



## **FACTUAL HISTORY**

On September 3, 2002 appellant, then a 34-year-old wild land firefighter, filed an occupational disease claim (Form CA-2) alleging that he developed scarring of the lungs and restrictive lung disease as a result of his federal employment duties. He explained that his condition developed from 11 years of wild land firefighting, sometimes in heavy smoke and toxic chemicals, along with a burn injury in 1996 which injured his lungs.<sup>3</sup> Appellant stopped work on July 14, 2002 and did not return. The record does not reflect that appellant received compensation benefits on the supplemental or periodic rolls.

By decision dated March 4, 2003, OWCP accepted the claim for smoke inhalation.

On April 26, 2015 appellant filed a claim for recurrence of disability (Form CA-2a) alleging a return/increase of disability on April 20, 2015. He explained that he was retired/disabled and had not returned to work, but that on April 20, 2015 he had difficulty breathing and sought emergency treatment, at which time he was diagnosed with restrictive lung disease.

By letter dated May 6, 2015, OWCP informed appellant that the evidence of record was insufficient to support his recurrence claim. Appellant was advised of the medical and factual evidence needed and was afforded 30 days to submit the additional evidence.

In a May 11, 2015 narrative statement, appellant related that he injured his lungs on August 27, 1996 when he was fighting a wildfire in Nevada. He explained that over the past 10 years he had been suffering from shortness of breath, which had worsened during the last few months. On April 20, 2015 appellant sought emergency treatment and underwent a series of tests. At the request of his physician, he returned to the emergency room on April 22, 2016 with increased shortness of breath. Appellant remained in the hospital until May 2, 2015 when he was diagnosed with restrictive lung disease. He was sent home with 100 percent oxygen treatment which he was required to use 24 hours a day, 7 days a week.

In an April 23, 2015 diagnostic report, Dr. Saadia Akhtar, Board-certified in internal medicine, reported that lung volumes revealed mild-to-moderate restrictive ventilator impairment and spirometry revealed reduced forced vital capacity (FVC) suggesting restriction.

In a May 1, 2015 St. Luke's hospital emergency report, Linda J. Gould, a nurse practitioner (NP), diagnosed restrictive lung disease, joint pain, and other nonspecific abnormal finding of lung fluid.

By decision dated June 10, 2015, OWCP denied appellant's claim for recurrence because the medical evidence submitted failed to establish that his alleged disability was due to a material change/worsening of his accepted work-related conditions.

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<sup>3</sup> The Board notes that on August 2, 1996, appellant filed a traumatic injury claim (Form CA-1) for burns suffered in a work-related injury. OWCP accepted the claim for second and third degree burns of the finger, hands, and arms (bilateral) in OWCP File No. xxxxxx797. On April 26, 2000 OWCP expanded the claim to include post-traumatic stress disorder. Following these injuries, appellant returned to work as a firefighter.

Appellant requested reconsideration of OWCP's decision on November 20, 2015. In an accompanying narrative statement, he explained that he was requesting reconsideration based on recent medical testing and results showing that his progressive disability of interstitial lung disease was caused by his work-related injury. Appellant stated that he was enclosing the required documents including recent pulmonary function test results, hospital notes, pathology reports, and physicians' statements. The record before the Board, however, contains no additional documents.

By decision dated November 30, 2015, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that the 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.<sup>4</sup> Section 10.608(b) of OWCP regulations provides 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.<sup>5</sup>

### **ANALYSIS**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not allege that OWCP erroneously applied or interpreted a specific point of law. He did not advance relevant legal argument which had not previously been considered. The decisive issue in this case was whether appellant was disabled on or after April 20, 2015 due to a worsening of his accepted work-related smoke inhalation condition. That is a medical issue which must be addressed by relevant medical evidence.<sup>6</sup> Appellant, however, failed to submit relevant and pertinent new medical evidence in support of his claim.<sup>7</sup>

Appellant alleged that he had submitted additional medical reports in support of his claim. However, his reconsideration request was not accompanied by any additional medical

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<sup>4</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>5</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>6</sup> *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

<sup>7</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

evidence and no other evidence was received by OWCP. A claimant may obtain a merit review of an OWCP decision by submitting pertinent new and relevant evidence.<sup>8</sup> In this case, appellant failed to submit any pertinent new and relevant evidence addressing a recurrence of disability due to his accepted employment injury beginning April 20, 2015.<sup>9</sup>

On appeal, appellant alleges that work caused his interstitial lung disease and submitted additional evidence in support of his claim. As previously noted, the Board does not have jurisdiction over the merits of the claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated November 30, 2015 is affirmed.

Issued: October 24, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> See *E.M.*, Docket No. 16-0471 (issued May 16, 2016).

<sup>9</sup> *L.J.*, Docket No. 14-523 (issued August 7, 2014).