

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

B.M., Appellant)	
)	
and)	Docket No. 15-110
)	Issued: April 3, 2015
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY & INSPECTION SERVICE,)	
Brooklyn, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

In an application postmarked October 13, 2014, appellant filed a timely appeal of an April 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ The last merit decision of record was a February 14, 2013 OWCP decision. As more than 180 days has elapsed between the issuance of the last merit decision and the filing of this appeal on October 13, 2014, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.³

¹ The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

² 5 U.S.C. §§ 8101-8193.

³ Under the Board's *Rules of Procedure* an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Board. One hundred and eighty days from April 15, 2014, the date of OWCP's decision, was Sunday, October 12, 2014. As Monday, October 13, 2014 was a federal holiday, the next business day was Tuesday, October 14, 2014. Since using October 20, 2014, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 13, 2014, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal he asserts that the evidence of record establishes his claim that he was exposed to toxic vapors at work on September 14, 2011.

FACTUAL HISTORY

On March 13, 2012 appellant, then a former consumer safety inspector, filed an occupational disease claim alleging that he had developed a pulmonary condition and other allergic responses due to exposure to chlorine gas while working at MB Consulting in South Fallsburg, New York. He stated that he first became aware of the illness on September 14, 2011 and its relationship to his employment on March 6, 2012. The employing establishment reported that appellant had been removed on November 21, 2011. By letter dated April 4, 2012, OWCP informed appellant of the evidence needed to support his claim. He was asked to complete a questionnaire describing the claimed exposure and to provide medical evidence that included a physician's reasoned explanation regarding whether the claimed exposure caused a diagnosed condition. An unsigned, undated statement, received by OWCP on April 16, 2012, indicated that on September 14, 2011 appellant was not working in an area where he would be exposed to chlorine.

In support of his claim, appellant submitted a number of reports from a Veterans Administration clinic. A February 9, 2012 chest x-ray demonstrated an opacity in the left lung base. A February 23, 2012 computerized tomography (CT) scan of the thorax demonstrated scattered tiny right lung nodules. A March 1, 2012 thyroid ultrasound demonstrated a thyroid nodule. A March 5, 2012 electrocardiogram was abnormal, showing a possible anterior infarct.

On February 9, 2012 Dr. Regina Sexton, an osteopath, noted a seven-month history of a cough that appellant felt was due to toxin exposure at work. She performed a physical examination and recommended consultation with specialists in pulmonary disorders and otolaryngology. Dr. Barry P. Pariser, a Board-certified otolaryngologist, reported that appellant had been a chicken inspector but left his job in November 2011. He noted a complaint of low midneck pain and productive cough. Dr. Pariser provided examination findings and diagnosed thyroiditis, asthma, pulmonary disease, and a possible allergy to birds. On March 1, 2012 Dr. German Chu-Aquino saw appellant for evaluation of a small back lipoma. On March 1, 2012 Dr. Vijaya L. Dasari, Board-certified in family medicine, noted a history of exposure to chlorine and vinegar in a chicken slaughter house and that appellant was seen for evaluation of cough, sore throat, and for preventive care. He diagnosed chronic obstructive pulmonary disease (COPD), chronic cough, asthma, a cyst on the right lower back, and sleep apnea. Medications were prescribed. On March 5, 2012 Dr. Mukhtar I. Khan, Board-certified in internal medicine and endocrinology, noted that appellant was seen for neck and back pain and elevated blood pressure. Following physical examination, he referred appellant to urgent care. Dr. Samir G. Patel saw appellant in the emergency department for evaluation of elevated blood pressure. Uncontrolled hypertension was diagnosed, and appellant was prescribed medication and referred to cardiology for consultation. In a pulmonary consultation dated March 6, 2012, Dr. Akhaya K. Das, a Board-certified internist, reported a history that appellant was exposed to chlorine in early September 2011. Following physical examination, he diagnosed bronchial asthma. Dr. Vikas

Jindal, Board-certified in internal medicine and cardiovascular disease, saw appellant in cardiology consultation on March 6, 2012. He noted the abnormal electrocardiogram findings and indicated that appellant needed further testing for risk stratification.

