United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 07-1551**
	)	**Issued: November 5, 2007**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 21, 2007 filed a timely appeal from a March 15, 2007 Office of Workers' Compensation Programs nonmerit decision. Because more than one year has elapsed between the last merit decision dated February 6, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On December 5, 2002 appellant, a 68-year-old steamfitter foreman, filed a Form CA-2 claim for benefits, alleging that he developed a pulmonary condition causally related to factors of his employment.

In a report November 2, 2002, Dr. Glen Baker, Board-certified in internal medicine, diagnosed occupational pneumoconiosis, as indicated by x-ray and chronic obstructive airway disease, with mild obstructive defect. He noted that appellant worked 21 years for the employing establishment as a pipefitter, where he was exposed to asbestos (insulation on pipes) on a daily basis for 15 to 16 of the 21 years. Appellant also reported a history of coal dust exposure for the entire 21 years he worked for the employing establishment. Dr. Baker advised that appellant had a 30-year pack per day smoking history, although he stated that he quit in 1978. He stated that appellant had experienced difficulty with breathing for 10 years, with daily symptoms of coughing, wheezing, shortness of breath and variable sputum production. Dr. Baker opined that the source of appellant's occupational pneumoconiosis was probably pulmonary asbestosis.

The Office referred appellant for a second opinion examination with Dr. Kenneth C. Anderson, Board-certified in internal medicine. In a February 14, 2005 report, Dr. Anderson reviewed the medical history and the statement of accepted facts and listed findings on examination. He stated:

> "I believe that [appellant's] chest x-ray demonstrates changes consistent with pneumoconiosis at a profusion level of 1/0, primary q and secondary t. [The statement of accepted facts] reports that [appellant] alleges exposure to coal dust daily. The patient reported to me that he also periodically worked with asbestos. Dr. Anne Roberts reports no documentation of exposure to asbestos or coal dust in excess of OSHA [Occupational Safety and Health Administration] PEL [Permissible Exposure Level] [standards]. Therefore, if exposure is present, I believe his chest x-ray does demonstrate a profusion of 1/0. However, pulmonary function test abnormally reveals moderate severity obstructive ventilatory defect consistent with chronic obstructive pulmonary disease with hyperinflation and abnormal corrected [Lung Diffusion Testing] DLCO consistent with his tobacco history. I do not believe that his pulmonary function tests are secondary to his abnormal chest x-ray."

By decision dated April 7, 2005, the Office denied appellant's claim, finding that he failed to submit medical evidence sufficient to establish that he sustained a pulmonary condition in the performance of duty.

By letter dated April 14, 2005, appellant's attorney requested an oral hearing, which was held on November 21, 2005.

In a November 8, 2005 report Dr. Baker stated:

> "[Appellant's] pulmonary function studies, both pre and post bronchodilator studies showed a mild obstructive defect with the FEV^1 [forced vital capacity^1] on the prebronchodilator study being 75 percent of predicted and the FEV^1 on the post-bronchodilator studies being 76 percent of predicted. There was no improvement following bronchodilators. I felt he had occupational pneumoconiosis primarily due to asbestos with a history of asbestos exposure and with the irregular opacities being present on the chest x-ray, showing findings consistent with pulmonary asbestosis. I also thought he had chronic obstructive

airway disease with a mild obstructive defect on basis of pulmonary function studies.

"On the basis of his x-ray changes, he would have clinical pneumoconiosis, and a history of significant history of asbestos exposure and x-ray changes consistent with asbestos exposure. This is presumptive evidence these changes are in fact due to asbestosis and represent pulmonary asbestos.

"[Appellant] also has a symptom complex of chronic bronchitis as well as chronic obstructive airway disease. He does have a long history of smoking but has not smoked any for approximately 27 years. Asbestos may or may not cause obstructive airway disease and cigarette smoking can. But with the duration of time that has passed since he has smoked and his continued dust exposure up to October 1994, suggest his dust exposure may have played a significant role in his symptom complex of chronic bronchitis as well as his chronic obstructive airway disease. It is difficult to partition the effects of each but with the 28 years that has passed since he ceased smoking, and the onset of symptoms for the last 10 years, I feel his dust exposure primarily is asbestos and whatever other dust he may have had in his workplace has played a role in his symptoms. Therefore, I feel his condition is significantly related to and substantially aggravated by dust exposure in his work environment."

By decision dated February 6, 2006, an Office hearing representative affirmed the February 14, 2005 decision.

By letter dated August 29, 2006, appellant's attorney requested reconsideration. In a January 31, 2007 report, Dr. Lalith C. Uragoda, Board-certified in internal medicine, stated that appellant had mild obstructive lung disease based on spirometry he underwent on September 23, 2004, which could be attributed to smoking. The spirometry revealed that the FVC was 3.42, which was 76 percent of predicted. Dr. Uragoda noted that FEV^1 was 2.21, which was 73 percent of predicted, with a ratio of 64 percent. She stated that there was no post-bronchodilator response noted. Appellant had diffusion capacity of 24.68, or 98 percent of predicted. Dr. Uragoda found that appellant had a Class II impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition. She stated:

"[Appellant's] chest x-ray abnormalities show no active disease, but he has chronic paralysis of the left hemi diaphragm. The linear atelectasis that is seen on the PA film is unusual for asbestos exposure, but there is no pleural calcification or pleural plaques that are usually commonly seen in asbestos exposure. I will not comment on pneumoconiosis as I am not a B reader."

By decision dated March 15, 2007, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[1] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[2]

ANALYSIS

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted is not relevant to the issue on appeal. The January 31, 2007 report of Dr. Uragoda found that appellant had mild obstructive lung disease based on a September 2004 spirometry test. This was attributed to smoking and appellant had a Class II impairment under the A.M.A., *Guides*. Dr. Uragoda noted no active disease detectable by chest x-ray and no pleural calcification or pleural plaques typically seen with asbestos exposure. She declined comment on whether appellant had pneumoconiosis since she was not a B reader. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[3] Dr. Uragoda's report, while new, did not provide any medical explanation pertinent to the underlying issue of the causal relationship of appellant's claimed pulmonary condition to factors of his federal employment. The Office noted that prior decisions had found no causal relationship between factors of appellant's employment and his lung conditions. As Dr. Uragoda's report did not render an opinion on causation, the Office found that it had no relevant evidentiary value. Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

[1] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[2] *Howard A. Williams*, 45 ECAB 853 (1994).

[3] *David J. McDonald*, 50 ECAB 185 (1998).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 5, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board