

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 48-year-old distribution clerk, was exposed to fumes from a floor cleaning solution or a sealant at her worksite, which aggravated her asthmatic condition on September 15, 2001. She filed a claim for benefits on May 8, 2002, which OWCP accepted for aggravation of preexisting reactive airway disease, toxic exposure and aggravation of asthma. OWCP paid appropriate compensation for temporary total disability.

In a report dated July 24, 2009, Dr. Michelle A. Huggins, a specialist in internal medicine, advised that appellant had recently recovered from a severe and prolonged exacerbation of asthma with acute bronchitis; this caused her extreme fatigue, shortness of breath, poor exercise tolerance and required primary bed rest for approximately three weeks. She stated that appellant had experienced recurrent episodes of bronchospasm and asthmatic exacerbations since she sustained a work-related pulmonary injury in September 2001. Dr. Huggins asserted that appellant's symptoms were aggravated by poorly ventilated spaces and extremes of hot and cold temperatures, abnormal fumes, chemicals and excessive dust. She advised that appellant had also been plagued with neurologic abnormalities of the upper and lower extremities, which slowed her mobility and dexterity, but did not completely inhibit her functioning.

Dr. Huggins advised that, in addition to her physical limitations, appellant had behavioral stressors which had led to clinical depression and limited her ability to effectively maintain employment at this time. She opined that appellant was neither physically nor behaviorally able to return to the workforce at this time. Dr. Huggins further opined that appellant was not capable of participating in vocational rehabilitation.

By letter dated September 1, 2009, OWCP noted that it had received a request from appellant to accept the conditions of stress, anxiety and depression. It asked her to submit additional factual and medical evidence in support of her request.

In order to determine appellant's current condition and whether she was capable of returning to gainful employment, OWCP referred her for a second opinion examination with Dr. Gerald Adler, a specialist in pulmonology. In reports dated September 1 and 21, 2009, Dr. Adler reviewed the medical history and the statement of accepted facts and stated findings on examination. He concluded that while appellant did experience asthma she had been able to work in certain settings so long as she avoided exposure to exacerbating factors such as irritant gasses, fumes or dust. Dr. Adler advised that she underwent a pulmonary function test on September 11, 2009 which showed a combination of obstructive lung disease of mild severity with improvement following a bronchodilator with typical asthmatic-type response and restrictive lung disease partially due to her increased body habitus. He opined that the 2001 work event may have either unmasked underlying asthma or aggravated appellant's air passage,

causing asthma exacerbation; her present condition was stable. Dr. Adler recommended that she avoid precipitating environmental factors like pollutants, dust and temperature extremes.

In a September 8, 2009 work restriction evaluation form, Dr. Adler indicated that appellant could return to her usual job within the listed restrictions.

In a report dated October 14, 2009, Dr. Huggins reiterated her previous findings and conclusions. She further stated that she claimed distress, anxiety and depression were due to the physical limitations brought on by the chemical lung injury and subsequent exposures causally related to employment factors, including work-induced stressors regarding job reassignment that resulted in new exposures and financial loss from excessive time off work without pay. Dr. Huggins advised that appellant was being treated for her claimed emotional condition with counseling and antidepressant medication; she advised that appellant's recovery was uncertain at that time.

In order to determine whether appellant had sustained an emotional condition causally related to employment factors and whether this condition resulted in her total disability, OWCP referred her to David B. Rush, Ph.D. in psychology. In a December 14, 2009 report, Dr. Rush stated that appellant had been experiencing symptoms of depression since 2002; she received psychiatric treatment and was taking various medications. He diagnosed recurrent, major depressive disorder and anxiety disorder. Appellant expressed anger and frustration with her current circumstances and had thoughts of hopelessness, but denied suicidal thoughts. She related that she experienced periods of tearfulness, hopelessness, irritability, memory deficits and loss of interest in activities and sexual interaction. Dr. Rush indicated that appellant's current level of depression and anxiety had been created by multiple circumstances, past and present and were not limited to the September 2001 work injury; this created some psychological vulnerability. He advised that she had difficulties while in the Army Reserves and became inactive prematurely and was involved in an automobile accident in 2000. Dr. Rush concluded that, from a psychological standpoint, appellant should be able to perform the duties of a distribution clerk, assuming that the physical limitations and restrictions were addressed.

OWCP found that there was a conflict in the medical evidence regarding whether appellant still had residuals from her accepted respiratory condition and whether she still was disabled due to a work-related physical or emotional condition. It referred her to Dr. William Crosland, a specialist in critical care medicine, and Dr. Gregory A. Haley, a specialist in psychiatry, for referee medical examinations.