In a May 7, 2012 decision, OWCP denied the claim. It found that appellant had not demonstrated that the injury occurred as alleged, noting that he had not provided an explanation of how he inhaled chlorine gas at work. OWCP further noted that the medical evidence did not contain an opinion that a diagnosed condition was causally related to exposure to chemicals at work.

On June 4, 2012 appellant requested reconsideration. He submitted an April 4, 2012 letter in which Dr. Dasari indicated that due to illness, appellant could not work until seen by a pulmonary specialist. On an OWCP questionnaire, signed by appellant on May 10, 2012, appellant stated that in conversations with an Office of Safety and Health Administration (OSHA) representative, seven other people who worked in that area were identified. He stated that it appeared that the date of exposure was September 6, 2011, and he stated that he only inhaled gas on one occasion. Appellant indicated that he would be providing medical records dating to the date of exposure, and the OSHA report was not yet available. In a May 29, 2012 statement, he stated that, most probably, he inhaled the toxic fumes while at a picnic table where he frequently took a break. Appellant indicated that he would forward the OSHA report and medical records as they became available.

On June 27, 2012 Dr. Jennifer C. Kennedy, a supervisory public health veterinarian at the employing establishment, advised that she had reviewed appellant's case, noted that appellant was listed as being on annual leave from August 28 to September 10, 2011, and that he was assigned to MB Consulting starting the week of September 11, 2011. She also stated that coworkers told her that appellant did not take breaks at the picnic table, and the tables were outside, in the open air, and not near a source of chlorinated water. Dr. Kennedy further indicated that the chlorine water used at the plant was at the level of chlorine found in the town water supply, and if there had been a chlorine leak, she would have been informed. On June 28, 2012 Samilya Zurawski, case management specialist at the employing establishment, reiterated Dr. Kennedy's conclusions.

In a merit decision dated September 21, 2012, OWCP denied modification of the May 7, 2012 decision. It noted that the factual aspect of appellant's claim remained in doubt, and that he had submitted no corroborative evidence regarding the claimed exposure.

On December 4, 2012 appellant again requested reconsideration. He forwarded an e-mail he sent to Ms. Zurawski on September 27, 2012, indicating that the date of claimed exposure was September 14, 2011. Appellant stated that on that day he was working as a line inspector, and that he took his break at a picnic table next to the poultry receiving/crate wash area. He indicated that he now believed that the toxic agent involved was not chlorine gas but anhydrous ammonia vapors from chicken urine, noting that dirty, unwashed chicken crates were stacked high and close together near the picnic area. Appellant stated that a coworker died due to chemical exposure that day, and that appellant has been awarded social security disability. On December 18, 2012 appellant indicated that he could take a break anywhere and could wander around for half an hour while working at MB Consulting.

May 2, 2012 pulmonary function tests demonstrated moderate obstructive lung disorder. Appellant was hospitalized for the period June 2 to 11, 2012. While hospitalized, he was seen by Dr. Michael Mirzoyan, Board-certified in internal medicine and pulmonary disease, who noted the reported history of claimed chlorine exposure and the results of the pulmonary function tests. Dr. Mirzoyan diagnosed moderate COPD and recommended otolaryngology evaluation and a repeat chest x-ray. On June 6, 2012 Dr. Chirag R. Patel, a resident physician in otolaryngology, noted appellant's history of obstructive sleep apnea, throat irritation, pain with breathing, and chronic cough. Following physical examination, he diagnosed chronic cough of unclear etiology and throat irritation likely secondary to chronic cough. An August 3, 2012 chest x-ray was reported as unchanged. On September 4, 2012 Dr. Alan H. Wolff, Board-certified in internal medicine, allergy, and immunology, noted the history of chronic cough and COPD and appellant's report that the cough started while working in a poultry packaging plant where he believed he was exposed to chlorine used to clean cages on September 6, 2011. Dr. Wolff opined that appellant had a possible reactive airways dysfunction syndrome but his history of exposure was not as strong as he would have expected. On September 27, 2012 Dr. Walter D. Strauss, Board-certified in internal medicine and pulmonary disease, noted that appellant felt that he was the victim of an industrial accident where he was exposed to chlorine and anhydrous ammonia. He diagnosed COPD and questionable asthma.

