

ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 52-year-old former contract specialist, has an accepted occupational disease claim for allergic reaction to airborne allergens/allergic asthma which arose on or about July 21, 1991.³ In September 1992, her then-treating physician, Dr. Denise E. Bruner, advised that appellant was able to perform her usual duties in an environment free of her known allergens.⁴ Effective September 12, 1993, appellant accepted a position as a management and program analyst with the Department of Defense (DOD), Office of the Inspector General.⁵ After an extended period of inactivity, OWCP destroyed the original case file associated with her July 21, 1991 employment injury.

In May 2004, Dr. Henry C. Fronc Jr., a cardiologist, saw appellant for complaints of chest discomfort which he later diagnosed as costochondritis.⁶ In October 2004, he also diagnosed autonomic dysfunction (AD). An October 28, 2004 head-up tilt table study triggered a syncope episode. Based on the positive test result, Dr. Fronc diagnosed AD. At the time, he recommended that appellant avoid her long daily commute and be permitted to telework from home. Dr. Fronc explained that driving could predispose her to breakthrough episodes of syncope which posed a danger to both appellant and the public at large. He would later explain that appellant was also limited in her ability to tolerate heat. Dr. Fronc noted that patients with AD, and appellant in particular, do better if they can control their environment and avoid excesses of heat or humidity.

Beginning in November 2004, DOD accommodated appellant's disability due to AD by temporarily allowing her to telework from home on a full-time basis. DOD subsequently modified the telework accommodation to three days of work at home. The other two days appellant was required to be on-site. Various telework accommodations remained in effect for approximately two years. In January 2007, DOD denied any further accommodation for telework on the basis that appellant could commute to work as long as she did not drive herself.

³ OWCP's October 27, 1993 acceptance letter noted that the medical evidence of record indicated that appellant's work-related condition ceased when she transferred to a new work environment and was no longer exposed to airborne aspergillus niger.

⁴ A September 24, 1992 duty status report (Form CA-17) signed by Dr. Bruner noted a diagnosis of reactive airway disease. In a September 29, 1992 narrative report, Dr. Bruner indicated that appellant had been seen by a pulmonary specialist in April 1992 whose testing confirmed a diagnosis compatible with asthma or reactive airway disease.

⁵ Her new employer reportedly had no record of any request for accommodation with respect to appellant's employment-related allergic asthma.

⁶ Dr. Bruner's September 1992 report noted that appellant appeared to have been suffering from costochondritis -- "chest pains" -- as early as August 1991.

DOD also initiated construction of an on-site work area where appellant would be able to control the temperature.

On February 6, 2007 appellant had a near syncope episode while at work. She was transported *via* ambulance to INOVA Alexandria Hospital emergency department where she received a diagnosis of vasovagal episode/AD. The emergency department treatment records noted that appellant “got up too quickly....” She was excused from work until February 10, 2007.

Appellant did not return to work and subsequently filed a claim (Form CA-2a) for recurrence of disability beginning February 6, 2007. She described her syncope/AD as a “consequential injury” due to her July 21, 1991 employment injury. Appellant’s prior work-related injury reportedly resulted in a “total restriction on marked temperature changes/extremes and dust/fumes environmental pollutants.”⁷

In a February 9, 2007 report, Dr. Fronc indicated that on February 6, 2007 appellant experienced an episode of near loss of consciousness, decreased blood pressure and varying heart rate while working on-site. He explained that the February 6, 2007 episode was characteristic of her disability due to AD which he initially diagnosed on October 28, 2004. Dr. Fronc further stated that this latest episode was one of many manifestations of AD. He described appellant’s episodes as sporadic and unpredictable. Dr. Fronc noted that appellant was currently required to work on-site, and thus, she had to commute to work daily. He stated that the high level of stress associated with commuting into work aggravated appellant’s medical condition and precipitated the February 6, 2007 episode. Dr. Fronc advised that appellant immediately apply for disability retirement and that she not commute to work.

