

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 2, 2020 appellant, then a 62-year-old retired painter supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained a respiratory condition due to factors of his federal employment including exposure to multiple chemicals without protective equipment.² He noted that he first became aware of his condition and realized its relation to his federal employment on November 1, 2000. Appellant remained employed as a painter supervisor through August 31, 2019, when he retired from the employing establishment. An official position description dated October 31, 2006, notes that appellant's working conditions as a painter supervisor were subject to epoxy, paint thinners, mineral spirits, methyl-ethyl-ketone, polyurethane paint, grease, oil, fuels, battery acid, cleaning solvents, slippery surfaces, high pressure air and engine noise, electrical energy, and dust.

In support of his claim, appellant provided a July 14, 2020 statement alleging that he had been issued improper or inadequate personal protective equipment (PPE). During operation of a bead-blast cabinet, which produced chromium dust, cadmium, and polyurethane dust, he alleged receiving a paper mask that did not offer adequate protection. Appellant used a half-face respirator while stripping paint from aircraft and aircraft parts with methylene chloride, using polyurethane paint, and sanding. He alleged that environmental testing later established that this PPE did not filter out contaminants.

In an incomplete, undated incident report received by OWCP on July 14, 2020, appellant noted that he had been hired by the employing establishment on August 17, 1989. He alleged that he had developed breathing problems due to workplace exposures to methyl ethyl ketone, polyurethane thinner, methylene chloride, epoxy primer, lacquer thinner, polyurethane paint, naphtha thinner, toluene thinner, acetone, plastic media, cadmium, and chromium.

OWCP also received material safety data sheets for methyl ethyl ketone, base component industrial coating, polyurethane thinner, stripper 18, and curing solution.

Appellant submitted medical evidence from the employing establishment's health unit. In an August 17, 1992 report, Dr. Gregory G. Gardner, an employing establishment family practitioner, opined that pulmonary function testing (PFT) performed on that date was within normal limits. In an August 5, 1993 report, Dr. Blake V. Chamberlain, an employing establishment emergency medicine specialist, found that PFT performed that day were within normal limits. In a July 26, 1995 report, Dr. Gardner opined that PFT performed on that date was within normal limits. Appellant completed a respirator medical evaluation questionnaire indicating complaints of shortness of breath, thick sputum, high blood pressure, and a heart problem for which he took medication.

² On July 9, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award. OWCP, in a development letter dated July 20, 2020, advised him of the evidence needed to establish his schedule award claim and afforded him 30 days to respond. There is no final decision of record regarding appellant's schedule award claim.

In an October 19, 1998 exposure questionnaire, appellant alleged excessive exposure to metals, dusts or fibers, chemicals, fumes, chromium, cadmium, and methyl ethyl ketone. He alleged that the PPE provided by the employing establishment was inadequate.

OWCP received laboratory test panels dated from November 3, 1999 through August 22, 2018 from the employing establishment health unit, screening for cadmium exposure.

A December 13, 1999 occupational health examination requirements report acknowledged that employees in the corrosion control area where appellant worked were exposed to strontium chromate, zinc chromate, and chromic acid above the occupational exposure limit. These exposures necessitated a program of periodic PFT, chest x-rays, physical examinations, and exposure questionnaires.

In a September 13, 2001 fitness-for-duty examination report, Dr. Allan E. Ward, an employing establishment occupational medicine specialist, noted appellant's complaints of intermittent right-sided chest pain that felt like pleurisy.

In a September 30, 2002 employing establishment health unit respirator questionnaire, Dr. Lisa B. Firestone, an employing establishment physiatrist, indicated that appellant's medical clearance or disqualification was on hold pending further evaluation. Appellant complained of chest pain, shortness of breath, and thick sputum production.

A January 6, 2011 occupational health note indicated that workers exposed to chromic acid should have periodic physical examinations to detect incipient changes in the nostrils and respiratory tract.

In an April 26, 2016 report, Dr. Preston Moore, an employing establishment family practitioner, opined that appellant's recent laboratory studies and PFT were within normal limits.

