



## **FACTUAL HISTORY**

On April 14, 2017 appellant, then a 42-year-old customer service representative, filed a notice of occupational disease (Form CA-2) claiming that she developed a severe cough after entering her work area. She noted that her team relocated and she began to experience nose burning, headaches, and dizziness. Appellant became aware of her condition on December 19, 2014 and realized that it was causally related to factors of her federal employment on October 20, 2015. She stopped work on March 18, 2017.

Dr. Michael R. Harbut, Board-certified in occupational medicine, treated appellant on March 17, 2017 for a medical condition and took her off work.

By development letter dated April 17, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish the claim. It advised her of the type of medical and factual evidence needed to establish her claim. OWCP specifically requested that appellant complete an enclosed questionnaire and submit a comprehensive narrative medical report from her treating physician that included a diagnosis and a reasoned explanation as to how specific work factors and/or incidents caused or contributed to the diagnosed condition(s). It afforded her 30 days to submit the necessary evidence.

Appellant was treated by Dr. Harbut on March 17 and June 16, 2017 for a cough which was exacerbated by her workplace. She reported working at the employing establishment which was at the time undergoing construction. Appellant indicated that she typically got a cough the same time each year, but since the workplace construction started her condition became worse when she entered the building. She was off work for January and February due to coughing spells. Dr. Harbut noted equal breathing sounds, no acute respiratory distress, quiet rales, and no wheezes, or rhonchi. He diagnosed moderate intermittent asthma with acute exacerbation, interstitial lung disease, and asbestos exposure. Dr. Harbut placed appellant off work.

A pulmonary function test (PFT) dated April 6, 2017 revealed an overall normal spirometry. A computerized tomography (CT) of the thorax dated April 25, 2017 was unremarkable. A CT of the maxillofacial dated April 25, 2017 revealed inflammatory and structural changes.

Attending physician's reports (Form CA-20) from Dr. Harbut dated April 14 and 20, 2017 diagnosed asthma with acute exacerbation. Appellant reported an exacerbation of cough upon entering the workplace while under construction. He noted with a check in a box marked "yes" that appellant's condition was caused or aggravated by an employment activity noting workplace exposure to asthmatogens.

Appellant submitted a statement dated May 3, 2017 and indicated that she was unsure of what she was exposed to, but she never suffered from bronchitis or asthma until she began working in the employing establishment building. She described the work facility as having poor air circulation and was extremely cold with air vents blowing directly into her face. Appellant wore a mask at work which helped with her coughing. She indicated that she was off work for one to three months due to frequent headaches and nostril burning. Appellant reported that she did not have allergies, she had bronchitis in 2015, and she was diagnosed with asthma in 2017.

Appellant was treated by Dr. Vilma Drelicham, Board-certified in infectious disease, on June 8 and 22, 2017, who diagnosed history of recurrent respiratory infections, chronic cough for three months, and pigeon/dove antibody titer positive on the hypersensitivity pneumonitis panel.

On June 30, 2017 Dr. Harbut treated appellant in follow-up for a cough which was exacerbated by her workplace. She reported that her work facility was a large open area where she saw pigeons flying and roosting. Appellant further indicated that she typically developed a cough in December which would last one to three months but since construction began in her workplace her cough worsened when entering the building. Dr. Harbut noted findings that appellant was obese, there were adventitious lung sounds, the PFT revealed an interstitial lung disease, and blood tests revealed the presence of antibodies to pigeon dropping. He indicated that appellant would be off work until the employing establishment obtained a properly completed industrial hygiene evaluation. Dr. Harbut opined that appellant's asthma was exacerbated and/or caused by exposure to pigeon droppings, construction dust, and extreme temperatures at her workplace.

In a prescription slip dated September 1, 2017, Dr. Harbut returned appellant to work on September 11, 2017. He noted that she could not be exposed to mists, dusts, fumes, smoke, extreme temperatures, humidity, and other asthmatogens and must be permitted to leave work if she became symptomatic.

The employing establishment submitted an e-mail from D.J., supervisor of customer relations, who noted the customer care center was under construction in January 2017 but appellant was not in the "direct path" of the construction. D.J. noted that appellant's attendance did not allow her to be at the customer care center for the majority of the construction time and construction was performed after hours.

