

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

T.S., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
EUROPE, Kaiserslautern, Germany, Employer**

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**Docket No. 15-1420
Issued: November 10, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 16, 2015 appellant filed a timely appeal from a February 24, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from November 22, 2013, the date of the most recent merit decision, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On February 17, 2010 appellant, then a 56-year-old finance technician filed an occupational disease claim (Form CA-2), asserting that from August 17, 2009 to February 4,

¹ 5 U.S.C. § 8101 *et seq.*

2010 he was assigned to work in Building 3245 in the Kleber Kaserne military compound in Kaiserslautern, Germany, which was contaminated with mold and he experienced chronic symptoms of nose and throat irritation, watery eyes, and scalp and skin irritation. He became aware of his condition on January 19, 2010. Appellant did not stop work.

By letter dated July 27, 2011, OWCP advised appellant of the type of evidence needed to establish his claim, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

In a letter dated July 26, 2010, appellant asserted that he had sick building syndrome from working in Building 3245. He noted his exposure was from August 2007 to July 2008 and from August 2009 to January 2010. Appellant indicated that there was mold growing on stair wells and there was a sewage leak in 2009. He submitted a February 10, 2010 report from Dr. Karin Claren, a German physician, who treated appellant on January 12, 2010 for itching on his head. Dr. Claren diagnosed tinea capitis and prescribed a topical solution, shampoo and tablets. She noted the laboratory test results revealed a culture plate of mold fungus. Appellant submitted a November 15, 2010 report from Dr. Van Thong Nguyen, a German physician, who treated appellant from May 4 to July 29 2010, for severe itching, a rash on his head, tinnitus, and loss of concentration. Dr. Nguyen noted that diagnostic testing revealed mold exposure. He determined that appellant had mold poisoning on the scalp with inflammation which spread over his whole body, arteries, liver, and lymph nodes causing reduced vision, weakness, poor concentration and tinnitus. Dr. Nguyen noted that the clinical course was detoxification, cleansing through herbs, acupuncture, and strengthening of the immune system.

Also submitted was an executive summary for the industrial hygiene survey for Building 3245 Leber Kaserne military compound, Kaiserslautern, Germany dated March 11 and April 8, 2010. The survey recommended the basement of Building 3245 be inspected for moisture incursion near room 012; a determination be made of the cause of musty odors in a basement storage area; removal of the carpet in room 007; and cleaning of the surfaces contaminated with microbial growth.

In a decision dated October 21, 2011, OWCP denied appellant's claim for compensation because the evidence did not support that the injury or events occurred as alleged.

On September 24, 2012 appellant requested reconsideration and submitted additional evidence. He submitted a report from Dr. Johannes Thum, a German physician, dated December 7, 2012, who treated him for a severe skin disease with ulceration, folliculitis, and severe itching. Dr. Thum diagnosed mold fungus infection of the skin. He noted that appellant was disabled from work for several weeks undergoing treatment. Dr. Thum opined that based on appellant's description of events he suspected the infection was caused by the presence of mold in the workplace as appellant described huge patches of dark fungus growing on the walls and stairways.

In a decision dated November 9, 2012, OWCP modified the decision dated October 21, 2011 to reflect that appellant established that he had workplace exposure to dampness, musty odors, and air passing over debris-filled window wells. It denied appellant's claim finding that

the medical evidence failed to establish that the diagnosed condition was causally related to the accepted work-related events.

On October 8, 2013 appellant requested reconsideration. He submitted a statement dated October 30, 2013 and noted reporting to his supervisors his exposure to mold while working in Building 3245 and informing them of his illness. Appellant noted that management did not act on his report until February 17, 2010. He disagreed with OWCP's denial of his claim and asserted that he has submitted sufficient medical evidence to support that his diagnosed condition was causally related to his work exposure to mold. Appellant also referenced reports from Dr. Nyugen and Dr. Thum. He submitted employing establishment medical records dated July 25, 2008 where he was treated for systemic hypertension. In a report dated August 3, 2009, appellant was treated for multiple skin lesions on the upper back, abdomen, upper arms, and head. He was diagnosed with cellulitis of the scalp and essential hypertension. Appellant submitted a March 15, 2010 report from Dr. Claren who treated him for inflammation and itching with lesions on his head, rump, and forearms. He noted that the spore's revealed bacterial infection. Dr. Claren noted that a mycological specimen growth could be a fungus and diagnosed suspected tinea capitis or folliculitis.

