant to the issue of this case. It is impossible to discern the dust that she alleged had collected on a desktop behind equipment. The open configuration of the office cubicles does not establish that appellant was, in fact, exposed to respiratory irritants. That remains a mere allegation unsupported by objective factual evidence. OWCP found that appellant failed to establish a factual basis for her claim. However, appellant did not support her reconsideration request with objective factual evidence establishing her exposure to respiratory irritants.

Appellant submitted additional medical evidence. However, Dr. Andrews' reports are cumulative insofar as she based her opinion on the unestablished exposure that appellant described. Her opinion accepts as factual the very thing appellant has failed to establish, namely, ongoing irritant/allergen exposures in her work environment. Although Dr. Andrews explained that, even small amounts of dust, odors, and allergens could trigger paroxysmal coughing episodes, appellant submitted no objective evidence with her reconsideration request to establish that she was, in fact, exposed to even small amounts of such irritants or allergens. It was obvious to Dr. Andrews, from the description of the work environment supplied by appellant, but as OWCP found, appellant had submitted no probative and reliable evidence to confirm that the employment factors actually occurred.

The Board finds that appellant's reconsideration request failed to meet any of the standards for obtaining a merit review of her case. Accordingly, the Board will affirm OWCP's June 2, 2014 decision denying that request.

CONCLUSION

The Board finds that appellant's March 10, 2014 reconsideration did not meet the standard for obtaining a merit review of her case. Thus, OWCP properly declined to reopen her case for a review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2014 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: April 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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