Dr. Jeffrey D. Gaber, a Board-certified internist, examined appellant on August 6, 2007 with respect to a “March 1992” injury. He noted that appellant developed syncope, near syncope and dizziness and underwent an extensive work-up which revealed a positive tilt table test consistent with AD. Dr. Gaber further noted that various medications had been utilized some of which were either ineffective or not well-tolerated by appellant. Her current medication, Ritalin, reportedly provided some relief, but appellant continued to have problems with dizziness, particularly when exposed to a hot environment or when seated for prolonged periods. Dr. Gaber stated that appellant had been unable to work because her job required her to work in a seated position and also her commute was one to one and a half hours in each direction. He noted appellant had not worked since February 6, 2007. Dr. Gaber also noted a history of complaints of intermittent chest pain, felt to be due to costochondritis, recurrent sinusitis, asthma and successful laparoscopic cholecystectomy. On physical examination, appellant’s chest was clear to auscultation and percussion, her heart revealed a normal rhythm and there was no rub, murmur, gallop or click. Dr. Gaber also noted that appellant’s chest wall was nontender. He found appellant unable to work in any capacity and not fit for duty “mainly due to problems with AD causing low blood pressure.” Having reviewed appellant’s job description as a management and program analyst, Dr. Gaber stated that considering her disabilities -- “AD and asthma as the most significant ones” -- appellant was incapable of rendering or performing useful service in her

⁷ Appellant did not identify the source of the quoted text.

previous occupation. He further explained that given appellant's disability, there was no accommodation for her medical condition that could be made which would allow her to perform her duties. Lastly, Dr. Gaber noted that appellant had been off duty for several months and he expected that she would remain fully disabled for at least one year.

By decision dated March 6, 2008, OWCP found the evidence insufficient to establish that appellant's claimed disability beginning February 6, 2007 was causally related to the original injury of July 21, 1991. Consequently, it denied her recurrence claim. Appellant has since requested reconsideration on five separate occasions.⁸

In a decision dated July 17, 2008, OWCP reviewed the recurrence claim on the merits and denied modification. Appellant filed another request for reconsideration on July 16, 2009 which OWCP denied on November 23, 2009 without reaching the merits. She again requested reconsideration on November 15, 2010. Appellant's November 2010 request was accompanied by new medical evidence from Dr. Gaber.

In an August 2, 2010 report, Dr. Gaber noted a prior history of having developed reactive airway disease -- "specifically asthma and costochondritis" -- as a result of an "April 9, 1992" work-related injury. He also noted work-related restrictions that included "marked temperature changes/extremes and dust/[fumes]." Additionally, Dr. Gaber described appellant's development of AD which was noted to be partly controlled with Ritalin. He stated that one of the major triggers of appellant's AD was increased temperatures which she reportedly had been exposed to in her work environment. Since his last examination in August 2007, appellant had several episodes of syncope or near syncope resulting in visits to the emergency room. Dr. Gaber noted that on one occasion appellant was nonverbal, unable to move her extremities and she had chest pain. He stated that "[c]ombined with recurring costochondritis and asthma," appellant had been unable to resume working as a management and program analyst for DOD. Dr. Gaber also noted that appellant had not worked for DOD since February 2007. He reported negative chest and heart examinations, but indicated that appellant's chest wall still remained tender in the upper parasternal borders. Dr. Gaber further indicated that appellant's situation had declined since his last examination a few years ago. Appellant reportedly continued to have syncopal episodes, chest pain, costochondritis and asthma for which she periodically used an inhaler. Dr. Gaber described her prognosis as fair, but noted she remained permanently unable to resume working due to risk of injury to herself or others.

In an August 26, 2011 decision, OWCP reviewed the merits of appellant's recurrence claim and denied modification. It noted that Dr. Gaber's August 2, 2010 narrative appeared to have been supplied by appellant. Additionally, Dr. Gaber failed to establish a connection between appellant's AD and her employment or original injury.