In a merit decision dated February 14, 2013, OWCP denied modification of the prior decisions. It found that appellant had not demonstrated that the injury occurred as alleged, noting that he had not provided an explanation of how he inhaled chlorine gas or other chemicals at work. OWCP further noted that the medical evidence did not contain an opinion that a diagnosed condition was causally related to exposure to chemicals at work.

On February 25, 2014 appellant again requested reconsideration. He claimed exposure to toxic fumes on September 14, 2011, stating that he talked with a coworker in the rear of a poorly ventilated bay and believed that at that time he was exposed to ammonia fumes. Appellant submitted a list of medical records from January 1, 2013 to present; copies of selected pages from medical records including CT scans of the chest dated February 13 and August 15, 2013; a November 20, 2013 pulmonary function study that demonstrated moderate obstructive lung disorder; and a December 26, 2013 skeletal bone survey for multiple myeloma workup. On November 8, 2013 Dr. George Protopapas, a Board-certified internist, noted appellant's complaint of throat irritation. He recommended medication and endoscopy. On November 25, 2013 Dr. Wilbur Wong, Board-certified in family medicine, noted a complaint of chronic throat pain which appellant indicated had been ongoing since an episode of ammonia exposure. He recommended otolaryngology consult. On January 8, 2014 Dr. Nishant P. Reddy, an otolaryngology resident, noted appellant's belief that he inhaled a toxic level of ammonia at work on September 14, 2011 that burned a hole in his soft palate. Physical examination demonstrated no evidence of soft palate erosions or hole.

In a nonmerit decision dated April 15, 2014, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to present clear evidence of error on the part of OWCP.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. 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.⁴ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁵ Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of its regulations, if the claimant's application for review shows "clear evidence of error" on the part of OWCP.⁶ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. 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. To show clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁸

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The only decision before the Board is the April 15, 2014 decision in which OWCP denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Appellant requested reconsideration with OWCP on February 25, 2014. The Board finds that as more than one year lapsed between the most

⁴ 20 C.F.R. § 10.607(b) (2011); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ 20 C.F.R. § 10.607 (2011).

⁷ *See Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011); *James R. Mirra*, 56 ECAB 738 (2005).

¹⁰ *Nancy Marcano*, 50 ECAB 110 (1998).

recent merit decision, dated February 14, 2013, and appellant's request for reconsideration, dated February 25, 2014, the request for reconsideration was untimely.¹¹

The Board also finds that appellant failed to establish clear evidence of error. Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed error.

In support of his reconsideration request, appellant submitted a list of medical records, CT scan reports, and a November 20, 2013 pulmonary function study that demonstrated moderate obstructive lung disease. He also submitted medical reports from Dr. Protopapas, Dr. Wong, and Dr. Reddy. While Dr. Wong and Dr. Reddy noted appellant's belief that toxic chemical exposure at work caused a throat condition and/or chronic cough, they did not indicate that any diagnosed condition was caused by claimed exposure. Therefore, the evidence submitted with appellant's February 25, 2014 reconsideration request would not tend to show that OWCP erred in issuing its February 14, 2013 merit decision.

The term clear evidence of error is intended to represent a difficult standard, and the argument provided here is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.¹² As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the February 14, 2013 OWCP decision, appellant has not established that OWCP committed error by its April 15, 2014 decision.¹³ The Board therefore finds that OWCP performed a limited review of the argument and evidence submitted by appellant with the February 25, 2014 reconsideration request to ascertain whether it demonstrated clear evidence of error in the February 14, 2013 decision, correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.¹⁴

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and that he failed to establish clear evidence of error. OWCP, therefore, properly denied a merit review of his claim.

¹¹ 20 C.F.R. § 10.607(a) (an application for review must be received by OWCP within one year of the date of the its decision for which review is sought).

¹² *Supra* note 8.

¹³ *Supra* note 10.

¹⁴ 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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