



## **FACTUAL HISTORY**

This case has been before the Board on three prior appeals. The Office accepted that appellant's husband, the employee, sustained an aggravation of preexisting asthma due to factors of his federal employment. The employee died on May 5, 1995 and appellant filed a claim for survivor's benefits. The death certificate listed the cause of death as metastatic melanoma with chronic obstructive pulmonary disease (COPD) and an excision of melanoma as contributing factors. By decisions dated August 21 and September 15, 1995, the Office denied appellant's claim for survivor's benefits.

In the first appeal, the Board affirmed a November 15, 1996 decision denying appellant's request for reconsideration under 5 U.S.C. § 8128 and a May 21, 1997 decision denying her request for reconsideration as it was untimely and did not show clear evidence of error.<sup>2</sup> On appeal, for the second time, the Board affirmed the March 21 and October 21, 2003 decisions denying appellant's reconsideration request as untimely and insufficient to demonstrate clear evidence of error.<sup>3</sup> In the most recent appeal, the Board affirmed an October 6, 2004 decision again finding that appellant's reconsideration request was not timely and failed to establish clear evidence of error.<sup>4</sup> In an order dated June 19, 2006, the Board denied her petition for reconsideration of the December 14, 2005 decision.<sup>5</sup>

On August 28, 2006 appellant again requested reconsideration. She contended that a review of the employee's complete medical records established that his death was related to his work injury. Appellant noted that he did not discuss the composition of the paint to which he was exposed with the second opinion examiner due to confidentiality issues. She reviewed employee's history of breathing problems from the date of his exposure to the paint fumes on September 2, 1988 to the date of his death. Appellant noted that hospital records revealed that he had difficulty breathing from asthma and COPD due to his chemical exposure. She related that in August 1990, employee had a skin cancer removed and in 1992 he had a "benign tumor removed from his tongue." In 1994 the employee was diagnosed with lesions in his lungs, which physicians believed was metastatic cancer; however, a primary cancer was not identified.

Appellant submitted hospital records for the employee dated August 1994 to April 1995. The employee received hospital treatment in January 1994 for shortness of breath. On January 21, 1994 Dr. Thai Ha, a gastroenterologist, diagnosed an exacerbation of COPD probably secondary to bronchitis and exacerbated by smoke inhalation. On January 17, 1994 the employee was discharged by Dr. Sherwin Levin, a Board-certified internist, with a diagnosis of improved asthma. On July 27, 1994 he was readmitted to the hospital with complaints of increased shortness of breath. Dr. James Lim and Dr. Daniel Kashinsky, both Board-certified in family practice, diagnosed an exacerbation of asthma and COPD and to rule out pneumonia. The employee was discharged on August 3, 1994. A chest x-ray showed no masses or infiltrates.

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<sup>2</sup> Docket No. 97-2715 (issued September 16, 1999).

<sup>3</sup> Docket No. 04-169 (issued May 20, 2004).

<sup>4</sup> Docket No. 05-564 (issued December 14, 2005).

<sup>5</sup> Order Denying Petition for Reconsideration, Docket No. 05-564 (issued June 19, 2006).

