

FACTUAL HISTORY

On February 13, 2002 appellant, then a 40-year-old mail clerk, filed an occupational disease claim alleging that he developed aggravation of sarcoidosis as a result of working in a dusty environment. His claim was accepted for aggravation sarcoidosis.

Appellant submitted a report dated March 14, 2002 from Dr. Marc E. Wilson, Board-certified in family medicine, who stated that he was treating appellant for a “plethora of medical conditions.” These included: sarcoidosis; asthma; allergic rhinitis; nephritic syndrome; hypoalbuminemia; edema; secondary hypercholesterolemia; secondary HTN; secondary NIDDM; gastrointestinal bleeding; anemia; orthostaisis; ocular HTN; and ocular lattice degeneration. Dr. Wilson opined that exposure to his employment had contributed to the repeated aggravations of appellant’s medical conditions.

In an attempt to obtain medical evidence regarding the current state of appellant’s condition, the Office referred him to Dr. Malik Rehman, a Board-certified internist, for a second opinion evaluation. In a report dated April 28, 2003, he opined that the exacerbation of appellant’s sarcoidosis condition had been temporary and stated that he did not have any respiratory problems at that time. His examination revealed that appellant’s lungs were “very clear” and that his pulmonary function was normal. Dr. Rehman further opined that appellant’s underlying sarcoidosis and asthma seemed to be well controlled.

The Office also referred appellant to Dr. Howard Bernstein, an ophthalmologist,² for an ocular examination. In a May 7, 2003 report, Dr. Bernstein opined that appellant had no ocular condition related to work exposure. On examination Dr. Bernstein found normal visual acuity with a small astigmatic refractive correction; no ocular signs of sarcoidosis; and no cataracts from long-term high dose steroids.

The Office also referred appellant to Dr. Ping-Hsin Chen, a Board-certified internist, specializing in the area of nephrology, for a second opinion evaluation. In a June 3, 2003 report, Dr. Chen provided an assessment of membranous nephropathy, which he opined may be secondary to sarcoidosis. Dr. Chen stated that “he likely also has interstitial nephritis with nephrogenic diabetes insipidus secondary to sarcoidosis.” Dr. Chen recommended that appellant work in a separate building from the dust-producing machines. In an accompanying work capacity evaluation, Dr. Chen indicated that appellant was capable of performing his usual job in a restricted, dust-free environment.

On August 12, 2004 the Office issued a notice of proposed termination of appellant’s medical and compensation benefits on the grounds that he had no disability or residuals due to the accepted work-related condition. The Office advised appellant that he had 30 days to submit additional evidence or argument.

Appellant submitted an undated narrative statement contending that the second opinion examinations did not accurately reflect his condition because they were performed nine months after he stopped working. He also argued that his current kidney condition was related to his

² Dr. Bernstein’s credentials cannot be verified.

accepted sarcoidosis, as indicated by Dr. Rehman. Appellant submitted a letter dated August 25, 2004 from Dr. Wilson, who stated that, on return to work, appellant would suffer an aggravation of his respiratory condition which would result in a “cascade of worsening of his other medical conditions.” He also indicated that appellant’s sarcoidosis likely caused his nephritic syndrome. Dr. Wilson opined that appellant could return to work so long as his work environment was free from particulate matter, gas or fumes. Appellant also submitted a report from a web site discussing the cause and treatment of sarcoidosis.

By decision dated September 22, 2004, the Office finalized the termination of appellant’s compensation and medical benefits effective October 3, 2004.

By letter dated September 30, 2005, appellant requested reconsideration.³ He contended that his place of employment must have been the cause of the aggravation of his sarcoidosis condition, because Dr. Wilson had clearly stated that his condition had improved after his dust exposure had ceased. Appellant stated that he was afraid to return to work, where he would be exposed to the elements of the workplace. He also stated his belief that his sarcoidosis was not a preexisting condition. Appellant also submitted a September 28, 2005 letter from Dr. Wilson, who stated that he still had “a plethora of very significant medical conditions.” Dr. Wilson noted that “for many medical conditions, one is only ‘sick’ when there are aggravators of the conditions and one is stable and well once aggravation is avoided.” He stated that “on return to his environment at work, [appellant’s] medical conditions get to the ‘sick’ state.” Dr. Wilson suggested that appellant be allowed to work in a different environment. Appellant also resubmitted a copy of Dr. Wilson’s letter dated March 14, 2002 and a publication which discussed the cause and treatment of sarcoidosis.