By decision dated October 10, 2017, OWCP denied appellant's claim because the evidence was insufficient to support that the injury or event occurred as alleged. It concluded, therefore, that the requirements have not been met to establish an injury as defined by FECA.

A PFT dated June 26, 2017 revealed mild restrictive impairment possibly from extrapulmonary etiology (body habitus/abdominal obesity) or parenchymal process. A PFT performed on August 24, 2017 revealed spirometry within normal limits and methacholine challenge testing indicating normal bronchial responsiveness.

In a report dated July 21, 2017, Dr. Harbut treated appellant in follow up. Appellant reported severe coughing upon exposure to cold air, smoke, or dust. He noted breathing sounds were equal, no acute respiratory distress, no rales, wheezes at the periphery, and no rhonchi. Dr. Harbut diagnosed asthma, moderate and persistent. On September 1, 2017 he rechecked appellant for asthma symptoms. Appellant reported being off work and away from the exposures that exacerbated her cough since March 17, 2017 and she was feeling better. Dr. Harbut noted examination findings were unchanged and diagnosed asthma cough variant and returned her to work on September 11, 2017.

On December 12, 2017 appellant requested reconsideration of the October 10, 2017 decision.

In an undated statement, appellant indicated that she could not return to work because it was not a safe environment and she experienced an allergic reaction. She reported chest tightening,

headaches, and severe cough. Appellant further indicated that she did not have any income and would return to work if she could and feared that she would not be able to care for her family.

Appellant submitted a September 1, 2017 prescription note from Dr. Harbut, previously of record. On October 6, 2017 Dr. Harbut noted that appellant had cough variant asthma and positive antibodies and could not return to work at her present location. On December 1, 2017 Dr. Harbut indicated that appellant had cough variant asthma and could not be exposed to mists, dust, fumes, smoke, extreme temperature, humidity and other asthmatogens in her present work location.

The employing establishment submitted a statement from appellant's supervisor D.J. who noted that there were 392 agents in the customer care center and appellant was the only one to allege fumes, dust, or chemicals affected her breathing at work. D.J. noted that there were no harmful substances use in the center and any levels of dust would be what you would experience in any office setting. She indicated that cleaning was performed by the overnight shift so that employees are not exposed to fumes or chemicals. D.J. noted that no air sampling was performed or was needed as it was a general office setting. She indicated that appellant performed her normal duties daily except when she was on leave and did not request a mask or respirator to minimize her exposure.

On January 16, 2018 appellant requested an oral hearing with a representative of OWCP's Branch of Hearings and Review. The request was dated January 10, 2018 and postmarked on January 16, 2018.

By decision dated February 22, 2018, OWCP denied appellant's request for an oral hearing. It found that her request was not made within 30 days of OWCP's October 10, 2017 decision. As such, appellant was not entitled to a hearing as a matter of right. OWCP exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submit new evidence establishing an employment-related injury.

By decision dated March 5, 2018, OWCP denied appellant's request for reconsideration of the merits of the case.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8124 of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.<sup>3</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."<sup>4</sup>

Under section 10.616(a), "[a] claimant injured on or after July 4, 1966, who had received a final adverse decision by the district OWCP may obtain a hearing by writing to the address

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.615.

specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."<sup>5</sup>

OWCP's regulations further provide that a request received more than 30 days after OWCP's decision is subject to OWCP's discretion<sup>6</sup> and the Board has held that OWCP must exercise this discretion when a hearing request is untimely.<sup>7</sup>

### ANALYSIS -- ISSUE 1

Appellant requested an oral hearing utilizing the appeal request form that accompanied OWCP's October 10, 2017 merit decision. OWCP noted that appellant's request was postmarked January 16, 2018, which was more than 30 days after OWCP's October 10, 2017 decision.<sup>8</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>9</sup> For this reason, the Board finds that the request was untimely and appellant was not entitled to an oral hearing as a matter of right.

