United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 09-799**
	)	**Issued: October 13, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

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 February 2, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 30, 2008 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 October 4, 2006 and the filing of this appeal on February 2, 2009, 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 and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 52-year-old distribution clerk, filed a Form CA-1 claim for benefits on August 24, 2005, alleging that she sustained a respiratory condition causally related to employment factors. She stated on the form that she became aware that this exposure had resulted in a respiratory condition on June 18, 2005.

In a statement dated October 27, 2005, appellant stated that the incident in which she was exposed to toxic chemicals was actually August 18, 2005, not June 18, 2005, as she had stated on her Form CA-1. She stated that she was exposed to propane on August 18, 2005 which caused her to experience chest tightness, shortness of breath and eye pain.

Appellant submitted an April 30, 2003 report from Dr. Hal M. Alpert, Board-certified in internal medicine and pulmonary medicine, who stated that she had developed an asthma condition precipitated by exposure to chemicals on September 15, 2002. Dr. Alpert advised that inhalation of chemicals can precipitate reactive airway disease and opined that it was possible that the chemicals to which appellant was exposed did precipitate her asthma symptoms. He stated that, although he could not absolutely state that there were no other precipitating factors which were causing her asthma symptoms, it was certainly a possibility that her initial chemical inhalation caused her to have persistent asthma.

By decision dated November 16, 2005, the Office denied the claim. It accepted that the August 18, 2005 incident had occurred; however, it found that appellant failed to submit sufficient medical evidence to establish that the August 18, 2005 exposure to propane fumes had caused or contributed to the claimed respiratory condition.

On December 28, 2005 appellant requested reconsideration.

By decision dated February 9, 2006, the Office reversed the finding in the November 16, 2005 decision which accepted that appellant had experienced an incident at work on August 18, 2005; *i.e.*, being exposed to propane fumes.

On March 11, 2006 appellant requested reconsideration.

By decision dated April 11, 2006, 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 it to review its prior decision.

In a report dated December 22, 2005, received by the Office on July 11, 2006, Dr. E. Clifford Beal, Board-certified in psychiatry and neurology, stated that he treated appellant for anxiety and depression in September 2005. He diagnosed an adjustment disorder with anxiety and depressed moods associated with a work-related injury she sustained on September 15, 2001. Dr. Beal stated his understanding that appellant was exposed to toxic fumes while on duty with the employing establishment. This caused appellant to develop respiratory, pulmonary and asthmatic problems and rendered her disabled from any kind of employment with the employing establishment. Dr. Beal advised that appellant was given limitations which included avoiding exposure to chemicals and fumes which could induce breathing problems and necessitated her being placed in well-ventilated work areas. He stated, however, that appellant was offered a modified job in September 2005 in which the environment was in close proximity to toxic substances, without regard to her health condition and without regard to the restrictions set forth by her primary physician. Dr. Beal opined that, as a result of this exposure to toxic fumes at the workplace, appellant had sustained a work-related injury. He stated that appellant continued to experience pulmonary and asthma problems and depressed

moods. Dr. Beal opined that she is presently totally disabled from any kind of gainful employment.

In a June 29, 2006 report, received on July 11, 2006, Dr. Michelle A. Huggins, Board-certified in internal medicine, stated:

> "[Appellant] is currently under my care for treatment of chronic asthma. Her clinical history and pulmonary function tests are consistent with this reactive airway disease. Although many people with this disorder will have obvious symptoms of shortness of breath, gasping for breath, and wheezing while having an acute asthma attack, [appellant's] condition is less classic. When she does have a reaction it includes symptoms of chest lightness, shortness of breath, occasional cough, and occasional wheezing. [Appellant] usually will not have obvious wheezing or gasping.
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> "[Appellant's] condition causes her to be sensitive to certain fumes, chemicals, and allergens that might not cause reactions in others. This was evident during her work-related exposures to noxious fumes. [Appellant] would be best served in a work environment which is well ventilated, without exposure to noxious fumes and dust if possible."

By letter dated July 3, 2006, received by the Office on August 8, 2006, appellant requested reconsideration. She alleged that the employing establishment had removed her from her modified-work assignment on August 17, 2005 for unknown reasons and returned her to a regular-duty assignment which violated her physical restrictions. Appellant stated that this reassignment exposed her to temperature extremes, airborne particles, gas fumes and toxic chemicals. She related that on August 18, 2005 she reported to work, in contrast with the expectations of her manager, Lori Branch, who believed appellant was on sick leave that day. Appellant stated that she was exposed to noxious odors from three propane/gas-powered forklifts on the front side of the building. She related that, although she told Ms. Branch she was having a problem with these noxious odors, experiencing shortness of breath and headaches, Ms. Branch dismissed her complaints and replied that the building was cleaner than the other worksite and that she did not smell anything. Appellant stated that Ms. Branch expressed no concern for her situation and offered no assistance, but merely told her to complete a leave slip. She stated that she reported her injury and left work.

By letter dated February 1, 2006, received by the Office on August 8, 2006, Ms. Branch stated that she was at the employees' entrance when appellant reported to work on August 18, 2005 at 8:00 p.m. She told appellant that she needed to discuss her reassignment to the annex and walked with her to her office. Ms. Branch stated that the distance from the entrance to her office is approximately 50 feet and that it took about one to two minutes to get from place to place. She related that appellant told her she could not work at the annex because there were toxic fumes emanating from two forklifts which affected her ability to work at that location; they also discussed her limitations and prior assignments. Appellant then completed a leave slip and left at approximately 8:45 p.m. Ms. Branch stated that the following week she received an injury report from appellant stating that she had been injured by exposure to fumes on August 18, 2005. She advised that she was curious as to how appellant could have been significantly affected by

such limited exposure when it only took one to two minutes to walk from the entrance to her office; she noted that the remainder of the time appellant was at the worksite she was in the annex having a discussion in Ms. Branch's office. Ms. Branch stated that appellant did not demonstrate any breathing difficulties or physical changes; nor did she complain about being sick or state that she required medical attention. She also stated that appellant did not leave by returning through the work floor to the employees' entrance, that she allowed her to exit though the manager's door.

