

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

S.S., Appellant)
and) Docket No. 11-1579
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 24, 2012
North Suburban, IL, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2011 appellant filed a timely appeal from a February 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request to expand acceptance of her claim. She also appeals a May 25, 2011 nonmerit decision denying her request for reconsideration of a December 30, 2002 decision as untimely and insufficient to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that OWCP should expand acceptance of her claim for asthma, allergies, pulmonary disease and an enlarged heart; and (2) whether OWCP properly denied her request for reconsideration of its December 30, 2002 decision as it was untimely and insufficient to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 13, 2004, the Board affirmed a December 30, 2002 decision terminating appellant's compensation effective July 15, 2000 as she had no further disability due to her accepted conditions of rhino conjunctivitis and allergic edema causally related to dust exposure at work.² The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.³

On June 9, 2009 appellant contacted OWCP to request compensation for disability due to asthma. OWCP advised her to request that her claim be expanded to include asthma and to submit a medical report to establish that she sustained asthma caused or aggravated by her employment. On July 2, 2009 appellant informed OWCP that she had a disabling respiratory condition related to her prior injury.

By decision dated December 11, 2009, OWCP denied appellant's request to expand her claim. It found that she had not submitted any supporting factual or medical evidence.

In a report dated February 10, 2009, received by OWCP on December 29, 2009, Dr. S.K. Wahi, Board-certified in family medicine, related that appellant was under his care for employment-related asthma, multiple allergies, recurrent rhino conjunctivitis and uticaria. He discussed her history of hypertension, pulmonary embolism and deep venous thrombosis. Dr. Wahi related that appellant qualified for a handicapped apartment.

By letter dated July 19, 2009, appellant challenged the prior termination of her compensation benefits. She asserted that she wanted her claim accepted for numerous conditions, among them asthma, allergies, edema, laryngitis, skin rashes, vertigo and vomiting. Appellant related that her work location tested positive for asbestos and other contaminants and that hundreds of employees had health problems as a result of exposure to the work location. She attributed her mother's death to chronic obstructive pulmonary disease as a result of working for the employing establishment.

Appellant submitted hospital and emergency room reports dated 2003 to 2009 discussing her treatment for conditions including hypertension, sleep apnea, insect bites and chest congestion.

² Docket No. 03-1119 (issued May 13, 2004). On September 17, 1991 appellant, then a 32-year-old central mark-up clerk, filed an occupational disease claim alleging that she sustained itching and a rash due to an allergy to dust at work. OWCP accepted the claim for rhinoconjunctivitis and allergic edema and paid her compensation for total disability beginning April 22, 1992. It doubled a prior occupational disease claim for illness due to problems with the ventilation at work into the current claim.

³ On November 29, 2010 the Board dismissed an appeal from December 11, 2009 and May 11, 2010 decisions at appellant's request. Docket No. 10-1726 (issued November 29, 2010).

In a letter dated January 29, 2010, a physician provided a list of medications that were prescribed to appellant due to her “approved claim of rhino conjunctivitis/upper respiratory infection/asthma.”⁴

On February 9, 2010 appellant requested a hearing before an OWCP hearing representative.⁵ She related that her address changed such that she was delayed receiving appeal rights.

On February 24, 2010 Dr. Teresa Cvengros, Board-certified in family medicine, related that appellant was prescribed a spacer with her inhaler and that the medication was “necessary due to past exposure to asbestos.”

In a decision dated May 11, 2010, OWCP denied appellant’s request for an oral hearing as untimely. On July 6, 2010 it vacated its May 11, 2010 decision after finding that her hearing request was timely.

On September 21, 2010 a physician related that appellant had received treatment for deep venous thrombosis, pulmonary embolism, severe allergies and employment-related reactive airway disease.⁶

At the hearing, held on October 21, 2010, appellant related that the facility where she worked tested positive for asbestos. She became sick while the employing establishment was removing asbestos from the building in 1988. Appellant indicated that a prior accepted claim for an upper respiratory infection should be part of the present claim.

In a statement received October 27, 2010, appellant requested reinstatement of her appeal of the December 30, 2002 decision. She maintained that the current file number should be combined with a prior accepted claim. Appellant asserted that the employing establishment failed to disclose the presence of asbestos. She described the health effects she experienced due to her exposure to asbestos, listed her hospitalizations and medical treatment and provided a list of her diagnosed conditions. Appellant further summarized the medical evidence and noted that, in a report dated September 26, 1996, Dr. Baltazar R. Espiritu, a Board-certified internist and allergist, found that she had permanent residuals from her accepted work injury. She maintained that records from the employing establishment from 1988 established that asbestos was present and removed while she worked in the building. Appellant reiterates that her benefits should be retroactively reinstated and her claim expanded for multiple medical conditions.

