United States Department of Labor
Employees' Compensation Appeals Board

A.F., widow of P.F., Appellant	)	
and	)	**Docket No. 22-0101**
	)	**Issued: June 1, 2023**
TENNESSEE VALLEY AUTHORITY, Chattanooga, TN, Employer	)	

Appearances:
Jimmy F. Rogers, Jr., Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On October 29, 2021 appellant, through counsel, filed a timely appeal from a May 3, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated March 30, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

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

FACTUAL HISTORY

On October 19, 2018 the employee, then a 78-year-old former boilermaker/welder, filed an occupational disease claim (Form CA-2) alleging that he sustained mesothelioma causally related to factors of his federal employment. He related that he was exposed to asbestos, the only known cause of mesothelioma, in the course of his work for the employing establishment at five different nuclear power plants.

A statement of earnings indicates that the employee worked for the employing establishment from 1976 to 1991. He subsequently worked in the private sector.

In a development letter dated October 24, 2018, OWCP informed the employee of the deficiencies of his claim. It advised him of the type of additional 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 additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of his statements. It afforded both parties 30 days to respond.

In a November 13, 2018 response, the employing establishment advised that the employee was an "intermittent hourly worker" and requested an extension of time to review his employment records.

Thereafter, OWCP received a September 19, 2017 report from Dr. Nathan Mull, a Board-certified internist, who evaluated the employee for right pleural effusion and dyspnea. Dr. Mull noted that he had never smoked, but had a history of significant exposure to asbestos in his work as a boilermaker. He diagnosed a right pleural effusion suspicious for mesothelioma.

In a sworn declaration dated November 21, 2018, the employee advised that he had worked for the employing establishment at five different nuclear power plants from October 20, 1976 to December 16, 1991, except for a few days of "lay-off" time. He related that from December 17, 1991 to April 23, 2002 he worked as a boilermaker/welder for various contractors primarily at the same facilities at the employing establishment. The employee asserted that he worked with employees in other crafts, including insulators, electricians, carpenters, and pipefitters and that he was exposed to a variety of "asbestos-containing products including but not limited to pipe covering/insulation, gaskets, pumps, valves, rope, and packing." He related that he was exposed "continuously throughout each day to asbestos from various sources including operating machinery and all the many tradesman/craftsmen performing their daily labor. The daily work I performed also exposed me to the same asbestos." The employee asserted that he saw visible dust from the asbestos. He noted that a coworker and fellow boilermaker, R.A., had an accepted claim for asbestosis.

On October 23, 2018 the employing establishment controverted the claim. It asserted that the employee had over 44 years working for the boilermakers' union and only 15 years of work for the employing establishment. The employing establishment indicated that it did not have data showing the employee's exposure to asbestos, but that other workers in the same environment showed exposure levels within occupational exposure limits. The employing establishment again noted that he had not performed abatement duties.

In a statement dated December 13, 2018, the employing establishment related that the employee's job did not include "removal or disturbance of asbestos," that he did not perform asbestos abatement work, and that he was not in an asbestos monitoring program. It maintained that he had subsequent employment with contractors who performed asbestos abatement work. The employing establishment advised that it required employees exposed to more than 0.1 fiber/cubic centimeter of air for more than 30 days a year to wear a respiratory and participate in an asbestos surveillance program.

On January 3, 2019 OWCP prepared a statement of accepted facts (SOAF) indicating that the employee was exposed to asbestos-containing products working around boilermakers, welders, insulators, electricians, laborers, carpenters, and pipefitters/steamfitters. It referred him for a second opinion examination regarding whether he had a diagnosed medical condition causally related to the accepted employment exposure.

In a report dated January 10, 2019, Dr. Mull related that he had evaluated the employee on September 19, 2017 for dyspnea and right lower thoracic pain. He advised that he was "immediately concerned about mesothelioma" due to the employee's asbestos exposure in his work as a boilermaker. Dr. Mull attributed his pleural mesothelioma to his occupational exposure to asbestos at the employing establishment.

The employee passed away on March 18, 2019. The death certificate listed the cause of death as malignant mesothelioma of the pleura and peritoneum, hypoxic respiratory failure, malignant pleural effusion, and mesothelioma.

On June 24, 2019 OWCP referred the case file to Dr. Ronald R. Cherry, a Board-certified internist and pulmonologist, for a second opinion examination.

