

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 15, 2017 appellant, then a 60-year-old part-time pharmacy volunteer/intern, filed an occupational disease claim (Form CA-2) alleging that while working in the chemical hazards room and morgue he sustained stomach cancer, vision problems, skin conditions, and cognitive issues while in the performance of duty on or before June 10, 2014. He alleged that his exposures to various materials continued until January 1, 2016.

In an undated letter, received by OWCP on February 27, 2017,⁴ Dr. Mitchell R. Smith, an attending Board-certified oncologist and internist, noted that he had treated appellant for aggressive B-cell lymphoma in the setting of a long-standing, but previously stable human immunodeficiency virus (HIV) infection. He opined that as “[c]hemicals have clearly been related to the development of lymphoma,” it was “highly likely that the chemical exposure either lead directly to the development of lymphoma, or indirectly through immunosuppression.”

Appellant also submitted Equal Employment Opportunity (EEO) documents dated from February 2014 to August 2015 alleging harassment and a hostile work environment, and a May 19, 2015 employment discrimination complaint.

By development letter dated March 29, 2017, OWCP notified appellant of the type of additional evidence needed to establish his occupational disease claim, including factual evidence documenting hazardous exposures at work, and a statement from his attending physician explaining the causal relationship between those exposures and the claimed conditions. It afforded him 30 days to submit the requested evidence.

In response, appellant submitted time sheets dated March 20, 2014 to March 12, 2015, academic records, an employing establishment job posting, personnel records, and EEO documents.

In an e-mail dated April 27, 2017, K.C., an employing establishment volunteer program officer, noted that appellant had been placed initially in the pharmacy service, but was subsequently assigned to another area. It was further noted that appellant “became very disruptive as a volunteer and was terminated” for that reason.

In an e-mail dated April 27, 2017, S.E., appellant's supervisor, indicated that appellant had been assigned to sort, file, or dispose of “slides and blocks of formalin-fixed, paraffin embedded tissue samples, which are not considered by OSHA [Occupational Safety and Health Administration] to be hazardous.” Records retention regulations required that some materials be kept for 25 years, but these items were “not considered hazardous or infectious by OSHA.” The laboratory and morgue area where appellant worked had not experienced hazardous materials

⁴ A second copy of Dr. Mitchell's letter received by OWCP on November 6, 2017 is dated November 18, 2016.

incidents during his tenure. All body parts were stored in closed containers and disposed of according to applicable safety regulations and procedures.

By letter dated April 28, 2017, the employing establishment noted that appellant “volunteered a total of 193 hours from March 20, 2014 to March 12, 2015” and was terminated from his volunteer position on April 9, 2015.

By decision dated June 8, 2017, OWCP denied appellant’s claim, finding that he had not established that the identified workplace exposures occurred as alleged.

On June 16, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on November 1, 2017. During the hearing, appellant alleged that his employment duties exposed him to formaldehyde, chemicals stored in a hazardous materials room, and improperly stored body parts.

Following the hearing, appellant submitted additional evidence. In a report dated November 12, 2015, Dr. Leonard H. Calabrese, an attending osteopathic physician Board-certified in immunology, held appellant off work through November 15, 2015 due to mobility issues. In a report dated February 28, 2017, he noted treating appellant for several serious conditions, and that burst pipes in appellant’s home had caused significant stress. In a report dated July 25, 2017, Dr. Calabrese opined that appellant was “medical[ly] unable to handle undue stress” and needed closure regarding his compensation claim.

Appellant also provided a log of patient biopsy slides that he had destroyed from April 10 to May 8, 2014.

By decision dated December 19, 2017, an OWCP hearing representative affirmed the prior decision finding that appellant had not established hazardous workplace exposures as alleged.

On January 19, 2018 appellant, through counsel, requested reconsideration and submitted a duplicate copy of Dr. Smith’s letter previously of record.

By decision dated March 14, 2018, OWCP denied modification of its prior decision.

On April 24, 2018 appellant, through counsel, requested reconsideration of the March 14, 2018 decision. He submitted a letter dated March 8, 2018 from Dr. Robert M. Dean, an attending Board-certified hematologist and oncologist, who opined that “[f]ormaldehyde exposure has been associated with higher risks of multiple forms of cancer, and this may explain why [appellant] developed lymphoma following many years of stable HIV infection without other complications.” Dr. Dean recommended approval of appellant’s claim based upon his occupational exposure and subsequent lymphoma diagnosis.

By decision dated July 20, 2018, OWCP denied modification of its prior decision finding that the additional evidence submitted was insufficient to establish hazardous exposures at work.

On July 27, 2018 appellant, through counsel, requested reconsideration and submitted additional evidence. In a letter dated July 25, 2018, Dr. Calabrese noted that appellant’s HIV had been stable for over 20 years until the lymphoma diagnosis in 2014. He opined that appellant should be entitled to compensation benefits.

By decision dated July 30, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted by him in support of his reconsideration request was irrelevant and repetitious.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It may review an award for or against payment of compensation at any time based on its own motion or on application.⁵

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (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.⁶ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁹ and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

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

With his timely request for reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.¹¹ Consequently, appellant is not entitled to review of the merits of his claim on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.608(a); *see also* *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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

¹⁰ *K.B.*, Docket No. 18-1392 (issued January 15, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

Additionally, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether he has submitted sufficient evidence to establish the hazard exposures as alleged in his occupational disease claim.

In support of his July 27, 2018 reconsideration request, appellant submitted a July 15, 2018 letter in which Dr. Calabrese noted that appellant should be entitled to compensation benefits as his HIV disease had been stable for over 20 years prior to the 2014 lymphoma diagnosis.

Because the underlying issue in this case is factual in nature, it must be addressed by relevant factual evidence. The Board finds that appellant has not submitted relevant and pertinent new evidence on reconsideration.¹² Appellant's submission of Dr. Calabrese's July 15, 2018 letter does not require reopening his claim for review on the merits because such medical evidence is not relevant to the above-noted underlying factual issue of this case. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel contends that the July 30, 2018 OWCP decision is contrary to fact and law. As stated above, the evidence appellant submitted on reconsideration has not met the requirements to reopen his case for a review of the merits of the claim.

CONCLUSION

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

¹² *K.B.*, *supra* note 10; *see J.F.*, *supra* note 11.

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2019
Washington, DC

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

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

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