

**United States Department of Labor
Employees' Compensation Appeals Board**

L.W., claiming as widow of B.W., Appellant

and

**DEPARTMENT OF THE ARMY, ANNISTON
ARMY DEPOT, Anniston, AL, Employer**

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**Docket No. 07-1540
Issued: October 23, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 3, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 1, 2007 which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated February 19, 2004 and the filing of this appeal on May 3, 2007, 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the third appeal before the Board. On July 1, 1999 the employee, a 50-year-old welder, filed a claim for benefits, alleging that he developed a myelodysplastic syndrome condition, which was diagnosed in April 1997. In reports dated November 9, 1999, Dr. James E.

Cantrell, the Board-certified hematologist and attending physician, diagnosed myelodysplastic syndrome. The employee passed away on February 19, 2000. The death certificate indicated that the cause of death was myelodysplasia. On April 10, 2000 appellant filed a claim for death benefits.

By decision dated January 16, 2001, the Office denied appellant's claim on the grounds that causal relationship was not established, finding that appellant submitted insufficient rationalized medical evidence to establish that the employee's myelodysplastic syndrome was related to any factor of his federal employment. By decision dated February 11, 2002, an Office hearing representative affirmed in part and modified in part the January 16, 2001 Office decision. The hearing representative found that appellant had submitted evidence sufficient to establish that the employee was exposed to toxic elements during the course of his employment. He found, however, that appellant had not submitted sufficient medical evidence to establish a causal relationship between the employee's toxic exposures and his myelodysplasia condition. In a February 20, 2003 decision,¹ the Board affirmed the Office's February 11, 2002 decision. The Board found that appellant submitted detailed, probative evidence establishing that the employee was exposed to hazardous chemicals in the course of his 20 years of work as a machinist and foreman, including benzene. However, the Board found that appellant did not submit medical evidence sufficient to establish a causal relationship between the employee's occupational exposures to such toxic elements and his myelodysplastic syndrome. The Board further found that appellant did not submit sufficient factual information to substantiate that the employee was exposed to radiation in the course of his federal employment. The complete facts of this case are set forth in the Board's February 20, 2003 decision and are herein incorporated by reference.

By decision dated February 19, 2004, the Office denied modification of its previous decisions denying death benefits. In a nonmerit decision dated February 25, 2005, the Office denied reconsideration. In an October 24, 2005 nonmerit decision,² the Board affirmed the Office's February 25, 2005 decision.

By letter dated November 13, 2006, appellant requested reconsideration. Appellant submitted a July 24, 2006 letter from the Myelodysplastic Syndromes Foundation, Inc. The letter defined myelodysplastic syndromes and explained the nature of the disease. It stated that, while the cause of these disorders was unknown, there was evidence that petrochemicals and the chemotherapy regimens utilized to provide curative strategies to patients with certain malignancies led to the development of myelodysplastic syndromes.

By decision dated February 1, 2007, the Office denied appellant's request for reconsideration without a merit review, finding appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which

¹ Docket No. 02-1358 (issued February 20, 2003).

² Docket No. 05-1313 (issued October 214, 2005).

showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁷

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁸ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows “clear evidence of error” on the part of the Office.⁹

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁶ 20 C.F.R. § 10.607(b).

⁷ See cases cited *supra* note 2.

⁸ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁵ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 19, 2004. Appellant requested reconsideration on November 13, 2006; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's November 13, 2006 request for reconsideration failed to show clear evidence of error. The July 24, 2006 letter from the Myelodysplastic Syndromes Foundation defined and explained the disease and speculated as to its potential causes, but did not constitute medical evidence from a physician. Appellant did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether her husband's death was causally related to employment factors.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit

¹⁰ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹² See *Jesus D. Sanchez*, *supra* note 4.

¹³ See *Leona N. Travis*, *supra* note 11.

¹⁴ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

review. The Board finds that the Office did not abuse its discretion in denying further merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request dated November 13, 2006. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on February 1, 2007.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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