

**United States Department of Labor
Employees' Compensation Appeals Board**

S.H., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
Washington, DC, Employer**

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**Docket No. 15-0539
Issued: September 21, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 20, 2015 appellant filed a timely appeal from a January 12, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Because more than 180 days has elapsed between the last merit decision dated June 10, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.³

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for merit review of his claim under 5 U.S.C. § 8128.

¹ The Board denied appellant's request for oral argument by order dated July 24, 2015.

² 5 U.S.C. §§ 8101-8193.

³ The Board notes that appellant submitted additional evidence to the record following OWCP's January 12, 2015 decision. The Board's jurisdiction is limited to a review of evidence which was before OWCP at the time of its final review. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This is appellant's third appeal before the Board.⁴ The facts pertinent to this appeal are set forth herein. Appellant, a 47-year-old administrative assistant, filed a Form CA-2 claim for benefits on November 20, 2012 alleging that he aggravated a preexisting allergy/respiratory condition after being exposed to irritants at a construction site adjacent to his workplace. On January 9, 2013 OWCP accepted the claim for allergic reaction to dust at worksite and bronchospasm.

By letter dated January 22, 2013, the employing establishment requested that OWCP reconsider its acceptance of appellant's claim. It contended that there was no causal relationship between the alleged exposure and the accepted conditions of allergic reaction to dust at worksite and bronchospasm. The employing establishment denied that appellant had sustained a bronchial spasm due to dust exposure from the adjacent construction site, stating that his physician's note and diagnosis were received 25 days after the alleged exposure. It further stated that he did not provide a medical report which discussed the threshold of dust or allergen particle levels that negatively affected him. The employing establishment noted that appellant failed to relate that his home had been located in a construction zone since 2008, which contained many of the irritants to which he had attributed his accepted conditions.

In a memorandum dated November 6, 2012, received by OWCP on May 1, 2013, an employing establishment study indicated that the General Services Administration had performed indoor air quality monitoring in three of the trailers at appellant's worksite. The project involved area sampling for indoor air quality parameters including temperature, relative humidity, carbon dioxide, carbon monoxide, total volatile organic compounds, repairable dust, particulate characterization, viable fungi, and viable bacteria. The survey was conducted in response to occupancy concerns regarding indoor air quality. The employing establishment conducted an air sample test and provided the results of air samples taken in three of the office trailers and then compared this sample to outside air samples taken at that same location. The study concluded that there was no difference in the air quality inside appellant's workplace and outside his workplace as all of the parameters measured were within standard indoor air quality guidelines. The employing establishment therefore asserted that he had not been exposed to any potentially harmful substances.

In a May 8, 2013 letter, OWCP advised appellant that it had prematurely accepted his claim for allergic rhinitis and bronchospasms. It stated that it had received additional information; *i.e.*, the air quality sample report, after the acceptance of his claim which indicated that there was no difference in the air quality inside his workplace and outside his workplace.

In a May 16, 2013 report, Dr. David M. Luse, a specialist in internal medicine, noted that he had been treating appellant since September 6, 2012 for reactive airway disease that was triggered by construction that had begun several weeks prior to the initial examination. He noted that the earliest diagnosis of respiratory issues was made in May 2007, at which time appellant

⁴ The first appeal to the Board was Docket No. 14-545, which affirmed an OWCP decision denying merit review of the rescission of the claim. Appellant filed another appeal on August 14, 2014 Docket No. 14-1766. This second appeal was dismissed at his request on October 17, 2014.

was diagnosed with allergic rhinitis and chronic sinusitis. Dr. Luse advised that appellant demonstrated significant expiratory wheezing bilaterally during his September 2012 examination. Appellant did not return to the worksite and was reevaluated on October 1, 2012 at which time his symptoms had resolved. He returned to the worksite and began wearing a mask and using an air purifier. These measures, however, were ineffective and appellant's symptoms soon returned. Appellant was exposed to dusty conditions, required to tour old buildings, and was exposed to outside irritants inside a trailer by workers from the outside. His symptoms returned each time he returned to the worksite. Dr. Luse noted that he last examined appellant on April 9, 2013. He opined that appellant should not be stationed in locations that exposed him to dust debris, high pollen counts, gas/chemical fumes, or other significant airborne irritants. Dr. Luse noted that, when appellant was not exposed to airborne irritants, he had no work limitations.