Appellant filed her fourth request for reconsideration on June 13, 2012. She described the evolution of her telework accommodation from October 2004 through early February 2007. After DOD withdrew the previous telework accommodation, appellant reported to the on-site facility on February 5, 2007. She returned there on February 6, 2007 arriving *via* MetroAccess

⁸ Appellant initially requested an oral hearing which the Branch of Hearings and Review denied as untimely by decision dated May 6, 2008.

at approximately 11:00 a.m. Appellant also described the February 6, 2007 near syncope episode at work and her subsequent emergency room treatment.

Appellant's June 13, 2012 reconsideration request referenced nine enclosures; most of which purportedly documented her telework accommodation for AD. She also provided another copy of the February 6, 2007 INOVA emergency department slip excusing her from work until February 10, 2007. Appellant argued that she sustained a new injury on February 6, 2007 that exasperated her July 21, 1991 injury. She also claimed that as a result of the 1991 injury, DOD was aware that she could not tolerate heat.

OWCP denied reconsideration by decision dated September 18, 2012. It received only one of the nine enclosures and that one particular document, a February 6, 2007 emergency department work excuse, was already part of the record.

On September 20, 2012 appellant submitted another request for reconsideration. She argued that DOD had accommodated her with full-time telework between 2004 and 2006 based on her disability -- AD -- and her impairment from 1991. Appellant stated that Dr. Bruner imposed limitations on "marked temperature changes/extremes and dust/fumes environmental pollutants" which DOD had allegedly been informed of prior to February 6, 2007. She argued that DOD should not have withdrawn the previous telework accommodation given her disability (AD) and her 1991 employment-related impairment. Appellant submitted various memoranda from DOD regarding her telework accommodation. OWCP also received a September 10, 2012 report from Dr. Gaber.

In his latest report, Dr. Gaber reiterated much of the history previously described in his August 2, 2010 report. Additionally, he referenced two recent syncopal episodes on March 31 and July 10, 2012, and noted that a July 3, 2012 bubble study revealed evidence of patent foramen ovale.⁹ Dr. Gaber stated that AD combined with recurring costochondritis and asthma, precluded appellant from resuming work as a management and program analyst with DOD. He again reported negative chest and heart examinations, but noted that appellant's chest wall was still uncomfortable to touch. Dr. Gaber's September 10, 2012 assessment and prognosis was a verbatim recitation of his August 2, 2010 findings.

In a March 1, 2013 decision, OWCP denied reconsideration. Appellant's September 20, 2012 request for reconsideration postdated OWCP's latest merit decision by more than a year and she failed to demonstrate clear evidence of error on the part of OWCP in denying her claimed recurrence of disability beginning February 6, 2007.

⁹ Appellant was also reportedly involved in an April 2010 motor vehicle accident where she sustained a neck sprain. Additionally, Dr. Gaber noted a recent history of back surgery (April 2011), right rotator cuff tear (December 2011) and lumbar herniated disc (August 2012).

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁰ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹¹ One such limitation is that the application for reconsideration must be sent within one year of the date of the merit decision for which review is sought.¹²

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹³ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 1

Appellant has an accepted occupational disease claim for allergic reaction to airborne allergens/allergic asthma which arose on or about July 21, 1991. She had been exposed to airborne aspergillus niger in the workplace. Appellant subsequently left the employing establishment and in September 1993 she began work as a management and program analyst with DOD. She remained at DOD through February 6, 2007. DOD reportedly had no record of her ever having requested an accommodation with respect to her previous employment-related lung condition.