With her request for reconsideration, appellant submitted a statement from Evora R. Jones, a former employee from a Kansas City, MO, workstation, who related that she was exposed to asbestos at work and had brain and lung cancer. Appellant submitted an e-mail about

⁴ The name of the physician is not legible.

⁵ On February 9, 2010 appellant sent an appeal request form to the Board, which indicated that she wanted an oral hearing and reconsideration. On November 29, 2010 the Board dismissed the appeal at her request. Docket No. 10-1726 (issued November 29, 2010).

⁶ The name of the physician is not legible.

asbestos in a Kansas City work location and a letter from a former employing establishment plumber regarding asbestos in its buildings in New York City, NY.⁷ She enclosed a publication about workplace violence and a statement from the employing establishment asserting that air quality tests showing dust levels within permissible levels.

In a report dated October 29, 2010, Dr. Yogesh P. Vajaria, Board-certified in emergency medicine, evaluated appellant for complaints of headache and nausea. He noted that her medical history included environmental allergies, asbestos exposure, migraines, pulmonary embolisms, hypertension and a history of asthma. Dr. Vajaria diagnosed an acute migraine headache. In a note dated November 12, 2010, Dr. Cvengros diagnosed asthma.

By decision dated February 7, 2011, the hearing representative affirmed the December 11, 2009 decision. He found that appellant had not established asbestos exposure and that the medical evidence was insufficient to accept the additional diagnosed conditions as causally related to exposure to employment factors. The hearing representative noted that her employment ceased in 1992.

In a decision dated May 25, 2011, OWCP denied appellant's request for reconsideration of its December 30, 2002 decision after finding that it was untimely and did not establish clear evidence of error.

On appeal, appellant argued that OWCP did not address all of her medical records and had paid for her allergy pump. She attributed her asthma to her employment. Appellant provided a list of the dates she received treatment.

LEGAL PRECEDENT -- ISSUE 1

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁹ The opinion of the physician must be based on a complete factual and medical background of the claimant,¹⁰ must be one of reasonable medical certainty¹¹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹²

⁷ Appellant also submitted a copy of her representative's March 28, 2003 appeal of the December 30, 2002 decision.

⁸ *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁰ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹¹ *John W. Montoya*, *supra* note 8.

¹² *Judy C. Rogers*, 54 ECAB 693 (2003).

ANALYSIS -- ISSUE 1

In a decision dated May 13, 2004, the Board affirmed OWCP's termination of appellant's compensation based on its finding that she had no further disability due to rhino conjunctivitis and allergic edema from dust exposure at work. On July 2, 2009 appellant requested expansion of her claim to include disabling pulmonary conditions. She subsequently maintained that exposure to dust and asbestos at work resulted in numerous medical conditions. Appellant did not, however, submit any medical evidence supporting that she sustained any diagnosed condition resulting from the identified employment factors.

In a report dated February 10, 2009, Dr. Wahi related that he was treating appellant for asthma, allergies, rhino conjunctivitis and urticaria due to her employment. He indicated that she qualified for a handicapped apartment. Dr. Wahi did not provide any findings on examination or a rationale for his opinion that the diagnosed conditions were work related. The opinion of a physician supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence and provide medical rationale explaining the relationship between the diagnosed condition and work factors.¹³

On January 29, 2010 a physician provided a list of medications that appellant took due to her approved rhino conjunctivitis, upper respiratory infection and asthma. The physician did not address the relevant issue of whether her claim should be expanded or the cause of the diagnosed conditions other than to note they were "approved." Consequently, the report is insufficient to meet appellant's burden of proof.

On February 24, 2010 Dr. Cvengros related that she had prescribed an inhaler due to appellant's history of asbestos exposure. She did not, however, provide a definite diagnosis or describe how appellant was exposed to asbestos and thus her report is of little probative value.

Appellant submitted numerous reports from hospitals and emergency rooms from 2003 to 2009. On September 21, 2010 a physician noted that she had received treatment for deep venous thrombosis, pulmonary embolism, allergies and employment-related reactive airway disease. The physician did not provide any history of injury or rationale for the finding that appellant's reactive airway disease was employment related. To be of probative value, a report must contain a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.¹⁴

On October 29, 2010 Dr. Vajaria diagnosed an acute migraine headache. On November 12, 2010 Dr. Cvengros diagnosed asthma. Neither physician, however, address the cause of the diagnosed conditions. Medical evidence that does not offer any opinion regarding

¹³ See *Robert Broome*, 55 ECAB 339 (2004).