In a statement dated May 22, 2013, received by OWCP on May 29, 2013 appellant alleged that the employing establishment unjustifiably controverted his claim and deliberately prevented OWCP from having access to factual and medical information pertaining to his claim. He alleged that management engaged in a conspiracy to rescind his compensation. Appellant asserted that management demonstrated bias against him by refusing to acknowledge and accommodate his long-term health issues, especially from August 4 through September 11, 2012, the period when his respiratory conditions were aggravated. He reiterated that his respiratory conditions were aggravated when he worked in a dusty working environment which contained contaminants. Appellant alleged that, despite the fact that he informed management that his allergy mask and purifier unit did not work and that his treating physician twice recommended that he be removed from the worksite, they directed/required him to drive golf carts and give tours in an extremely unhealthy working environment detrimental to his health. He asserted the air quality tests that management conducted were performed after his physicians recommended his removal from the St. Elizabeth's construction site in early September 2012 and were therefore irrelevant to his contention that the worksite aggravated his respiratory conditions.

In letters dated May 29 and June 6, 2013, the employing establishment rebutted appellant's contentions. It denied that it deliberately obstructed his attempts to receive compensation and process his claim. Management indicated that appellant provided no documentation that he was exposed to asbestos at the worksite when asbestos was removed from the worksite in March 2011, 18 months prior to him filing his claim of exposure to asbestos and other contaminants. The employing establishment asserted that he did not state that he was actually exposed to anything specific and suffered a medical condition as a result. It stated that although appellant alleged that his treating physician recommended removal from the St. Elizabeth's construction site in early September 2012 and air quality tests were performed after the fact, such tests were actually performed both prior to his arrival at the worksite as well as subsequently. Appellant did not, however, provide the results of these tests to his treating physician who issued this recommendation based on subjective complaints from him, not factual evidence. Management asserted that while he contended that his respiratory issues were activated when he was placed in a dusty working environment where air borne contaminants existed, he was exposed to contaminants at his home. The employing establishment stated that appellant worked in a facility that was in good condition, was only three years old, and received regular janitorial service and common area dusting. Appellant was also provided with a portable

air purifier to operate within or adjacent to his workspace if needed and was not required to work outdoors for significant periods.

By decision dated June 10, 2013, OWCP rescinded appellant's claim, finding that the medical evidence did not support that his claimed conditions were causally related to exposure to contaminants at his worksite. Although his treating physician generally opined that he had recently been exposed to a large quantity of dust at his workplace, he did not provide objective medical reasoning for this opinion. OWCP therefore rescinded its acceptance of appellant's claim because the requirements were not met for establishing that he sustained an injury and/or medical condition that arose during the course of employment and within the scope of compensable work factors under FECA.

On June 24, 2013 appellant requested reconsideration.

Appellant thereafter submitted several e-mails between himself and management from February and June 2013, which indicated that he provided tours of the worksite in August 2012 and June 2013, described the worksite, and provided correspondence with management pertaining to his workers' compensation claim. He also submitted copies of e-mails which were previously submitted to OWCP and were part of the present record.

Appellant also submitted a copy of a May 13, 2013 memorandum from management and a handwritten diagram of the worksite documents pertaining to air quality tests, a reassignment request letter, and numerous inter-office memoranda. In addition, he submitted a September 23, 2013 letter to management which contained numerous accusations of alleged management misconduct.

By decision dated November 7, 2013, OWCP denied appellant's application for review finding that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

Appellant filed an appeal with the Board on January 13, 2014. In a June 18, 2014 decision,⁵ the Board affirmed OWCP's November 7, 2013 decision. The complete facts of this case are set forth in the Board's June 18, 2014 decision and are incorporated herein by reference.

By letter dated October 8, 2014, appellant requested that OWCP reconsider the rescission of his claim.