More than 12 years after her July 1991 employment injury, appellant was diagnosed with AD, a condition which manifested itself by precipitous decreases in heart rate and/or blood pressure. As a result, she experienced periodic and unpredictable episodes of syncope or near syncope. Dr. Fronc, a cardiologist, treated appellant for her AD beginning in October 2004. He recommended that she telework from home because it was potentially unsafe for appellant to operate a motor vehicle to commute to work. Dr. Fronc subsequently advised that increased ambient temperature -- excessive heat -- was a common trigger for AD-related syncope and particularly with respect to appellant. For more than two years, DOD accommodated appellant's AD by permitting her to telework between three to five days per week. In late January 2007, DOD withdrew the previous telework accommodation. Appellant was instead required to work on-site, full time.

¹⁰ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.607.

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.606(b)(2).

¹⁴ *Id.* at §§ 10.607(b), 10.608(b).

On February 6, 2007 appellant had a near syncope episode while on-site and she has not returned to work since.¹⁵ She claimed that her disability beginning February 6, 2007 was causally related to her July 21, 1991 employment-related lung condition. Appellant believes there is a causal relationship between her employment-related allergic asthma and her subsequently acquired syncope/AD. She noted a common susceptibility to extreme temperatures with both conditions. Appellant also believes her costochondritis is causally related to her July 21, 1991 employment injury.

OWCP initially denied appellant's recurrence claim on March 6, 2008. Since then it has twice reviewed the claim on the merits and denied modification. The latest merit decision was issued August 26, 2011. OWCP has consistently found the medical evidence of record insufficient to establish a causal relationship between appellant's July 21, 1991 employment-related lung condition and her claimed disability beginning February 6, 2007.

On June 13, 2012 appellant timely requested reconsideration of OWCP's August 26, 2011 merit decision. However, her June 2012 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. The relevant issue on reconsideration was medical in nature. Thus, the chronology of appellant's telework accommodations for AD was not germane to the question of whether the medical evidence established a causal connection between her July 1991 employment-related lung condition and her claimed disability beginning February 6, 2007.

Appellant also claimed that as a result of the July 1991 injury, DOD was aware that she could not tolerate heat. However, DOD disputed this assertion when she originally filed her recurrence claim (Form CA-2a). In response to a question (No. 38) of whether there were any post-injury accommodations or adjustments in appellant's regular duties due to injury-related limitations, DOD noted on Form CA-2a that it had not employed appellant until September 12, 1993 and had no idea if her former employer (GSA) had made any accommodations/adjustments in her duties. DOD further noted that since appellant's employment with the Office of the Inspector General, she had "never requested an accommodation due to her original injury." Having considered appellant's June 13, 2012 request for reconsideration, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. Therefore, appellant is not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(2).¹⁶

Appellant also failed to submit any "relevant and pertinent new evidence" with her June 13, 2012 request for reconsideration. The only enclosure OWCP received was a duplicate copy of the February 6, 2007 INOVA emergency department slip which excused appellant from work until February 10, 2007. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹⁷ Because appellant did not provide any new evidence that might arguably impact the prior decision, she is

¹⁵ In January 2008, the Office of Personnel Management authorized disability retirement.

¹⁶ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹⁷ *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).¹⁸ Accordingly, OWCP properly denied appellant's June 13, 2012 request for reconsideration by decision dated September 18, 2012.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to 20 C.F.R. § 10.607(a) an application for reconsideration must be sent within one year of the date of OWCP's decision from which review is sought. If the request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of OWCP in its "most recent merit decision. 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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 OWCP's decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS -- ISSUE 2

Appellant's latest request for reconsideration was dated September 20, 2012, which is more than a year after OWCP's August 26, 2011 merit decision. Because this request was untimely, appellant must demonstrate "clear evidence of error" on the part of OWCP in denying her claim for recurrence of disability beginning February 6, 2007.¹⁹

The September 20, 2012 request was accompanied by various DOD memoranda regarding appellant's telework accommodations for AD. Appellant argued that DOD had accommodated her with full-time telework between 2004 and 2006 based on her disability -- AD -- and her impairment from 1991. She further stated that Dr. Bruner imposed limitations on "marked temperature changes/extremes and dust/fumes environmental pollutants" which DOD had allegedly been informed of prior to February 6, 2007. As previously noted, DOD denied any knowledge of appellant having either requested or received an accommodation based on her July 21, 1991 employment-related lung condition. Moreover, the quoted limitations appellant attributed to Dr. Bruner are not supported by the current evidence of record. It appears that appellant first reported the quoted limitations in a June 19, 2007 memorandum to DOD requesting continuation of pay. At the time, appellant did not attribute the quoted passage to a particular source. Now Dr. Bruner is purportedly the source of the reported limitations.