In a decision dated November 22, 2013, OWCP denied modification of the decision dated November 9, 2012.

By appeal request form dated November 3, 2014 and received on December 3, 2014, appellant requested reconsideration. In a November 3, 2014 letter, he disagreed with OWCP's denial of his claim and asserted that he submitted sufficient evidence to support that his diagnosed condition was causally related to the accepted work-related events. Appellant noted that Dr. Nguyen provided a rationalized opinion describing the causal relationship of his condition and his workplace. He noted that Dr. Nguyen and Dr. Claren provided laboratory results which supported that he was infected with mold poisoning. Appellant indicated that he began to have problems with his skin and eyes while working in Building 3245 and was moved to another building and his skin healed. He indicated that in August 2009 he was transferred back to Building 3245 and his skin condition returned.

Appellant submitted employing establishment medical records dated July 25, 2008 and August 3, 2009, reports from Dr. Claren dated January 12 and March 15, 2010, an executive summary for the industrial hygiene survey for Building 3245 Leber Kaserne military compound, Kaiserslautern, Germany dated March 11 and April 8, 2010, a report from Dr. Nguyen dated November 15, 2010, a request for reconsideration dated October 30, 2013, a report from Dr. Thum dated October 30, 2013, a November 13, 2013 copy of his appeal of the prior OWCP decision, a copy of OWCP's decision dated November 22, 2013, all previously of record.

By decision dated February 24, 2015, OWCP denied appellant's request for reconsideration as it was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“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, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP’s decision for which review is sought.³ However, OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.⁸ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁹

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁷ *Id.*

⁸ *Id.*

⁹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until December 3, 2014, more than one year after issuance of the November 22, 2013 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its November 22, 2013 decision.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his November 3, 2014 reconsideration request, appellant disagreed with OWCP's decision denying his claim for an occupational disease. He indicated that he began to have problems with his skin and eyes while working in Building 3245. Appellant asserted that Drs. Nguyen and Claren provided rationalized opinions describing the causal relationship of his skin condition and his workplace exposure to mold and they provided laboratory results which supported that he was infected with mold poisoning. While he addressed his disagreement with OWCP's decision denying his claim for an occupational disease, this does raise a substantial question as to the correctness of OWCP's decision. As noted, to establish clear evidence of error, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.

In support of his reconsideration request, appellant also submitted evidence. He submitted employing establishment medical records dated July 25, 2008 and August 3, 2009, reports from Dr. Claren dated January 12 and March 15, 2010, an executive summary for the industrial hygiene survey for Building 3245 Leber Kaserne military compound, Kaiserslautern, Germany dated March 11 and April 8, 2010, a request for reconsideration dated October 30, 2013, a report from Dr. Thum dated October 30, 2013, a report from Dr. Nguyen dated November 15, 2010, a November 13, 2013 copy of his appeal of the prior OWCP decision, and a copy of OWCP's decision dated November 22, 2013. However, this evidence was previously of record. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. It is not apparent how resubmission of this evidence is sufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, this resubmitted evidence is insufficient to show clear evidence of error.

Consequently, appellant has not established clear evidence of error by OWCP in its November 22, 2013 decision.

On appeal, appellant reiterated assertions that he previously made before OWCP indicating that he disagreed with OWCP's decision denying his claim for an occupational disease. He asserted that he submitted sufficient evidence to support that his diagnosed condition was causally related to the accepted work-related events. However, as noted, the

¹⁰ 20 C.F.R. § 10.607(a).

Board does not have jurisdiction over the merits of the claim. Appellant has not established clear evidence of error by OWCP.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board