

FACTUAL HISTORY

This case has been before the Board on several previous occasions. Appellant, the employee's widow, filed a claim for death benefits on April 23, 1995. She alleged that the cause of her husband's death was inhalation of toxic chemicals resulting in chronic obstructive pulmonary disease. The death certificate dated May 5, 1995, was signed by Dr. Sherwin Levin, a Board-certified internist and the attending physician. The immediate cause of death, as stated by Dr. Levin, was metastatic melanoma, with chronic obstructive pulmonary disease listed as an additional significant cause. Dr. Levin also noted that appellant had a prior excision of melanoma on March 10, 1993. By decision dated August 21, 1993, the Office denied appellant's claim for death benefits on the grounds that the evidence of record did not establish that the employee's death was casually related to his accepted September 2, 1988 employment injury. In the last merit decision in this case dated September 13, 1995, the Office denied reconsideration. In nonmerit decisions dated November 28, 1995, July 19 and November 15, 1996 and May 21, 1997, the Office denied appellant's requests for reconsideration. In a decision dated September 16, 1999,¹ the Board affirmed the Office's May 21, 1997 decision, which denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error.

In a letter dated June 29, 2002, received by the Office on July 2, 2002 appellant's representative requested reconsideration. The letter indicated that a statement made by the Office in its August 21, 1995 decision, which quoted the 13th edition of *The Merck Manual of Diagnoses and Therapy*,² constituted clear evidence of error. Appellant's representative indicated that this reliance on an outdated edition of *The Merck Manual* constituted error because *The Merck Manual* has been updated to its current 16th edition,³ which provides more detailed information on asthma and its relationship to chronic obstructive pulmonary disease. In essence, appellant's representative argued that the employee's death was causally related to employment factors based on the following rationale: because the current 16th edition of *The Merck Manual* indicates that an asthma condition, such as that borne by appellant, shares certain characteristics with and may be interrelated to chronic obstructive pulmonary disease, the employee's accepted asthma condition was interconnected with chronic obstructive pulmonary disease, to which the employee's death was partly attributable; therefore, the employee's death is compensable. She further contended that the Office erred in according greater weight to the Office referral physician, Dr. Dennis Long, Board-certified in internal medicine, in determining that chronic obstructive pulmonary disease was not an accepted condition. Appellant, however, did not submit any new medical evidence in support of her request for reconsideration.

¹ Docket No. 97-2715 (issued September 16, 1999).

² The Office stated:

“According to the Merck Manual of *Diagnoses and Therapy*, COPD [chronic obstructive pulmonary disease] can be fatal, but generally arises from emphysema or bronchitis. On page 588 thirteenth edition, the Manual states ‘while typical allergic bronchial asthma is not a common precursor of COPD, the exact interrelationships of these disorders is not yet determined.’” *The Merck Manual of Diagnoses and Therapy* (13th ed. 1977).

³ *The Merck Manual of Diagnoses and Therapy*, pages 658-59 (16th ed. 1992).

In a nonmerit decision dated September 17, 2002, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error. On October 8, 2002 appellant filed an appeal of the September 17, 2002 Office decision to the Board. By order dated February 5, 2003, the Board, noting that the case file did not include a copy of the September 17, 2002 Office decision, remanded the case to the Office for reconstruction of the record, including the September 17, 2002 Office decision. By decision dated March 21, 2003, the Office denied appellant's request for reconsideration dated June 29, 2002 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. By order dated June 27, 2003, the Board denied appellant's petition for reconsideration of its February 5, 2003 order, advising appellant that after the Office reconstructed the record and issued a new decision, she could file a new appeal to the Board.

By decision dated October 21, 2003, the Office again denied appellant's request for reconsideration dated June 29, 2002 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. The Office 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. The Office, therefore, denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ 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.”

⁴ 5 U.S.C. § 8128(a).

⁵ *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 regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ 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.⁷ 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).⁸

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.⁹ The 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.¹⁰

To establish clear evidence of error, an appellant must submit evidence relevant to the issue, which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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.¹⁶ The Board makes

⁶ 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; (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).

⁷ 20 C.F.R. § 10.607(b).

⁸ See cases cited *supra* note 2.

⁹ *Rex L. Weaver*, 44 ECAB 535 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, *supra* note 5.

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.*, *supra* note 5.

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.¹⁷

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 September 13, 1995. Appellant requested reconsideration on June 29, 2002; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's June 29, 2002 request for reconsideration failed to show clear evidence of error. Appellant's representative contended that the Office erred in its August 21, 1995 decision by citing the 13th edition of The Merck Manual in support of its finding that the employee's death was not caused by factors of his employment. Appellant's representative asserted that the Office's reliance on an outdated edition of the Merck Manual constituted clear evidence of error because the Merck Manual has been updated to its current 16th edition, which provides more detailed information on asthma and its relationship to chronic obstructive pulmonary disease. Appellant's representative contended that because the updated, 16th edition of the Merck Manual discusses a possible interrelationship between asthma, the employee's accepted condition and chronic obstructive pulmonary disease, an additional significant cause of the employee's death, the employee's death was causally related to his employment. The Board finds that appellant has failed to establish clear evidence of error based on this contention. Appellant is alleging error based merely on a revision of a medical textbook, which has no evidentiary value, as opposed to a rationalized medical opinion by a physician making rationalized conclusions. Thus, appellant failed to present probative medical evidence establishing error on the part of the Office. Appellant's representative further contended that the Office erred in according greater weight to the Office referral physician, Dr. Dennis Long, Board-certified in internal medicine, in determining that chronic obstructive pulmonary disease was not an accepted condition. The Board additionally rejects this argument, finding that it fails to present clear evidence of error. Appellant is in essence requesting a reweighing of the medical evidence that was considered by the Office in numerous previous decisions and by the Board in its September 16, 1999 decision, finding that appellant failed to establish clear evidence of error. As appellant has submitted no new medical evidence with her request, she has merely presented similar arguments regarding the same medical evidence, which was previously considered on several occasions.¹⁸ Thus, appellant's representative did not present any evidence of error in her request letter. 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.

¹⁷ *Gregory Griffin, supra* note 5.

¹⁸ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501(c).

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 June 29, 2002. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on March 21 and October 21, 2003.

ORDER

IT IS HEREBY ORDERED THAT the October 21 and March 21, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member