Although appellant was not entitled to a hearing, OWCP may exercise its discretion to either grant or deny an oral hearing even if appellant is not entitled to a review as a matter of right.<sup>10</sup> The Board finds that OWCP, in its February 22, 2018 decision, properly exercised its discretionary authority by noting that it had considered the matter and denied appellant's request for an oral hearing as her claim could be equally well addressed through a reconsideration application.<sup>11</sup>

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>12</sup> The evidence of record does not indicate that OWCP committed an abuse of discretion in connection with its denial of appellant's request for an oral hearing.

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<sup>5</sup> *Id.* at § 10.616(a).

<sup>6</sup> *Id.* at § 10.616(b).

<sup>7</sup> *D.W.*, Docket No. 17-1413 (issued December 18, 2018); *Samuel R. Johnson*, 51 ECAB 612, 613-14 (2000).

<sup>8</sup> Under OWCP regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

<sup>9</sup> *William F. Osborne*, 46 ECAB 198 (1994).

<sup>10</sup> *D.E.*, 59 ECAB 438, 442-43 (2008); *J.C.*, 59 ECAB 206, 210-11 (2007).

<sup>11</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts. See *André Thyrastron*, 54 ECAB 257, 261 (2002).

<sup>12</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>13</sup> 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>14</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>15</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>16</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>17</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>18</sup>

## ANALYSIS -- ISSUE 2

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

In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In an undated statement, she indicated that she could not return to work because she experienced an allergic reaction to the environment. Appellant indicated that she experienced chest tightening, headaches, and severe cough. She further indicated that she did not have any income and would return to work if she could and feared that she would not be able to care for her family. However, her statements do not show a legal error by OWCP nor does it provide a new and relevant legal argument not previously reviewed. The underlying issue in this case is whether appellant submitted sufficient factual evidence establishing that the injury or events occurred as alleged. That is a factual issue which must be addressed by relevant new factual evidence.<sup>19</sup> However, appellant did not submit any new and relevant factual evidence in support of her claim.

In a report dated July 21, 2017, Dr. Harbut treated appellant in follow-up for asthma. Appellant reported severe coughing upon exposure to cold air, smoke, or dust. Dr. Harbut

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<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> *Id.* at § 8128(a).

<sup>15</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>16</sup> 20 C.F.R. § 10.607(a).

<sup>17</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

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

<sup>19</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

diagnosed asthma, moderate and persistent. On September 1, 2017 he rechecked appellant who reported being off work since March 17, 2017 and feeling better. Dr. Harbut diagnosed asthma cough variant and recommended she return to work on September 11, 2017. Similarly, in notes dated October 6 and December 1, 2017, he diagnosed cough variant asthma and positive antibodies and opined that appellant could not return to work at her present location. While these reports are new, they are not relevant as they are substantially similar to Dr. Harbut's reports dated March 17, April 27, June 16, and June 30, 2017 previously submitted and were considered by OWCP in its earlier decision dated October 10, 2017 and found to be deficient. As noted, evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>20</sup> Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

Appellant submitted PFT's dated June 26 and August 24, 2017 which revealed mild restrictive impairment possibly from extrapulmonary etiology (body habitus/abdominal obesity) or parenchymal process. While this evidence is new to the record, it is not relevant to the issue for which OWCP denied appellant's claim, the failure to establish the factual component of her claim because the evidence did not support that the injury or events occurred as alleged.<sup>21</sup> These reports do not address the factual components of appellant's claim. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>22</sup> Therefore, these documents do not constitute a basis for reopening appellant's claim.<sup>23</sup> Accordingly, appellant has not established a basis for further merit review under 20 C.F.R. § 10.606(b)(3)(iii).

Appellant has not met any of the regulatory requirements and OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).<sup>24</sup> Thus, OWCP did not abuse its discretion in refusing to reopen her claim for a review on the merits.<sup>25</sup>

### CONCLUSION

The Board finds that OWCP properly denied appellant's January 10, 2018 request for an oral hearing as untimely. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>20</sup> See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>21</sup> *Id.*

<sup>22</sup> *M.M.*, Docket No. 10-0224 (issued October 6, 2010).

<sup>23</sup> See *W.D.*, Docket No. 09-0658 (issued October 22, 2009) (causal relationship is a medical issue).

<sup>24</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>25</sup> Appellant submitted a new argument on appeal. However, "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 5 and February 22, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 21, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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