

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

**SHERRY D. RAGAN, Appellant, claiming as
widow of RONALD D. RAGAN**

and

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, Palmdale, CA,
Employer**

Docket No. 05-564

Issued: December 14, 2005

Appearances:
Sherry D. Ragan, 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
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On January 6, 2005 appellant filed a timely appeal of the October 6, 2004 decision of the Office of Workers' Compensation Programs which denied reconsideration on the basis that her request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated September 13, 1995 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the Office's October 6, 2004 decision, denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. Appellant's deceased husband had an accepted occupational disease claim for aggravation of preexisting asthma, arising on or about September 2, 1988. He died May 5, 1995 at the age of 50. The May 10, 1995 death certificate identified the immediate cause of death as metastatic melanoma. Additionally, chronic obstructive pulmonary disease (COPD) and excision of melanoma were noted to be contributing factors.

The Office denied appellant's claim for survivor's benefits on August 21, 1995. She requested reconsideration arguing that her husband's COPD was the result of his 1988 occupational exposure and this condition contributed to his death. In a report dated August 14, 1995, Dr. Sherwin Z. Levin, a Board-certified internist, indicated that the decedent's metastatic melanoma of the lung was severely compromised by his preexisting COPD.¹ The Office reviewed the claim on the merits and denied modification by decision dated September 15, 1995. The Office found that the medical evidence failed to establish a causal relationship between the employee's death and his accepted condition. Appellant requested reconsideration on several subsequent occasions which the Office repeatedly denied.

In response to appellant's most recent appeal, the Board issued a May 20, 2004 decision affirming two Office decisions dated March 21 and October 21, 2003. In both instances the Office denied reconsideration on the basis that her request was untimely filed and she failed to demonstrate clear evidence of error.² Appellant again requested reconsideration on August 1, 2004. She submitted various treatment records from the Department of Veterans Affairs, Lancaster Community Hospital and Kaiser Permanente.

In a decision dated October 6, 2004, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office in denying her survivor's claim. Accordingly, the Office declined to review the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵ One such limitation is that the application for

¹ Dr. Levin later explained in a June 20, 1996 report, that the decedent's melanoma had nothing to do with his asthma and while the asthma aggravated his problem of breathing it did not cause immediate death.

² Docket No. 04-169. The Board's May 20, 2004 decision is incorporated herein by reference.

³ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁷

ANALYSIS

The one-year time limitation begins to toll the day the Office issued its September 13, 1995 decision, as this was the last merit decision in the case.⁸ Appellant’s latest request for reconsideration was dated August 1, 2004. Because she filed her request more than one year after the Office’s September 13, 1995 merit decision, appellant must demonstrate “clear evidence of error” on the part of the Office in denying her claim.⁹

To establish clear evidence of error appellant must submit evidence relevant to the issue that was decided by the Office.¹⁰ On reconsideration she argued that her husband’s COPD was due to his employment exposure and this condition contributed to his death. Appellant raised this same argument in her initial request for reconsideration dated August 31, 1995 and she has reiterated it on numerous occasions over the past decade. She has failed to demonstrate clear evidence of error on the part of the Office in not accepting the decedent’s COPD as employment related.¹¹ Furthermore, the voluminous record submitted on reconsideration does not include a rationalized medical opinion that establishes a causal relationship between the employee’s death and his accepted condition of aggravation of preexisting asthma. The various treatment records from the Department of Veterans Affairs, Lancaster Community Hospital and Kaiser Permanente chronicle the employee’s long-standing treatment for preexisting chronic obstructive pulmonary disease along with many other ailments including a tongue ulcer, diabetes mellitus, thrombophlebitis, congestive heart failure, coronary artery disease, seizure disorder, degenerative joint disease of the knees and melanoma. The records also include various objective studies and

⁶ See *id.* § 10.607(a).

⁷ See *id.* § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. See *Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. See *Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. See *Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁸ See *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁹ 20 C.F.R. § 10.607(b) (1999).

¹⁰ See *Dean D. Beets*, *supra* note 7.

¹¹ Where appellant claims that a condition not accepted by the Office was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

laboratory results. These records, however, are immaterial as they do not relate the employee's death to his accepted employment injury.

Appellant's request for reconsideration and the accompanying evidence failed to demonstrate clear evidence of error on the part of the Office in denying survivor's benefits. Accordingly, the Office properly declined to reopen her case for merit review under section 8128(a) of the Act.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board