Ms. Branch asserted that appellant appeared more upset over being removed from her previous modified duty than anything else. Appellant had raised this complaint on several occasions and had filed several grievances pertaining to this issue; however, Ms. Branch stated that she had rejected two modified job offers, the most recent of which required her to work at a desk in a wide corridor area near an emergency exit. She asserted that she had reviewed this offer with the management safety specialist, who told Ms. Branch and appellant that there were no safety violations in this area.

By decision dated October 4, 2006, the Office denied the request for modification of the February 9, 2006 decision.

On October 3, 2007 appellant requested reconsideration.

In an August 16, 2007 report, received by the Office on October 10, 2007, Dr. Huggins stated:

> "[Appellant] has undergone two evaluations, by two unassociated [p]ulmonary specialists who concluded that her asthma was precipitated by the chemical exposure of September 15, 2001. Since that time, she has required daily use of asthma medications and has limitations in her exertional abilities, as well as decreased tolerance for certain environmental changes (poor ventilation, too hot, too dusty, etc.) which may aggravate her asthmatic symptoms. This is viewed as a permanent impairment."
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> * * *
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> "I must concur that [appellant]'s diagnosis of chronic asthma was precipitated by the work[-]related exposure to noxious fumes and chemicals which occurred on September 15, 2001."

By letter dated September 26, 2007, received by the Office on October 11, 2007, appellant noted that she had filed separate claims based on exposure to asthma irritants, claim number xxxxxx593, and exposure to propane, claim number xxxxxx637, which should have been combined with the instant claim, number xxxxxx593, which should not have been adjudicated as a new claim.

By decision dated October 18, 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.[1]

By letter dated October 15, 2008, appellant requested reconsideration.

In support of her claim, appellant submitted a material safety data sheet dated April 10, 2002 which outlined the hazards pertaining to exposure to propane fumes; form reports dated August 16 and 26, 2005 and August 31, 2006 which indicate that she should work in environments in which she is not exposed to noxious fumes, which are well ventilated, and do not place her at risk of an asthma attack a leave slip dated August 18, 2005; a February 1, 2006 e-mail from her supervisor, Ms. Branch, which expounds on her account of what occurred when appellant showed up for work on August 18, 2005, and actions taken in the aftermath of the August 18, 2005 incident and a copy of an Office decision issued for claim number xxxxxx909.

By decision dated October 30, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that appellant was required to present evidence which 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 Act[2] does not entitle an employee to a review of an Office decision as a matter of right.[3] 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--
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> (1) end, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

[1] The Office rejected appellant's argument that the instant claim should have been combined with previous claims in which he had alleged exposure to toxic elements. It noted: (1) in claim number xxxxxx637, she had claimed a recurrence of August 18, 2005, which was denied by an Office decision dated December 7, 2005; (2) her occupational disease claim, claim number xxxxxx909, which she filed on April 30, 2002, was accepted by the Office in May 2002, and was not relevant to the instant claim because it pertained to exposure which occurred prior to the claimed exposure in the instant claim, which is based on one-time, traumatic exposure.

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] 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.[5] 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).[6]

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.[7] 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.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] 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.[13] 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.[14] The Board makes

[4] 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).

[5] 20 C.F.R. § 10.607(b).

[6] *See* cases cited *supra* note 2.

[7] *Rex L. Weaver*, 44 ECAB 535 (1993).

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

[9] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *See Leona N. Travis*, 43 ECAB 227 (1991).

[11] *See Jesus D. Sanchez, supra* note 3.

[12] *See Leona N. Travis, supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[14] *Leon D. Faidley, Jr., supra* note 3.

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.[15]

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on October 4, 2006. Appellant requested reconsideration on October 15, 2008; thus, her reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's request for reconsideration failed to show clear evidence of error. The evidence she submitted is not pertinent to the issue on appeal. The form reports from August 2005 and August 2006 merely reiterate the fact that appellant should be restricted from environments in which she is not exposed to noxious fumes.[16] The April 2002 material safety data sheet provides a description of the hazards posed by exposure to propane fumes but has no bearing on whether she was substantially exposed to propane fumes on August 18, 2005. These reports are of limited probative value as they did not provide a reasoned medical opinion on the relevant issue; *i.e.*, whether appellant established that she experienced exposure to propane fumes on August 18, 2005 at the time, place and in the manner alleged, sufficient to result in a traumatic injury. The copy of the Office decision issued for claim number xxxxxx909 pertains to a prior, unrelated incident and has no bearing on the instant case.

The August 18, 2005 leave slip and February 1, 2006 e-mail from Ms. Branch merely reiterate that appellant briefly appeared at work on August 18, 2005, walked through the worksite for a few minutes, completed and submitted a leave slip and left the building. These documents are cumulative and repetitive of reports previously reviewed by the Office. None of the reports appellant submitted with her request are 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. The evidence appellant submitted is not pertinent to the underlying issue and is of no evidentiary value.

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 her. 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 review. The Board finds that the Office did not abuse its discretion in denying further merit review. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.[17]

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[15] *Gregory Griffin, supra* note 3.

[16] The Board notes that form reports which supported causal relationship with a checkmark are insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

[17] The Board notes that appellant advances several arguments in her appeal letter to the Board. All of these arguments, however, were raised below by appellant and were considered and rejected by the Office.

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 October 15, 2008. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on October 30, 2008.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2009
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