¹⁴ *John W. Montoya*, *supra* note 8.

the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹⁵

OWCP advised appellant that it was her responsibility to provide a comprehensive medical report containing a diagnosis and a rationalized opinion regarding the cause of her condition. She failed to submit such evidence. Appellant's belief that her condition was caused by the alleged work-related exposure is not determinative.¹⁶ As there is no probative medical evidence addressing how any diagnosed condition was caused or aggravated by employment, she has not met her burden of proof to establish that her claim should be expanded.

On appeal, appellant listed the medical evidence of record and argued that she sustained asthma due to her employment. As discussed, however, she has the burden to submit rationalized medical evidence supporting her allegation. Appellant's lay opinion on the cause of her condition is insufficient to discharge her burden of proof as lay individuals are not competent to render a medical opinion.¹⁷ The issue of causal relationship is a medical one and must be resolved by probative medical evidence.¹⁸

Appellant notes that OWCP paid for her asthma medication. The fact that OWCP authorized and paid for some medical expenses does not establish that the condition for which she received treatment was employment related.¹⁹

LEGAL PRECEDENT -- ISSUE 2

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.²⁰ 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 OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.²¹

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP 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 denial, would have created a conflict in medical

¹⁵ *Conard Hightower*, *supra* note 9.

¹⁶ See *D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁷ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁸ *Luis M. Villanueva*, 54 ECAB 666 (2003).

¹⁹ See *Dale E. Jones*, 48 ECAB 648 (1997); *James F. Aue*, 25 ECAB 151 (1974).

²⁰ 5 U.S.C. § 8101 *et seq.*

²¹ 20 C.F.R. § 10.607.

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.²² To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that it committed an error.²³

ANALYSIS -- ISSUE 2

OWCP 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 decision.²⁴ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.²⁵ As appellant's October 27, 2010 request for reconsideration was submitted more than one year after May 13, 2004, the date of the last merit decision of record regarding the termination of her compensation benefits, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for compensation.²⁶

In an October 27, 2010 request for reconsideration, appellant maintained that her work location contained asbestos and described a myriad of health conditions that she attributed to asbestos exposure. She listed the dates of hospitalizations and medical treatment and indicated that the employing establishment had records regarding her asbestos exposure. The issue, however, is whether appellant has shown that OWCP erred in finding that she had no further disability due to her accepted rhino conjunctivitis and allergic edema as a result of dust exposure at work. To show clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP.²⁷

Appellant also asserted that Dr. Espiritu's September 26, 1996 report established that she had permanent residuals of her accepted work injury. OWCP and the Board, however, previously considered Dr. Espiritu's opinion prior to the termination of her compensation benefits. Appellant has not identified any positive and precise error by OWCP in its consideration of Dr. Espiritu's report and thus has not shown clear evidence of error.

On reconsideration appellant submitted a statement from Ms. Jones, who worked for the employing establishment in another work location. Ms. Jones stated that she developed brain and lung cancer due to employment-related asbestos exposure. Appellant also submitted an e-mail message about asbestos at Ms. Jones' work location, a letter from a plumber regarding asbestos in employing establishment locations in New York City, a publication about workplace

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (December 2003).

²³ *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

²⁴ 20 C.F.R. § 10.607(a).

²⁵ *Robert F. Stone*, *supra* note 23.

²⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

²⁷ *See Thankamma Mathews*, 44 ECAB 765 (1993).

violence and an e-mail from the employing establishment about dust levels. Again, however, the relevant issue on reconsideration is whether appellant has disability from her accepted rhino conjunctivitis and allergic edema. As the evidence submitted on reconsideration regarding the presence of asbestos at other work locations, publications about workplace violence and e-mail messages is not relevant to the underlying issue, which is medical in nature, it is insufficient to show clear evidence of error.²⁸

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 raise a substantial question as to the correctness of OWCP's decision.²⁹ The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that appellant has not established that OWCP should expand acceptance of her claim for additional conditions including asthma, allergies, pulmonary disease and an enlarged heart. The Board further finds that OWCP properly denied her request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

²⁸ See *Howard Y. Miyashiro*, 51 ECAB 253 (1999) (in order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP).

²⁹ See *Veletta C. Coleman*, 48 ECAB 367 (1997).

ORDER

IT IS HEREBY ORDERED THAT the May 25 and February 7, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 24, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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