Appellant resubmitted e-mails between himself and management from February and June 2013, in addition to correspondence with his congressional representative. He submitted additional e-mails and letters which contained numerous accusations of misconduct on the part of management and alleged that management had conspired to cover up the fact that he had been exposed to contaminants and denied reasonable accommodations for his medical conditions. Appellant also submitted numerous additional e-mails from November 2013 to January 2015. None of these documents contained a medical report attributing his claimed conditions to exposure to contaminants during the claimed periods.

⁵ Docket No. 14-545 (issued June 18, 2014).

In a letter dated September 23, 2014, appellant reiterated his allegations that management covered up the fact that air quality studies taken of the worksite were inadequate and failed to show that it contained a variety of samples that could produce an allergic reaction and expose him to contaminants. He also asserted that he was removed from the employing establishment based on OWCP's erroneous decision.

In a December 8, 2014 report, Dr. Ann E. Medinger, Board-certified in pulmonary medicine and internal medicine, reported that appellant had reactive airway disease, sleep apnea, rhinitis, sinusitis, and bronchitis which he initially contracted in 1990 while serving in New Orleans, Louisiana. She opined that this condition recurred in 1996 while he was working in Texas, in 2007 while he was working at the Pentagon during construction, and in 2012 while he was working at St. Elizabeth's Hospital during construction. Dr. Medinger advised that each of these incidents was precipitated by appellant working in a hot dusty environment. She noted that he had symptoms of coughing, wheezing, and shortness of breath which were often associated with upper airway rhinitis, watery eyes, headache, and dark sputum. Dr. Medinger noted that appellant was asymptomatic as long as he avoided dusty environments. She advised that he was recently discharged from the employing establishment because he got sick with bronchitis while posted to dusty conditions at St. Elizabeth's Hospital while the facility was under construction.

On January 11, 2015 OWCP received a February 28, 2014 report from Dr. David Benderson, a Board-certified ophthalmologist. Dr. Benderson advised that he had treated appellant for glaucoma in both eyes.

By decision dated January 12, 2015, OWCP denied appellant's application for review as it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP regulations provide that the evidence or argument submitted by 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.⁷ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁸

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at 10.608 (b).

⁹ *Howard A. Williams*, 45 ECAB 853 (1994).

ANALYSIS

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. The evidence he submitted is not pertinent to the issue on appeal. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁰ The issue in this case is medical; *i.e.*, whether appellant submitted medical evidence, based upon a proper factual basis, sufficient to establish that his claimed allergic reaction to dust at his worksite and his bronchospasm conditions were caused or aggravated by exposure to contaminants at his worksite.

In her December 8, 2014 report, Dr. Medinger diagnosed reactive airway disease, sleep apnea, rhinitis, sinusitis, and bronchitis and indicated that these conditions were aggravated by working in hot, dusty environments at the employing establishment. This report, however, merely restates findings and conclusions contained in reports previously submitted, such as the May 16, 2013 report from Dr. Luse, and is cumulative and repetitive. Dr. Medinger's report does not address the underlying issue in this case, that is whether the medical opinion regarding diagnosis and causal relationship was made upon an accurate factual background regarding appellant's actual exposure to contaminants at work.

Dr. Benderson's February 28, 2014 report notes that appellant was treated for glaucoma, a condition that has never been claimed by him, and is not relevant to the issue in this case.

Appellant also submitted numerous e-mails, correspondence, and memorandum from the employing establishment. While some of these documents generally pertain to the processing of his workers' compensation claim, none of them contain evidence relevant to the issue in this case. Moreover, many of these documents were previously submitted.¹¹ This evidence is therefore cumulative and duplicative.¹²

On appeal appellant reiterates his argument below that management was biased against him, repeatedly and maliciously obstructed his efforts to receive compensation, and hampered his efforts to obtain supporting medical evidence. However, he has provided no corroboration or support for this contention. Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits.

¹⁰ See *David J. McDonald*, 50 ECAB 185 (1998).

¹¹ The Board notes that the evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. See generally *Sue A. Sedgwick*, 45 ECAB 211(1993).

¹² See *Patricia G. Aiken*, 57 ECAB 441 (2006).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 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