The employee received treatment at a hospital on August 9, 1994 for severe dyspnea and wheezing after smoke exposure. Dr. Shan Nathan, Board-certified in internal medicine, diagnosed an acute exacerbation of COPD, congestive heart failure, coronary artery disease, diabetes mellitus and to rule out dyspnea and wheezing caused by exposure to smoke. The employee was again hospitalized on November 6, 1994 after an x-ray showed multiple lung lesions. In a November 11, 1994 transfer summary, Dr. Albert Bodt, a Board-certified internist, diagnosed multiple nodular lesions, probably metastatic, from an unknown primary, COPD or sleep apnea and Pickwickian syndrome, congestive heart failure, coronary artery disease and diabetes. A needle aspiration of the employee's lung on November 16, 1994 revealed "malignant cells consistent with metastatic melanoma." From December 29 to 31, 2004 he was hospitalized due to pain and swelling of the left leg. In a discharge summary dated December 31, 2004, Dr. Philip Tusso, a Board-certified internist, diagnosed left saphenous vein thrombophlebitis, malignant melanoma, uncontrolled diabetes and COPD. In a hospital report dated February 7, 1995, Dr. Manjula Vaghjiani, a Board-certified internist, discussed the employee's history of "malignant melanoma starting on the back with metastasis to the lungs and left auxiliary lymph nodes," COPD, coronary artery disease and partial complex seizures. He was again hospitalized from March 29 to April 1, 1995. In a discharge summary dated April 1, 1995, Dr. Vaghjiani noted that the employee had a history of melanoma five years earlier with metastases to the lymph nodes and lungs in November 1994.<sup>6</sup> The employee further had COPD due to exposure to chemicals at work, coronary artery disease, a seizure disorder and diabetes. Dr. Vaghjiani diagnosed malignant melanoma with metastasis, an exacerbation of COPD and acute bronchitis. In an April 4, 1995 emergency room report, Dr. Harihar Agarwal, an internist, discussed the employee's history of metastatic melanoma in of the lymph nodes and lungs. He diagnosed an exacerbation of COPD with lung cancer and primary melanoma metastatic disease.

By decision dated September 25, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error. The Office noted that she had not submitted any medical evidence addressing the relationship between the employee's death and his exposure to chemicals at work.

### **LEGAL PRECEDENT**

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>7</sup> The Office 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.<sup>8</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>9</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing

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<sup>6</sup> The final page of the discharge summary containing the physician's signature does not appear to be in the case record.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

<sup>9</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>15</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>16</sup> As appellant's August 28, 2006 request for reconsideration was submitted more than one year after September 13, 1995, the date of the most resent merit decision, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in denying her claim for compensation.<sup>17</sup>

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<sup>10</sup> See *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> *Dorletha Coleman*, 55 ECAB 143 (2003); *Leon J. Modrowski*, 55 ECAB 196 (2004).

<sup>13</sup> *Id.*

<sup>14</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

<sup>15</sup> 20 C.F.R. § 10.607(a).

<sup>16</sup> *Robert F. Stone*, 57 ECAB \_\_\_\_ (Docket No. 04-1451, issued December 22, 2005).

<sup>17</sup> 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB \_\_\_\_ (Docket No. 05-1637, issued October 18, 2005).

In appellant's request for reconsideration, she argued that a review of the medical records established that the employee's death was related to his employment injury. She noted that the employee did not disclose the composition of the paint he used during the course of his federal employment as it was classified information. Appellant maintained that he experienced breathing problems from the date of his employment exposure to the date of his death. She summarized the employee's medical history. The relevant issue, however, is whether the medical evidence establishes a causal relationship between the employee's death and his accepted employment injury. As this issue is medical in nature, it can only be resolved through the submission of probative medical evidence.<sup>18</sup> Appellant's lay opinion on the cause of the employee's death and her interpretation of the medical evidence is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.<sup>19</sup> Consequently, her contentions are insufficient to establish clear evidence of error by the Office or shift the *prima facie* weight of evidence in favor of the claim.

The employee was hospitalized multiple times in 1994 and 1995 for breathing difficulties. In November 1994 he was diagnosed with lung cancer. The biopsy report found that the cancerous cells were consistent with metastatic melanoma. None of the medical reports submitted, however, address the underlying issue of whether the employee's death was related to any chemical exposure during the course of his federal employment. The medical evidence thus does not establish clear evidence of error.<sup>20</sup>

The evidence submitted in support of appellant's untimely reconsideration request is irrelevant and thus insufficient to establish clear evidence of error. In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>21</sup> The evidence appellant submitted on reconsideration fails to meet this standard.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

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<sup>18</sup> *George C. Vernon*, 54 ECAB 319 (2003).

<sup>19</sup> *Gloria J. McPherson*, 51 ECAB 441 (2000).

<sup>20</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>21</sup> See *Veletta C. Coleman*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 25, 2006 is affirmed.

Issued: September 21, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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