

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

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<b>S.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 15-1283</b>
	)	<b>Issued: September 2, 2015</b>
<b>DEPARTMENT OF THE NAVY, PUGET</b>	)	
<b>SOUND NAVAL SHIPYARD, Bremerton, WA,</b>	)	
<b>Employer</b>	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 18, 2015 appellant filed a timely appeal of a December 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Since more than 180 days elapsed from the most recent merit decision dated January 17, 2014 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 15, 2010 appellant, then a 61-year-old supervisory production controller, filed a CA-2 (claim for occupational disease or illness) alleging that he sustained “possible cancer associated with asbestos exposure.” In an accompanying statement, he alleged that he was exposed to insulation and other sources of asbestos since 1974. Appellant stated that cancer in his chest and stomach area could have been caused by long-term asbestos exposure.

As part of the development of the medical evidence, appellant was referred for a second opinion examination by a specialist in pulmonary disease. In a report dated September 1, 2011, Dr. Robert Cox, a Board-certified internist specializing in pulmonary disease, provided a history and results on examination. He stated that appellant had a mild-to-moderate obstructive lung disease, perhaps asthma, but there was no evidence by computerized tomography (CT) scan of asbestos-related lung disease. Dr. Cox indicated that appellant had carcinoma of the esophagus and was postsurgery, radiation, and chemotherapy.

By decision dated November 3, 2011, OWCP denied the claim for compensation. It found that the medical evidence failed to establish a diagnosed condition causally related to asbestos exposure in his federal employment.

The record indicates that appellant was also referred for a second opinion examination by Dr. Robert Levenson, an oncologist. In a report dated November 7, 2011, Dr. Levenson opined that appellant’s adenocarcinoma of the esophagus was not causally related to asbestos exposure. Appellant continued to submit evidence with respect to treatment for esophageal cancer.

Appellant submitted a request for reconsideration on October 19, 2012. He submitted a September 2008 medical article on mesothelioma.

In a decision dated November 29, 2012, OWCP reviewed the case on its merits and denied modification. On October 1, 2013 appellant again requested reconsideration. He stated that he was submitting an x-ray report, but no medical evidence was received. By decision dated January 17, 2014, OWCP reviewed the case on its merits and denied modification.

On December 1, 2014 appellant requested reconsideration. He submitted an October 9, 2014 report from Dr. Alan Schonfeld, an osteopath specializing in pulmonary medicine. Dr. Schonfeld provided a history discussing appellant’s exposure to asbestos in his federal employment. He provided results on examination and pulmonary function testing. Dr. Schonfeld opined that given appellant’s history of significant exposure to asbestos in the workplace, given an appropriate latency, and given the roentgenographic findings, “I feel with a reasonable degree of medical certainty that [appellant] is diagnosed as having bilateral asbestos-related pleural disease.” He concluded that appellant was at increased risk of developing lung cancer and mesothelioma.

By decision dated December 15, 2014, OWCP denied merit review of the claim. It stated that the October 9, 2014 report “did not contain information relevant to the issue in this claim.” According to OWCP, appellant had claimed esophageal cancer due to asbestos exposure, and the

report submitted discussed only asbestos exposure, with no rationale as to how it caused the cancer condition.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>2</sup> OWCP's 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>3</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>4</sup>

### **ANALYSIS**

In the present case, OWCP had denied appellant's claim for a medical condition casually related to asbestos exposure in federal employment. The last decision on the merits of the claim was January 17, 2014. Appellant submitted a request for reconsideration on October 19, 2014. He did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

Appellant did, however, submit an October 9, 2014 report from Dr. Schonfeld, a pulmonologist. OWCP finds that this was irrelevant because appellant's claim was that his esophageal cancer was related to asbestos exposure. The Board disagrees with OWCP's finding in this regard. Appellant's claim was for an injury resulting from asbestos exposure, including a possible pulmonary condition. OWCP initially referred appellant for a second opinion examination by Dr. Cox, a pulmonary specialist. Dr. Cox provided an opinion that appellant did not have an asbestos-related lung condition.

The October 9, 2014 report constitutes new medical evidence that is relevant to the issue of whether appellant has an asbestos-related lung condition. This represents relevant and pertinent evidence not previously considered by OWCP. It is not necessary that the evidence be sufficient to establish the claim, only that it is new, relevant, and pertinent to the issue presented.<sup>5</sup>

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<sup>2</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>3</sup> 20 C.F.R. § 10.606(b)(3).

<sup>4</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>5</sup> *See C.L.*, Docket No. 14-1904 (issued May 18, 2015).

The Board finds that appellant met the requirement of 20 C.F.R. § 10.606(b)(3) in this case. Appellant was therefore entitled to a review of the merits of his claim for compensation. The case will be remanded to OWCP for a proper decision on the merits.

**CONCLUSION**

The Board finds that appellant was entitled to a review of the merits of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 15, 2014 is set aside and the case remanded to OWCP for action consistent with this decision of the Board.

Issued: September 2, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board