

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **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 November 6, 2018 appellant, then a 63-year-old boilermaker, filed an occupational disease claim (Form CA-2) alleging that he had developed pneumoconiosis and bronchitis due to factors of his federal employment. He noted that he first became aware of his condition and its relation to his federal employment on August 23, 2018. Appellant stopped work on January 1, 2011.

In support of his claim, appellant submitted a September 8, 2018 report from Dr. Glen Baker, a Board-certified pulmonologist and National Institute for Occupational Safety and Health (NIOSH) Certified B-Reader. Dr. Baker recounted that appellant was exposed to asbestos, coal dust, flue gas, welding fumes, argon fumes and other fumes, odors, and dust during his work at the employing establishment as a boilermaker. He noted that appellant was never a smoker. Dr. Baker reviewed a July 27, 2018 chest x-ray on August 14, 2018 and on a form report indicated by checking a box marked "Yes" that there were parenchymal abnormalities consistent with pneumoconiosis. He found that the September 7, 2018 pulmonary function studies were normal. Dr. Baker diagnosed occupational pneumoconiosis secondary to coal dust and asbestos exposure as well as other multiple exposures to dust, odors, and fumes.

On December 3, 2018 appellant described his work exposures from 1970 through 1991 and from April 22, 2002 through September 10, 2010 to coal dust, asbestos, flue gas, fly ash, arsenic, lead, cambium, welding fumes, smoke, and grinding dust. He provided a June 1, 2006 witness statement asserting that he and his coworkers were exposed to asbestos contamination at the employing establishment on May 30 and 31, 2006.

On January 25, 2019 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF) and a series of questions to Dr. Harold Dale Haller, Jr., a Board-certified pulmonologist, for a second opinion examination regarding the nature and extent of appellant's lung condition.

In his February 25, 2019 report, Dr. Haller reviewed the SOAF and Dr. Baker's report. He recounted appellant's symptoms of shortness of breath and cough with dark sputum. Dr. Haller noted that appellant reported a two-year smoking history of less than one pack a week. On pulmonary function testing, he found that appellant gave wholly unacceptable effort. Dr. Haller concluded that lung function was normal. He requested a chest high resolution computerized tomography (HRCT) scan as a much more definitive study to demonstrate interstitial changes. On

March 25, 2019 Dr. Haller reviewed a March 22, 2019 HRCT scan and found no evidence of coal workers' pneumoconiosis or other interstitial lung disease.<sup>3</sup>

By decision dated April 4, 2019, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a diagnosed condition in connection with the accepted employment exposure. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

Following further development, OWCP received supplemental reports. In supplemental reports dated February 25, 2020 and March 2, 2021, Dr. Haller concluded that appellant's examination and his March 2, 2021 chest x-rays demonstrated no evidence of a pulmonary condition or pulmonary cause for his dyspnea.

By decision dated April 6, 2021, OWCP again denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a diagnosed condition in connection with the accepted employment exposure. On April 20, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The oral hearing was held on August 9, 2021.

By decision dated October 22, 2021, OWCP's hearing representative affirmed the April 6, 2021 OWCP decision.

On December 3, 2021 appellant, through counsel, requested reconsideration. He provided a chest radiograph classification report dated November 15, 2021 in which Dr. James B. Crum, a Board-certified diagnostic radiologist and NOISH B reader, examined and classified the findings on appellant's March 2, 2021 chest x-rays. This form report directed the examining physician to classify all appearances in the international classification of radiographs of pneumoconiosis. Dr. Crum indicated by checking a box marked "Yes" that there were classifiable parenchymal abnormalities. He reported small opacities in all three zones of the lungs bilaterally. Dr. Crum indicated by checking a box marked "No" that there were no classifiable pleural abnormalities. He indicated by checking a box marked "Yes" that there were other abnormalities.

By decision dated March 3, 2022, OWCP denied appellant's request for reconsideration, 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 or her own motion or on application.<sup>4</sup>

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<sup>3</sup> In a report dated March 22, 2019, Dr. Vineet Sharma, a Board-certified diagnostic radiologist, conducted appellant's chest HRCT scan and found no evidence of interstitial lung disease, fibrosis, or asbestos-related lung disease.

<sup>4</sup> 5 U.S.C. § 8128(a).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.<sup>5</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>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</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>8</sup>

### 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's timely December 3, 2021 request for reconsideration does not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>9</sup>

Appellant also did not submit any relevant and pertinent new evidence with his December 3, 2021 request for reconsideration. He submitted a November 5, 2021 form report by Dr. Crum, which addressed his findings of parenchymal abnormalities on x-ray. The Board finds that, as Dr. Crum did not provide a diagnosis of a medical condition in connection with the accepted employment exposures, nor did he address the particular issue involved,<sup>10</sup> and thus his report does not constitute new, relevant medical evidence warranting a review of the merits of appellant's claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet 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>11</sup>

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<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *Id.* at § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>10</sup> *K.D.*, *id.*; *K.B.* Docket No. 18-1392 (issued January 15, 2019).

<sup>11</sup> *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2023  
Washington, DC

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

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

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