On June 28, 2019 counsel questioned why the employing establishment referred to the employee's work as intermittent when he had worked over 15 years with only a few days of break. He referenced a statement from R.A., a coworker, confirming exposure to asbestos fibers.

In a report dated July 8, 2019, Dr. Cherry noted that the employee had died from a malignant right pleural mesothelioma that had extended into his pericardium. He reviewed the SOAF and Dr. Mull's finding in his January 10, 2019 report that the employee was exposed to asbestos while working for the employing establishment. Dr. Cherry related that most mesothelioma cases resulted from exposure to asbestos. He asserted that there was "essentially no safe exposure to asbestos dust" and that all exposure to asbestos was "damaging, potentially carcinogenic, and cumulative." Dr. Cherry found that if the employee's exposure to asbestos including his work for the employing establishment, then his "malignant pleural mesothelioma was caused or accelerated as a result of his federal employment."

OWCP prepared a SOAF on August 6, 2019 that indicated that the employee was not in a classification that included the removal or disturbance of asbestos, and that he did not perform asbestos abatement work.

By decision dated August 9, 2019, OWCP denied the employee's claim as appellant had not established fact of injury. It found that appellant had not established that the employee was exposed to asbestos in the course of his federal employment.

On September 6, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Subsequently, counsel submitted a portion of testimony from a physician in a circuit court case. He further submitted revised standards from the National Institute for Occupational Safety & Health (NIOSH) that noted that excessive risk of cancer had been demonstrated at all asbestos fiber concentrations, and that there was no safe level of exposure. It recommended setting the standard at the lowest level detectable.

In a July 23, 1999 letter, the Occupational Safety and Health Administration (OSHA) advised that it had not set the permissible exposure limits for asbestos below where a significant risk occurred because it could not be reliably measured at that level.

In a sworn declaration dated January 9, 2020, T.R., a coworker, related that he had worked as a boilermaker/welder at the employing establishment's nuclear power plant from 1982 to 1988 except for an occasional "lay-off" day. His duties included working around various craftsman that exposed him to asbestos-containing products including "pipe covering/insulation, gaskets, pumps, valves, rope, and packing." T.R. advised that the products produced visible dust. He related that while welding at the employing establishment's plant he often wrapped himself in asbestos blankets to protect against the sparks, and worked on boilers that required him to remove the asbestos insulation. T.R. did not receive airway protection until the late 1980s. He also removed asbestos insulation from large tanks and air ducts to work on metal tubes. T.R. asserted that he worked with the employee on the same shift and occasionally on the same crew. He related that he had been diagnosed with asbestosis due to his work at the employing establishment and had an approved claim with OWCP. T.R. noted that the employee worked at the plant for a longer period, and had greater exposure to asbestos.

In a January 10, 2020 sworn declaration, R.A. advised that he had worked as a boilermaker/welder at various nuclear power plants at the employing establishment from 1976 to 1991 with occasional lay-off days. He described his work around other tradesman and his exposure to asbestos-containing products daily. R.A. related that he had used both his bare hands and various tools including hand grinding tools to remove asbestos insulation from pipes and boilers, which produced thick dust such that he could see his footprints on the ground. He had no airway protection until the mid-1980s. R.A. advised that he worked with the employee at three different nuclear power plants. He indicated that he had an approved claim with OWCP for medical monitoring due to his asbestosis. R.A. asserted that the employee had worked at the employing establishment's power plants for longer than he had and had more asbestos exposure.

Counsel submitted literature regarding asbestos exposure in various occupations, including power plant workers.

A journal report on the history of movement toward an asbestos ban noted that in June 1986 OSHA reduced the permissible level of exposure to 0.2 fiber/meter cubed. It noted that the risk remained significant but could not be further lowered. Two years later OSHA reduced exposure limits to 0.1 fiber/meter cubed.