In an April 6, 2010 report, Dr. Haley related that many of appellant's work colleagues experienced teary eyes and sore throat; she, however, believed that she was the only one who developed lung problems. Appellant attempted to return to work but was unable to stay at work for a long period. She asserted that on one occasion she was not given a job within her medical restrictions and that she left for recurrence of "pneumonia" or other complaints of a respiratory nature. Appellant advised that her coughing and shortness of breath resulted in extreme anxiety and panic; by February 2002 she was being treated for anxiety and depression. She asserted that she was offered light duty from June through November 2002 but she declined. Appellant alleged that they were refusing her medical documentation that would have taken her out of work on medical leave. In addition, there were apparently long periods in which she was without pay,

which she resented bitterly, stating that it jeopardized her household and life. Appellant was prescribed medication and counseling but resents being required to attend group sessions.

Dr. Haley related that appellant is currently off work due to her severe asthma condition. While appellant uses a nebulizer three times a day she lacks a portable one, which makes it difficult for her to leave the house. Dr. Haley noted that she took medication for depression, anxiety and panic. Appellant related being anxious and angry because she never used to get sick and she feels her asthma condition robbed her life from her. Dr. Haley stated that she feels mistreated by her employer to the extent that she experiences homicidal thoughts toward her supervisors; she also believes that the employing establishment is spying on her. He diagnosed depression, anxiety disorder, cluster B personality traits and moderate to high reactive airway disease. Dr. Haley opined that he did not believe that appellant was totally disabled from a psychiatric standpoint; he noted that she has not failed multiple conservative attempts to treat her anxiety, anger and depression. He advised that her anxiety actually seemed to revolve around her losing her benefits as much if not more than her anxiety about her pulmonary status. Dr. Haley believed that appellant was very fixed on the idea that she is “owed” for “their” having “taken my life away” from a pulmonary/health standpoint and that she is being unfairly treated as she “knows” that “they have paid off other lesser conditions for fellow employees.”

Dr. Haley asserted that the likelihood of appellant returning to work without being disruptive or issuing more overt threats was low. He advised that she had a personality disorder that colored her view of the world and of the claims process; he was unable to tell how much was baseline difficulty or retaliatory, passive aggression. Dr. Haley opined, however, that resentment over appellant’s condition was not a basis for disability. He considered her appropriate for job retraining or a position commensurate with her physical limitations; any position, in which she is exposed to pressure to resign, retire or quit, however, will certainly fail.

On August 23, 2010 OWCP accepted the emotional condition of dysthymic disorder.

In a July 12, 2011 report, Dr. Crosland stated findings on examination and presented a thorough review of the medical evidence and appellant’s medical history. He opined that, based on her job description, her measured pulmonary function test, her spirometry and her methacholine challenge test that she was capable of doing her job as a distribution clerk. Dr. Crosland listed the following diagnoses: acute inhalation injury in 2001 without long-term objective sequelae by pulmonary function, methacholine challenge or chest x-ray; dyspnea, doubt pulmonary limitation, suspect deconditioning; gastroesophageal reflux disease; and panic/anxiety disorder. He opined that appellant might experience breathlessness standing four hours per day, lifting 70 pounds or carrying 70 pounds based on her obesity and level of fitness. Dr. Crosland advised that she had a history of gastroesophageal reflux and that her symptoms could be a manifestation of nonacid symptoms; he stated that uncontrolled nonacid reflux could present as recurrent bronchitis, chest tightness and dyspnea. He further advised that appellant had a normal persantine thallium stress test but no echocardiogram, which could be helpful in evaluating and treating her symptoms.

Dr. Crosland stated that appellant underwent pulmonary function testing on September 11, 2009 which showed a primary mild restrictive ventilatory defect based on a reduction in the total lung capacity of 2.85 liters. He related that the technician reported that she

did not give her best effort for all tests and did not tolerate the body box test for determination of lung volume. Dr. Crosland advised that appellant's flow volume loops were inconsistent; her prebronchodilator FEV₁ was normal at 82 percent of predicted and her postbronchodilator maneuver showed improvement in her FEV₁. He stated, however, that given her inconsistent efforts, this might represent a false positive bronchodilator response.

On September 1, 2010 OWCP issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by the impartial opinions of Drs. Crosland and Haley, established that appellant's accepted respiratory condition had ceased and that she had no work-related residuals stemming from these conditions.

In a September 28, 2010 report, Dr. Huggins expressed her disagreement with the opinion that appellant had no residuals from her accepted respiratory condition. She stated that she was awaiting functional capacity testing before making a determination as to appellant's ability to perform work, in light of her ongoing, accepted work-related conditions.

By decision dated October 8, 2010, OWCP terminated appellant's compensation for medical benefits.

