

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that her preexisting allergy conditions were aggravated by her exposure to fumes and cold temperatures at work from January 28, 2010 to March 9, 2011.

FACTUAL HISTORY

This case was previously on appeal before the Board with respect to the denial of appellant's claim for a respiratory condition.³ In an October 5, 1998 decision, the Board affirmed as modified an August 8, 1996 OWCP decision, finding that the evidence established that appellant was exposed to dirt and dust on June 19, 1993 in the performance of duty, but that the medical evidence was insufficient to establish that she sustained a diagnosed condition causally related to the accepted work exposure. The facts as relevant to the present issue are set forth.

On March 15, 2010 appellant, then a 60-year-old clerk, alleged that on March 11, 2010 she developed an upper respiratory condition as a result of her adverse reaction to a combination of fumes in the air from service and vehicle shops and spray from the supply shop and exterminator at work. In an April 20, 2010 letter, she described the effects of her exposure to environmental pollutants at work on her preexisting allergy condition. Medical reports dated March 17 through May 1, 2010 from Dr. James A. Mutcherson, Jr., an attending physician specializing in pediatric allergy, advised that appellant had exacerbated perennial allergic rhinitis and vasomotor rhinitis due to her March 11, 2010 exposure to noxious fumes and extreme temperature changes at work. He opined that she could not perform her regular work duties, but was able to perform light-duty work with restrictions.

In an October 29, 2009 report, which contained an orthopedic surgeon whose signature is illegible advised that appellant had spinal stenosis at L3-5. Appellant could not perform her regular work duties, but was able to work with restrictions.

In a September 9, 2010 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish that her claimed allergic rhinitis was caused or aggravated by the established March 11, 2010 work-related exposure to fumes.

On March 9, 2011 appellant requested reconsideration.

In a June 10, 1986 report, Dr. Mutcherson opined that appellant was incapable of performing her assigned duties commencing February 8, 1984 because her allergic symptoms were aggravated by her work environment. He signed a job description on January 10, 1989 stating that, she could perform the duties of a modified data conversion operator. In a March 16, 2010 report, Dr. Mutcherson reiterated his diagnosis of perennial allergic rhinitis. He advised that appellant had severe vasomotor rhinitis. Dr. Mutcherson opined that she was permanently

³ Docket No. 97-451 (issued October 5, 1998).

restricted from exposure to offending allergens, *i.e.*, pungent odors from transportation vehicles, dust-laden work areas, ventilation ducts and any mold contaminants as they could cause incapacitation. In a January 4, 2011 report, he provided a history of his treatment of appellant's allergic conditions since December 1994 and the March 11, 2010 work exposure. Dr. Mutcherson initially recommended avoidance of exposure to noxious odors and fumes. He stated that this would prevent the exacerbation of the experienced severe allergic episodes that were fraught with malaise.

On February 3, 1989 a medical officer whose signature is illegible signed a job description stating that, appellant could perform the duties of a modified data conversion operator.

Correspondence from OWCP and the employing establishment, dated April 3, 1986 through February 8, 1989 addressed the acceptance of appellant's claim for temporary aggravation of allergic rhinitis, disability for work on intermittent dates from August 28, 1984 to August 28, 1986 and modified job offers. In an April 17, 2010 letter, the employing establishment advised appellant that there was no need for further action by its reasonable accommodation committee since she was receiving assistance with her traumatic injury claim.

In a November 25, 2011 decision, OWCP denied appellant's request for reconsideration, finding, that it neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

On March 9, 2011 appellant disagreed with OWCP's September 9, 2010 decision denying her claim for a traumatic injury in the performance of duty and requested reconsideration. The relevant issue on reconsideration is whether she submitted sufficient medical evidence to establish her claim for employment-related allergy conditions.

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

Dr. Mutcherson's June 10, 1986 report found that appellant was unable to perform her assigned duties commencing February 8, 1984 due to her allergic symptoms which were aggravated by her work environment. This evidence predates the March 11, 2010 employment-related exposure and is not relevant to whether the accepted work exposure caused or aggravated appellant's allergy symptoms. Dr. Mutcherson's March 16, 2010 and January 4, 2011 reports found that appellant had perennial allergic and severe vasomotor rhinitis. He permanently restricted her from exposure to certain offending allergens to prevent incapacitation. The fear of a future injury is not compensable under FECA.⁷ Accordingly, these reports are not relevant to the issue of whether the diagnosed conditions were caused or aggravated by the accepted March 11, 2010 work exposure. The Board has held that evidence that does not address the pertinent issue in a claim does not warrant a reopening of the case for a merit review.⁸ The other evidence that appellant submitted, such as the job descriptions signed by Dr. Mutcherson and the unidentified medical officer and correspondence from OWCP and the employing establishment do not address the relevant medical issue of whether appellant sustained an allergy condition caused or aggravated by her March 11, 2010 employment-related exposure to fumes.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her March 9, 2011 request for reconsideration.⁹

On appeal, appellant contended that her preexisting allergy conditions were aggravated by her exposure to fumes and cold temperatures at work from January 28, 2010 to March 9, 2011. As stated, the Board finds that she did not meet any of the requirements of section 10.606(b)(3). Appellant failed to establish that OWCP erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument or submit relevant and pertinent evidence not previously considered by OWCP. Accordingly, OWCP properly denied her March 9, 2011 request for reconsideration.

Also on appeal, appellant submitted new evidence. However, the Board lacks jurisdiction to review evidence for the first time on appeal.¹⁰

CONCLUSION

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

⁷ *L.T.*, Docket No. 10-442 (issued October 20, 2010); *Mary A. Geary*, 43 ECAB 300 (1991).

⁸ *See E.M.*, Docket No. 09-39 (issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence).

⁹ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

¹⁰ 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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