At the telephonic hearing, held on January 13, 2020, counsel noted that the employee had worked for the employing establishment at 5 different power plants for approximately 15 years and 2 months. He noted that the employing establishment admitted that it had no first-hand knowledge about the employee's exposure to asbestos. Counsel advised that appellant had submitted witness statements verifying the employee's asbestos exposure, and that the time of his diagnosis was consistent with the latency period of the disease. He asserted that the issue of whether the employing establishment currently had monitoring programs in place was not relevant. Counsel noted that it had maintained that the exposure met the threshold level of 0.1 fiber per cubic centimeter, which OSHA found was an unsafe level of exposure. He further related that the limit of 0.1 fiber per cubic centimeter was not set until the 1990s, after the employee had left employment. Counsel asserted that the employing establishment claimed compliance with the standard of 0.1 fiber per cubic centimeter without advising that it was a standard from the 1990s that did not apply to the employee. He additionally noted that the employee worked in groups that included insulators and pipe fitters. Counsel cited authorities discussing the use of asbestos in power generating plants and specifically at the employing establishment.

By decision dated March 30, 2020, OWCP's hearing representative affirmed the August 9, 2019 decision. He found that the employee had not offered any support beyond his testimony that he had been exposed to asbestos. OWCP's hearing representative noted that the employing establishment had denied exposure, because he was not in a monitoring program and asbestos work was performed by trained contractors.

In a sworn declaration dated February 25, 2021, appellant asserted that the employee had never worked for asbestos abatement contractors or performed asbestos abatement work either before, during, or after working for the employing establishment. She advised that after he left employment, he worked in maintenance tasks usually at the facilities of the employing establishment.

On March 30, 2021 appellant, through counsel, requested reconsideration. Counsel asserted that the evidence, in particular the declarations of the employee and his coworkers, established that the employee had been exposed daily to asbestos dust and fibers during his over 15 years of work for the employing establishment. He advised that the employing establishment had no factual basis for its assertion that the employee had subsequent employment for an asbestos abatement contractor. Counsel noted that the medical evidence supported that the employee's employment with the employing establishment caused or contributed to his mesothelioma. He contended that the employing establishment only described actions taken to reduce the risk of exposure without addressing whether first-hand information supported exposure. Counsel maintained that even if boilermakers like appellant and his coworkers were not in a trade recognized as at risk did not mean that they were not exposed. He related that medical journals

identified boilermakers as "being in a category with recognized occupational exposure risk."[3] Counsel noted that asbestos compensation trust funds recognized the facilities where the employee worked as preapproved sites. He asserted that there was nothing in the record to rebut the declarations of R.A. and T.R. regarding the employee's exposure history. Counsel noted that OWCP had prepared three SOAFs and OWCP's hearing representative chose to rely on the one that found no asbestos exposure. He referenced evidence finding that there was no safe level of asbestos exposure. Counsel maintained that OWCP had failed to consider the employee's supporting evidence in reaching its decision.

By decision dated May 3, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim under 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.[4]

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.[5]

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

[3] Counsel referenced exhibits that are not contained in the case record.

[4] 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[5] 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[6] *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 (February 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). *Id.* at Chapter 2.1602.4b.

[7] *Id.* at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[8]

ANALYSIS

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

On reconsideration, counsel challenged OWCP's finding that appellant had not established that the employee was exposed to asbestos. He asserted that the employee and two coworkers had submitted sworn declarations regarding their exposure, and questioned why OWCP failed to weigh this evidence in reaching its determination. Counsel noted that the employing establishment acknowledged that it had no actual knowledge of the extent of the employee's exposure to asbestos. The Board finds that counsel has raised a relevant legal argument not previously considered. OWCP's hearing representative concluded that appellant had not submitted any evidence that the employee was exposed to asbestos other than the employee's declaration. However, statements from the employee's coworkers support that he had asbestos exposure and, as noted by counsel, the employing establishment indicated that it had no data showing the extent of any exposure to asbestos. While it maintained that the employee was not in a position that required monitoring, and that exposure limits for similar workers showed data within occupational exposure limits, it did not address whether those were current standards or standards in effect during the time the employee worked at the employing establishment beginning in 1976. The relevant factual issue is not whether the employee performed asbestos abatement work or was in a monitoring program, but whether he had asbestos exposure at work and, if so, the extent of the exposure. The issue of whether any accepted exposure caused his cancer is a medical question that must be resolved by a physician.

Therefore, the Board finds that this argument requires reopening of appellant's claim for merit review pursuant to the second requirement of section 10.606(b)(2).[9] Accordingly, the Board will set aside OWCP's May 3, 2021 decision and remand the case for an appropriate merit decision.

CONCLUSION

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

[8] *Id*. at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[9] 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 1, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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