

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

W.O., Appellant

and

**DEPARTMENT OF THE ARMY, PINE BLUFF
ARSENAL, Pine Bluff, AR, Employer**

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**Docket No. 12-893
Issued: September 6, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 13, 2012 appellant, through his attorney, filed a timely appeal of a January 17, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without further merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed from May 2, 2003, the date of the most recent OWCP merit decision, to May 13, 2012, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 3, 1998 appellant, then a 56-year-old retired toolmaker foreman, filed a Form CA-2 alleging that he sustained a pulmonary disorder due to industrial asbestos exposure since 1976. He became aware of his condition and its relationship to his federal employment on April 7, 1998. Appellant retired effective January 30, 1997.²

In a May 8, 1996 form report, Dr. Mark A. Schiefer, an occupational physician, checked the “yes” box to specify that a July 14, 1995 chest x-ray exhibited parenchymal abnormalities consistent with pneumoconiosis.

OWCP informed appellant in an October 16, 1998 letter that additional medical evidence was needed to establish his claim. It subsequently received chest x-rays from Drs. Rodolfo E. Lim and James E. Stark, Board-certified diagnostic radiologists, for the period November 1, 1994 to November 5, 1996. Neither showed pneumothorax, pleural effusions, calcification or other irregularities indicative of active chest disease.

OWCP referred appellant for a second opinion examination to Dr. Michael M. Newan, a Board-certified pulmonologist. In a November 17, 1999 report, Dr. Newan related that appellant routinely inhaled asbestos fibers at work from 1976 to 1994 and thereafter experienced chronic shortness of breath, dizziness and fatigue. Lung volume was mildly limited while spirometry, diffusing capacity, pulse oximetry and physical examination findings were normal. A November 17, 1999 chest x-ray did not exhibit evidence of pleural or interstitial lung disease. After reviewing previous radiological records, Dr. Newan diagnosed chronic shortness of breath possibly due to bronchospasm, pointing out that appellant used an epinephrine inhaler. He added that there was no objective evidence of asbestos-related lung disease.

By decision dated May 2, 2003, OWCP accepted that appellant was exposed to asbestos in the workplace, but denied his claim on the grounds that the weight of the medical evidence did not demonstrate that a pulmonary condition resulted from the accepted exposure.

Following issuance of this decision, OWCP received additional medical evidence, namely a September 26, 2001 report from Dr. Christopher L. John, a pulmonary and critical care physician, a June 8, 1998 report from Dr. Schiefer and October 15 and 19, 1998 reports from Dr. Ray A. Harron, a nuclear physician and radiologist. Each opined that appellant sustained employment-related asbestosis.

Counsel requested reconsideration on October 10, 2011.

By decision dated January 17, 2012, OWCP denied appellant’s request for reconsideration, finding that it was not filed within one year of the May 2, 2003 decision and that the new evidence did not establish clear evidence of error.

² This information was incorporated into the October 26, 1999 statement of accepted facts.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. Title 20 Code of Federal Regulations, section 10.607(a) provide that a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.⁴ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely on the grounds that it was not timely filed. When a claimant's application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ The evidence must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that appellant filed an untimely request for reconsideration. The last merit decision in this case was issued on May 2, 2003. Counsel filed an application to reopen this decision for further merit review on October 10, 2011. Because more than eight years passed between May 2, 2003 and October 10, 2011, OWCP properly determined that the reconsideration request was not timely filed.

³ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) ("[t]he term 'clear evidence of error' is intended to represent a difficult standard").

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

The Board also finds that appellant's untimely request failed to demonstrate clear evidence of error. In its May 2, 2003 decision, OWCP denied his occupational disease claim, finding that the weight of the medical evidence did not establish that his accepted asbestos exposure caused or contributed to a pulmonary condition. Thereafter, appellant submitted new medical evidence, including reports from Drs. John, Schiefer and Harron for the period September 26, 2001 to October 19, 1998. As noted, the question of whether a claimant has established clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record. Although Drs. John, Schiefer and Harron supported causal relationship, their opinions did not manifest on their face that OWCP erred in denying appellant's claim in view of the earlier, deficient case record.¹⁰ Since the new evidence did not raise a substantial question as to the correctness of the May 2, 2003 decision, OWCP properly determined that the untimely request failed to establish clear evidence of error.

Counsel contends on appeal that the January 17, 2012 decision was contrary to fact and law. The Board has already addressed the deficiencies of the reconsideration request.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration on the basis that it was untimely filed and did not establish clear evidence of error.

¹⁰ See also *D.G.*, 59 ECAB 455, 460 (2008) (the submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error; the evidence must shift the weight of the evidence in favor of the claimant).

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 6, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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