By decision dated October 17, 2005, the Office denied appellant’s request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act⁴ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”⁵

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law;

³ Appellant indicated that he was requesting reconsideration of the Office’s letter of denial dated October 3, 2004. However, the record reflects that the Office’s decision terminating appellant’s benefits was issued on September 22, 2004, to be effective October 3, 2004.

⁴ 5 U.S.C. §§ 8101 *et seq.*

⁵ 20 C.F.R. § 10.605.

(2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.⁷ Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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. The Board makes an independent determination of whether a claimant 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.¹⁰

ANALYSIS

The Board finds that the Office properly refused to reopen appellant's claim for further consideration of the merits, under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

In the present case, the most recent merit decision on the issue of termination was the Office's September 22, 2004 decision. Appellant had one year from the date of that decision to request reconsideration, but failed to do so. By letter dated September 30, 2005, he requested reconsideration. The Board notes that appellant indicated that he was requesting reconsideration

⁶ 20 C.F.R. § 10.606.

⁷ *Donna L. Shahin*, 55 ECAB ____ (Docket No. 02-1597, issued December 23, 2003).

⁸ 20 C.F.R. § 10.608.

⁹ *See Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005); *see also Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004).

¹⁰ *See Alberta Dukes*, *supra* note 9.

of the Office's letter of denial dated October 3, 2004. However, the record reflects that the Office's decision terminating appellant's benefits was issued on September 22, 2004, to be effective October 3, 2004. The Office properly determined that his application for review was not timely filed. Therefore, the Board must address whether appellant has demonstrated clear evidence of error by the Office.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹¹ In support of his request for reconsideration, appellant submitted: an undated narrative statement; an August 25, 2004 report from Dr. Wilson; a copy of his previously submitted letter dated March 14, 2002; and a publication which discussed the cause and treatment of sarcoidosis. The Board finds that appellant has not submitted sufficient evidence to establish clear evidence of error on the part of the Office.

In his undated narrative statement, appellant contended that being exposed to his work environment aggravated his condition. He stated that he was afraid to return to work, where he would be exposed to the elements of the workplace. Appellant also stated his belief that his sarcoidosis was not a preexisting condition. These contentions do not raise a substantial question concerning the correctness of the Office's decision and are insufficient to establish clear evidence of error. The Board has held that fear of a future injury is not compensable.¹² The Office found that the medical evidence of record, including reports from appellant's treating physician, established that the accepted condition, sarcoidosis aggravation, was temporary and that the temporary aggravation had resolved. Appellant submitted no probative medical evidence in support of his request for reconsideration contradicting the Office's conclusion. Moreover, his argument that his sarcoidosis was not preexisting, but rather was caused by his employment, is not relevant to the issue at hand, namely, whether his accepted condition, sarcoidosis aggravation, had resolved.

Appellant submitted a September 28, 2005 letter from Dr. Wilson, who reiterated his opinion that appellant would benefit from working in a different environment. Dr. Wilson noted that "for many medical conditions, one is only 'sick' when there are aggravators of the conditions and one is stable and well once aggravation is avoided." He stated that appellant still had "a plethora of very significant medical conditions" and that "on return to his environment at work, [his] medical conditions get to the 'sick' state." Appellant also resubmitted a copy of Dr. Wilson's letter dated March 14, 2002 and a publication which discussed the cause and treatment of sarcoidosis. This evidence is not sufficient to shift the weight of the evidence in favor of the claim. These reports lack probative value, in that they are repetitive and fail to provide a rationalized opinion establishing that appellant has residuals from his accepted condition. The publication submitted by appellant discusses the condition of sarcoidosis generally. Because it cannot by its very nature address appellant's specific condition, the Board finds that it lacks probative value.

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

¹² See *Judy C. Rogers*, 54 ECAB 693 (2003). See also *Mary A. Geary*, 43 ECAB 300 (1991).

The Board finds that the arguments and evidence submitted by appellant in support of his request for reconsideration do not *prima facie* shift the weight of the evidence in his favor or raise a substantial question as to the correctness of the Office's September 22, 2004 decision and are thus, insufficient to demonstrate clear evidence of error.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board