¹⁸ 20 C.F.R. § 10.606(b)(2)(iii).

¹⁹ *Id.* at § 10.607(b).

However, neither his September 24, 1992 CA-17 nor his September 29, 1992 narrative report included the above-noted restrictions.

As previously indicated, the issue on reconsideration is medical in nature. The various DOD memoranda regarding appellant's AD-related telework accommodations are not medical evidence, and thus, do not address the relevant issue on reconsideration. The only additional medical evidence submitted in support of appellant's latest request was Dr. Gaber's September 10, 2012 report.

Between August 2007 and September 2012, Dr. Graber examined appellant on three occasions. His September 12, 2010 report noted that she developed reactive airway disease -- "specifically asthma and costochondritis" -- as a result of an April 9, 1992 work-related injury. Dr. Gaber also noted work-related restrictions that included "marked temperature changes/extremes and dust/[fumes]...."²⁰ Additionally, he described appellant's development of AD which was partly controlled with Ritalin and noted that one of the major triggers of her AD was increased temperatures which she was "exposed to in her work environment." Since he last examined appellant in August 2010, she reportedly had two syncopal episodes in March and July 2012. According to Dr. Gaber, appellant's AD "[c]ombined with recurring costochondritis and asthma" precluded her from resuming work as a management and program analyst with DOD. His physical examination consisted of reported vital signs for height, weight and blood pressure and a chest/heart examination which was reportedly negative, except for appellant's chest wall which notably "still remain[ed] tender in the upper parasternal borders." Dr. Gaber indicated that appellant's condition had declined since he saw her a few years ago. He specifically noted that she "continues to have syncopal episodes, chest pain, costochondritis and asthma for which she uses an inhaler periodically." Dr. Gaber also indicated that appellant's prognosis was fair, but she remained fully disabled.

The September 10, 2012 report does not establish clear evidence of error with respect to OWCP's August 26, 2011 merit decision. Apart from a few minor differences, Dr. Gaber's latest report is essentially a verbatim recitation of his August 2, 2010 assessment which OWCP previously found deficient. The September 10, 2012 report incorrectly identified April 9, 1992 as the date of injury. Additionally, none of Dr. Gaber's reports included a specific history of injury regarding appellant's employment-related allergic asthma. He attributed appellant's current disability to a combination of AD, asthma and costochondritis. However, Dr. Gaber's latest physical examination findings did not support a diagnosis of ongoing employment-related asthma. Appellant's chest examination was reportedly negative except for noted tenderness in the upper parasternal borders of the chest wall. Dr. Gaber also diagnosed ongoing costochondritis, but he failed to explain how this condition precluded appellant from work. Moreover, all of Dr. Gaber's reports failed to explain how costochondritis was causally related to appellant's accepted July 21, 1991 employment injury. Lastly, Dr. Gaber has not attributed appellant's AD to her previously accepted July 1991 employment-related lung condition. Thus, while appellant believes her current syncope/AD and her July 1991 employment injury are related, the medical evidence fails to establish a causal relationship between the two.

²⁰ Dr. Gaber did not identify the source of the quoted information regarding appellant's work-related restrictions.

The Board finds that appellant has not demonstrated clear evidence of error. As such, there is no justification for further merit review. Accordingly, OWCP in its March 1, 2013 decision properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied merit review with respect to appellant's June 13 and September 20, 2012 requests for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2013 and September 18, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 12, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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