

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

T.M., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS LOGISTICS BASE, Albany, GA,
Employer**

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**Docket No. 10-440
Issued: October 15, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2009 appellant, through his attorney, filed a timely appeal from a November 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration as it was untimely and did not establish clear evidence of error. As the last merit decision of the Office is dated July 13, 2004, more than one year before the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. On February 14, 2005 the Board affirmed Office decisions finding that appellant failed to establish that he sustained a cardiac

condition causally related to factors of his federal employment.¹ The Board discussed his allegations that he was exposed to fumes from Turco 6776 Thin at work, but noted that the employing establishment disputed the extent of his exposure. The Board concluded that the medical evidence was insufficient to establish that appellant sustained a cardiac condition as a result of his alleged chemical exposure in the course of his employment. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a letter dated November 25, 2008, appellant related that he requested but did not receive a respirator when cleaning vats of Turco 6776. The Occupational Safety & Health Administration (OSHA) tested the air quality and found that the employing establishment violated the proper procedures for using Turco 6776. OSHA ordered the cleaning vats moved to another area and that workers wear protective clothing and breathing apparatus. Appellant related that his cardiologist recommended that he be moved from the area where Turco 6776 was used.

On January 11, 2009 appellant requested reconsideration. He based his request for reconsideration on the employing establishment's violation of safety rules and evidence not previously submitted. Appellant contended that the employing establishment did not notify him of its experimental use of Turco 6776, provide protection from the chemical or test for side effects.

In support of his request for reconsideration, appellant submitted an October 22, 2004 material safety data sheet (MSDS) on Turco 6776 Thin and the OSHA guidelines for exposure to formic acid. The MSDS indicates that prolonged contact could interfere with the nervous system and provides exposure limits. The OSHA guidelines noted that it is "dangerously irritating to the skin, eyes and mucous membranes and may also be toxic to the kidneys." It provides that workers should wear protective equipment.

An article from the Institute for Manufacturing and Sustainment Technologies (IMST) noted that the employing establishment was testing different chemical strippers, including Turco 6776 Thin, to determine the most effective. In a memorandum dated August 28, 2001, the employing establishment noted that it was evaluating different chemical strippers. At the conclusion of the project in June 2001, it selected Turco 6776 Thin. An August 2001 survey indicated that no respiratory protection was recommended.

In a notice of unsafe or unhealthful working conditions dated January 21, 2003, OSHA determined that the employing establishment did not inform employees of the dangers of chemical exposure, ensure adequate airflow or evaluate respiratory hazards at the Turco 6776 paint stripper tank. The OSHA further found that the tank of Turco 6776 was not labeled and

¹ Docket No. 04-2057 (issued February 14, 2005). In 2002 appellant, then a 48-year-old heavy mobile equipment mechanic, filed claims alleging that he sustained problems with his central nervous system due to chemical exposure to Turco 6776.

contained a potentially hazardous atmosphere after drainage when employees had to enter the area and clean the bottom of the tank.²

Appellant submitted an article that described recommended improvements at the employing establishment in the metalworking area. The article noted that “previous processes had produced hazardous waste and emitted hazardous air pollutants....”

The medical evidence submitted by appellant in support of his request for reconsideration included a February 17, 1993 respiratory certification and a September 11, 2003 letter from a nurse indicating that he could not be certified to use a forklift as his physician restricted his exposure to noxious fumes. In a chart note dated October 4, 2002, appellant related that he believed that Turco 6776 was harming his central nervous system. On November 21, 2002 a medical provider noted that the OSHA sampling found that the formic acid was within acceptable limits on the date tested.

Appellant resubmitted reports from Dr. Robert V. Glover, Jr., a cardiologist, dated February 11, 2003 to April 6, 2004. He also submitted a December 17, 2008 and June 15, 2009 medical reports regarding his back pain.

By decision dated February 11, 2009, the Office denied appellant’s request for reconsideration after finding that it was not timely and did not show clear evidence of error.

Appellant appealed to the Board. On October 21, 2009 the Board issued an order remanding the case. The Board determined that the Office’s February 11, 2009 nonmerit decision failed to provide sufficient factual findings and legal conclusions to conform to the requirements for a decision under 5 U.S.C. § 8124 and 20 C.F.R. § 10.126.³

In a decision dated November 5, 2009, the Office again denied appellant’s request for reconsideration as untimely and insufficient to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of the Federal Employees’ Compensation Act.⁴ As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence

² On January 14, 2003 the employing establishment provided appellant’s exposure levels to formic acid and sodium hydroxide. On January 27, 2003 it asserted that the exposure were within acceptable levels. By letter dated January 23, 2003, the employing establishment informed appellant that the OSHA did not show overexposure to fumes but did identify other violations.

³ Order Remanding Case, Docket No. 09-894 (issued October 21, 2009).

⁴ 5 U.S.C. §§ 8101-8193.

on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁵

The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.⁶ 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.⁷

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ As appellant’s January 11, 2009 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁰

The Office denied appellant’s claim on the grounds that the evidence did not establish that he sustained a medical condition due to his exposure to Turco 6776 Thin. With his request for reconsideration, appellant submitted evidence from OSHA showing that the employing establishment violated certain safety requirements in handling the chemical. Appellant also submitted the 2004 MSDS on Turco 6776 Thin and OSHA’s guidelines for exposure to formic acid, one of the chemicals in Turco 6776 Thin. He further submitted evidence establishing that the employing establishment experimented with Turco 6776 Thin and other chemical strippers in 2001 to determine the most effective. This evidence, however, does not show clear evidence that the Office erred in denying appellant’s claim, as it does not establish on its face that he sustained a cardiac condition as a result of his exposure to Turco 6776 Thin.

Appellant also submitted a February 17, 1993 respiratory certificate, a September 11, 2003 letter from a nurse noting that he was restricted from exposure to fumes and December 17,

⁵ 20 C.F.R. § 10.607.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

⁷ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ *Id.* at § 10.607(a).

⁹ *See Robert F. Stone*, *supra* note 7.

¹⁰ *Id.* at § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

2008 and June 15, 2009 medical reports addressing his back condition. None of this evidence is relevant to the issue of whether he sustained a medical condition as a result of exposure to the chemicals in Turco 6776 Thin. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹

Appellant also resubmitted medical reports from Dr. Glover. The Board, however, previously considered Dr. Glover's reports and determined that they were not sufficient to establish that appellant sustained a cardiac condition as a result of chemical exposure in the course of his federal employment. Consequently, this evidence does not establish clear evidence of error.

As the evidence submitted by appellant is insufficient to shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.¹²

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

¹¹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹² *See Andrew Fullman*, 57 ECAB 574 (2006); *Joseph R. Santos*, 57 ECAB 554 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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