By letter dated October 3, 2011, appellant requested reconsideration. She argued that the opinions of Drs. Rush and Haley lacked probative value because her dysthymic disorder was not included in the statement of accepted facts at the time of their evaluations. Appellant also contended that the case file was incomplete because it did not include all of her medical records.

By decision dated January 6, 2012, OWCP denied modification. It rejected appellant's argument that the opinions of Drs. Rush and Haley were not valid because her dysthymic disorder condition was not included in the statement of accepted facts when they rendered their opinions. OWCP stated that at the time she was referred for her second opinion and referee examinations the examiners were provided with a complete and accurate copy of the medical evidence contained in your case file.

By letter dated January 2, 2013, received by OWCP on January 8, 2013, appellant requested reconsideration. She essentially reiterated the contentions she advanced with her October 3, 2011 reconsideration request.

In a December 28, 2012 report, received by OWCP on January 8, 2013, Dr. Huggins stated that appellant had been treated for numerous severe and prolonged exacerbations of asthma, chronic bronchitis, pneumonia and allergy-related symptoms. She stated:

"Since terminations of her wages, [appellant] experienced a lengthy asthma/flair which began October 2010 lasting through August 2011 and another flare up in November 2011 lasted over a month. This caused her extreme fatigue, shortness of breath and poor exercise tolerance.

"Since her work[-]related pulmonary injury ... [appellant] has been disabled by life's single most important function, breathing. Her asthma has substantially limited her ability to work and perform the basic functions of her job. Pulmonary function testing performed by Georgia Lung Associates confirms moderate to

severe persistent asthma, requiring daily medications. At present [appellant] does not meet the physical requirements of her job which requires arduous exertion involving prolonged standing, walking, bending, reaching, handling/lifting heavy containers of mail/parcels weighing up to 70 pounds or more. Required daily medications which cause drowsiness/dizziness would prevent her from operating industrial machinery.

“The following industrial pollutants would prevent [appellant] from returning to the job she held prior to her injury; excessive dust, toxic solvents, paint fumes, welding dust, etc.

“Due to the unpredictable nature of the onset of respiratory limitations and [her] history of prolonged exacerbations she will have difficulty maintaining regular attendance on any job. Pulmonologist recommendations and plans to improve her lung function and endurance require allergy treatments with injections for three to five years with strict adherence to respiratory triggers. [Appellant] continues to be incapacitated because of her employment injury, to earn the wages that she received at the time of her injury.”

By decision dated March 8, 2013, OWCP denied appellant’s request for reconsideration without a merit review, finding that the request was untimely requested reconsideration and that she had not established clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle an employee to a review of an OWCP decision as a matter of right.⁴ This section, vesting OWCP 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.”

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).

OWCP, 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, it 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 OWCP 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 OWCP must nevertheless undertake a limited review of the case to determine, whether there is clear evidence of error pursuant to the untimely request.⁸ OWCP's procedures state that OWCP 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 the appellant's application for review shows "clear evidence of error" on the part of OWCP.⁹

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifested on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP 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 OWCP 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 OWCP.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 OWCP's decision.¹⁵ The Board makes an

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

⁶ 20 C.F.R. § 10.607(b).

⁷ *See* cases cited *supra* note 3.

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

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

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

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

¹² *See Sanchez*, *supra* note 4.

¹³ *See Travis*, *supra* note 11.

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

¹⁵ *See Faidley*, *supra* note 4.

independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁶

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on January 6, 2012. OWCP received appellant's reconsideration request on January 8, 2013; thus, the request is untimely as it was outside the one-year time limit.¹⁷

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of OWCP's March 8, 2013 decision to shift the evidence of record in her favor. It is appellant's burden to establish clear evidence of error in OWCP's merit denial of the claim. The issues in this case concern whether she had any continuing disability due to her accepted respiratory or emotional conditions. Dr. Huggins' December 28, 2012 report merely reiterated that appellant continued to experience symptoms of her respiratory condition which made it difficult to perform her usual job duties as a distribution clerk. It is repetitive and cumulative of previous reports. Dr. Huggins' opinion represents one side of a conflict in medical evidence which was resolved by Dr. Crosland's impartial medical opinion. Appellant's arguments regarding the validity of the reports from Dr. Rush, the second opinion psychologist, and Dr. Haley, the impartial psychiatrist, which she also presented in her appeal to the Board, were addressed and properly rejected by OWCP. She did not submit evidence to create a *prima facie* case of continuing disability sufficient to shift the weight of the evidence or raise a substantial question as to the correctness of the decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear evidence of error on the part of OWCP in her reconsideration request dated January 8, 2013. Inasmuch as her reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on March 8, 2013.

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

¹⁷ 20 C.F.R. § 10.607(a).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2013 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: February 20, 2014
Washington, DC

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

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

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