In a development letter dated July 17, 2020, OWCP advised appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. By separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding appellant's allegations, including any history of hazardous exposures, the frequency and duration of such exposures, air sample results, safety data sheets for the relevant materials, and a description of the safety equipment provided. It afforded both parties 30 days to submit the requested evidence.

On December 1, 2020 OWCP referred appellant, along with statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Lukena Karkhanis, a Board-certified internist, allergist, and immunologist, for a second opinion evaluation regarding whether the identified occupational exposures had caused the claimed respiratory condition. In a January 11, 2021 report, Dr. Karkhanis opined that PFT results obtained that day demonstrated a mild restrictive ventilator defect based on a mildly reduced forced vital capacity. She noted that appellant's symptoms of difficulty getting air in at rest, worsened when wearing a surgical mask, and were better when walking, were atypical for asthma. On examination, Dr. Karkhanis found that appellant's pulmonary auscultation was within normal limits, with no crackles or wheezes. She diagnosed shortness of breath and cough after exposure to diisocyanates. Dr. Karkhanis

opined that there was no objective evidence that diisocyanate-related injury had any role in appellant's current condition. She noted that appellant's morbid obesity, obesity-related hypoventilation, and significant cardiac disease, were alternative etiologies for his symptoms. Dr. Karkhanis recommended treatment for vocal cord dysfunction. She returned appellant to sedentary duty in a position that would allow him to walk around the room occasionally when he developed pulmonary symptoms while seated.

By decision dated February 1, 2021, OWCP accepted that the alleged occupational exposures had occurred as described. It denied the claim, however, finding that the medical evidence of record was insufficient to establish that appellant sustained a pulmonary condition causally related to the accepted occupational exposures.

On March 15, 2021 appellant requested reconsideration. In an accompanying statement dated March 6, 2021, he contended that the factual evidence of occupational exposures was sufficient to establish his claim, and that Dr. Karkhanis did not discuss these exposures in her report.

Appellant submitted material safety data sheets for red and white urethane paint, and high solids Ura-Zen catalyst.

A September 19, 2013 occupational health examination requirements memorandum indicated that employees in the corrosion control unit where appellant worked were exposed to chromium VI and strontium chromate "over the action level."

In a July 9, 2020 attending physician's report (Form CA-20), Dr. David M. O'Brien, an employing establishment physician specializing in aerospace medicine, diagnosed asthma and/or emphysema and/or airway obstruction. He answered "Yes" in support of causal relationship between the diagnoses and "[l]ack of proper respirator."

Appellant also resubmitted evidence previously of record.

By decision dated July 19, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA 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 compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument which: (1) shows that OWCP erroneously applied or interpreted a

³ 5 U.S.C. § 8128(a); *see D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

On reconsideration, appellant submitted a July 9, 2020 Form CA-20 by Dr. O'Brien, who diagnosed asthma and/or emphysema and/or airway obstruction. He answered "Yes" in support of causal relationship between the diagnoses and the "[l]ack of proper respirator." As such, this report constitutes relevant and pertinent new evidence with regard to the threshold issue of whether appellant sustained a respiratory condition due to hazardous exposures in the performance of duty, as alleged. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).⁸ Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.⁹ Instead, the requirement pertaining to the submission of evidence in

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

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4(b).

⁶ *Id.* at § 10.608(a); *D.G., supra* note 3; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *D.J.*, Docket No. 21-0371 (issued November 24, 2021); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *F.F.*, Docket No. 20-1542 (issued April 9, 2021); *see C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁹ *B.S.*, Docket No. 20-0555 (issued April 22, 2021); *P.M.*, Docket No. 19-1253 (issued January 23, 2020); *R.T.*, Docket No. 18-1263 (issued February 7, 2019).

support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰

As appellant has submitted new and relevant evidence, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹¹ Consequently, the case shall be remanded to OWCP for a review of the merits of the claim. Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2021 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 6, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *B.S., id.*; *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ *F.F.*, *supra* note 8; *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). See *L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).