



(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

### **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**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 12, 2013 appellant, then a 62-year-old retired air condition operator/mechanic, filed an occupational disease claim (Form CA-2) alleging that he was exposed to asbestos for 20 years at work and had developed asbestosis.<sup>5</sup> In a November 19, 2013 decision, OWCP initially denied the claim based on appellant's failure to establish fact of injury. However, by decision dated March 21, 2014, an OWCP hearing representative set aside the November 19, 2013 decision, and remanded the case for further development. Following additional development, by decision dated July 16, 2014, OWCP found that while appellant established both components of fact of injury, he had not established causal relationship between the accepted employment factors and the diagnosed medical condition. That decision was subsequently affirmed by a representative of OWCP's Branch of Hearings and Review, and by decision dated December 16, 2015, the Board affirmed the hearing representative's April 27, 2015 decision.<sup>6</sup> Although appellant established that he was exposed to asbestos during his federal employment and that he suffered from asbestosis, the Board found that he had not established causal relationship.<sup>7</sup>

On May 26, 2016 appellant requested reconsideration and submitted additional medical evidence, which included a recent pulmonary function study and a May 17, 2016 narrative report from Dr. Gregory G. Hickey, a Board-certified internist and pulmonologist, who diagnosed chronic obstructive pulmonary disease, chronic rhinitis, and chronic pneumoconiosis due to asbestos and other mineral fibers.

By decision dated August 25, 2016, OWCP denied modification of its prior decision. Appellant appealed to the Board. By decision dated April 6, 2017, the Board affirmed OWCP's August 25, 2016 decision denying appellant's claim.<sup>8</sup> The Board found that the medical evidence

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<sup>4</sup> Docket No. 17-0090 (issued April 6, 2017); Docket No. 15-1826 (issued December 26, 2015).

<sup>5</sup> Appellant retired from the employing establishment, effective October 15, 1999.

<sup>6</sup> Docket No. 15-1826 (issued December 16, 2015).

<sup>7</sup> *Id.*

<sup>8</sup> Docket No. 17-0090 (issued April 6, 2017).

of record failed to establish causal relationship between appellant's diagnosed medical condition and the accepted asbestos exposure at work.

On March 19, 2018 appellant, through counsel, requested reconsideration of the April 6, 2017 merit decision. In support of the request, counsel submitted a recent pulmonary function study and a January 11, 2018 narrative report from Dr. Linas Vaitkus, a Board-certified internist specializing in pulmonary disease. Counsel related that appellant was seen for assessment of asbestosis. Dr. Vaitkus reviewed appellant's history and noted that he had 22 years of asbestos exposure working for the government. He provided examination findings and noted that a chest computerized tomography (CT) scan from 2016 showed asbestosis and pleural plaques. Dr. Vaitkus also reviewed the results of a January 11, 2018 pulmonary function study. He diagnosed chronic obstructive pulmonary disease, chronic rhinitis, chronic pneumoconiosis due to asbestos and other mineral fibers, and contact with exposure to asbestos, and pleural plaque with presence of asbestos.

By decision dated August 27, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>9</sup> vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>10</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.<sup>11</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>12</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>13</sup> 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.<sup>14</sup>

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<sup>9</sup> *Supra* note 1.

<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>12</sup> *Id.* at § 10.607(a).

<sup>13</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>14</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

## 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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted a January 11, 2018 report by Dr. Vaitkus. He provided examination findings and reported diagnoses of chronic obstructive pulmonary disease, chronic rhinitis, chronic pneumoconiosis due to asbestos and other mineral fibers, contact with exposure to asbestos, and pleural plaque with presence of asbestos. The Board finds that Dr. Vaitkus did not provide an opinion or discussion regarding whether appellant's medical conditions were causally related to his accepted employment exposure. The January 11, 2018 diagnostic pulmonary function study similarly fails to address causal relationship. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup> Accordingly, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>16</sup>

On appeal counsel asserts that OWCP's delay in ruling on the March 19, 2018 request for reconsideration cost appellant his appeal rights. As noted, the last merit decision of record was issued by the Board on April 6, 2017, and is not subject to further review by the Board.<sup>17</sup> Counsel waited more than 11 months before requesting reconsideration and, as discussed above, failed to present sufficient evidence or argument to warrant further merit review. Although OWCP issued its August 27, 2018 nonmerit decision more than 90 days after counsel requested reconsideration, under the circumstances the approximate two-month delay did not jeopardize appellant's right to a review of the merits of the case by the Board.<sup>18</sup>

## 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).

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<sup>15</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>16</sup> *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>17</sup> *See supra* note 2.

<sup>18</sup> *See E.I.*, Docket No. 18-0634 (issued January 23, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7a (October 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 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