



## ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> In a July 18, 2008 decision, the Board reversed OWCP's decision dated August 27, 2007 and remanded the case for development and adjudication of the claim. The Board found that appellant timely filed a claim for death benefits. In a decision dated January 3, 2011, the Board found that appellant did not meet his burden of proof to establish that the employee's death on April 6, 2003 was causally related to his employment.<sup>4</sup> The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.

In an appeal form dated May 13, 2013, appellant's representative requested reconsideration. She asserted that the evidence submitted supported that the employee, a deceased technical services supervisor, developed renal cell cancer with metastasis while performing his work duties which included working with and around asbestos at the employing establishment. Appellant's representative noted that the employee was first aware of his disease on August 15, 1999. The employee was terminated from employment due to a reduction-in-force on November 15, 1996. Appellant's representative summarized the employee's duties as a material tester noting his exposure to coal, coal ash and asbestos. She addressed the history of the employee's hospital admissions from August 22, 2000, when the employee was diagnosed with renal cell carcinoma. Appellant's representative contends that the medical evidence of record supports that the employee's death was causally related to his employment.

Appellant's representative resubmitted hospital records from November 14 to 19, 2002; a November 14, 2002 report from Dr. Burton Stodghill, a Board-certified orthopedic surgeon; a November 16, 2002 computerized tomography (CT) scan of the chest; a November 20, 2002 thoracentesis procedure note; hospital admission records from January 2 to 10, 2003; reports from Dr. Harry Carloss, a Board-certified internist; multiple pathology reports from November 2002 to February 2003; various x-ray, bone scan and CT scans from August 16, 2000 to April 5, 2003; a death certificate; a CA-1, notice of traumatic injury, alleging a left knee contusion on August 25, 1989; and employer medical records from December 11, 1984 to May 7, 1996. She also submitted the employee's October 26, 1983 and October 29, 1984 job applications; a job history summary; a job description for a public safety officer; a job description for a materials tester; e-mails dated January 5, 2009 from Mr. Bradford, a safety consultant and industrial hygienist; and a January 26, 2009 statement from James R. Hubbard, a safety consultant, all previously of record. Appellant's representative submitted a CA-2, notice of occupational disease, filed on December 26, 2001, in which the employee asserted that he sustained hearing loss as a result of his employment duties.

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<sup>3</sup> Docket No. 08-289 (issued July 18, 2008).

<sup>4</sup> Docket No. 10-177 (issued January 3, 2011).

Dr. Charles W. Ransler, a Board-certified urologist, provided reports dated January 24, 1989 to September 7, 2000. He treated the employee for intermittent pain in the left testis and diagnosed with mild chronic epididymitis. The employee underwent a CT scan on August 16, 2000 which revealed a mass in the left upper quadrant of the left kidney with necrosis, with no evidence of metastasis to the lungs or pelvis. Dr. Ransler hospitalized the employee and, on August 22, 2000, he performed a left radical nephrectomy with node dissection and adrenalectomy and diagnosed left renal cell carcinoma, stage A. He noted that the pathology report revealed a large necrotic tumor grade 2 with no evidence of invasion of the renal pelvis or capsule. In reports dated September 7, 2000 to December 26, 2002, Dr. Ransler noted a November 7, 2002 chest x-ray showed a mass and the employee reported pain in his left knee and a fractured femur which suggested a possible pathologic fracture from a metastatic lesion. On December 26, 2002 Dr. Ransler noted the nephrectomy was not extensive through the capsule and was grade 2, but there was a possible pathologic fracture of the left femur and a pleural effusion. He could not confirm metastatic disease as no actual tumor cells were found in the femur or lung.

The employee was also treated by Dr. Jimmie N. Mancell, a Board-certified internist. On February 24, 2003 Dr. Mancell diagnosed status post left proximal femur resection with endoprosthesis reconstruction, status post embolization of tumor vasculature, renal cell carcinoma status post left nephrectomy in 1997 with recent pathological fracture of the left femur and repair in December 2002. A February 24, 2003 pathology report from a left femur mass revealed malignant spindle cell proliferation and possible sarcomatoid. Chest x-rays of February 24 and 27, 2003 revealed an infiltrate in the left lower lobe. The employee was hospitalized on March 20, 2003 for metastatic renal cell carcinoma with symptoms of intractable nausea and vomiting and worsening renal function. On March 20, 2003 Dr. Anita L. Arnold, a Board-certified internist, diagnosed recurrent nausea and vomiting, acute and chronic renal insufficiency, renal cell carcinoma with metastasis to the lung bases and pleural effusions and bony metastases. A March 28, 2003 CT scan of the thorax showed moderate left pleural effusion with lower lobe atelectasis and an infiltrate in the right lung base.

By decision dated May 28, 2013, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>5</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be filed within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>7</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>6</sup> 20 C.F.R. § 10.607(a). *See also D.O.*, Docket No. 08-1057 (issued June 23, 2009); *W.G.*, Docket No. 08-2340 (issued June 22, 2009).

<sup>7</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

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.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>9</sup> is positive, precise, and explicit, and manifests on its face that OWCP committed an error.<sup>10</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also 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.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. The most recent merit decision was the Board's January 3, 2011 decision. Appellant's May 13, 2013 letter requesting reconsideration was received by OWCP more than one year after the January 3, 2011 merit decision. Therefore, it was not timely filed.<sup>12</sup> Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim for compensation.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. On reconsideration, appellant's representative asserted that the evidence submitted supported that the employee developed renal cell cancer with metastasis while performing his work duties, which included working with and around asbestos. Appellant's representative summarized the employee's duties and provided a detailed medical history. While appellant expressed disagreement with OWCP's denial of the claim, the general allegations concerning the employee's duties and medical treatment do not raise a substantial question as to the correctness

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<sup>8</sup> *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) (the term "clear evidence of error" is intended to represent a difficult standard).

<sup>9</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>12</sup> 20 C.F.R. § 10.607(a). *See* Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1604.4(a) (October 2011), which provides in pertinent part: [A] right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any merit decision by ECAB.

of OWCP's decision. OWCP properly found that appellant's statement of May 13, 2013 did not establish clear evidence of error.

The Board notes that the underlying issue is medical in nature. On reconsideration, appellant submitted additional medical evidence. Appellant resubmitted certain reports dated December 11, 1984 to April 6, 2003. OWCP previously considered this evidence and appellant did not explain how this evidence was positive, precise and explicit in manifesting on its face that it committed an error in denying the claim for compensation. The resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of OWCP's decision. Thus, these reports are insufficient to discharge appellant's burden of proof.

The reports from Dr. Ransler dated January 24, 1989 to September 7, 2000, noted treatment for renal cell carcinoma. On August 22, 2000 he performed a left radical nephrectomy with node dissection and adrenalectomy and diagnosed left renal cell carcinoma, stage A. In reports dated to December 26, 2002, Dr. Ransler noted a November 7, 2002 chest x-ray revealed a mass. On December 26, 2002 he opined that the employee probably had metastatic disease. Dr. Ransler noted the nephrectomy was not extensive through the capsule and there was a possible pathologic fracture of the left femur and a pleural effusion. These reports are insufficient to establish clear evidence of error on the part of OWCP in denying the claim.<sup>13</sup> This evidence is not so positive, precise or manifest that OWCP committed an error. Dr. Mancell's February 24, 2003 report noted diagnoses and a treatment plan and not the cause of the employee's condition. Dr. Arnold's March 20, 2003 report also noted diagnoses and a treatment plan but did not address the cause of the employee's diagnosed conditions or death. Other medical evidence such as diagnostic test reports did not specifically address whether the employees employment activities had caused or contributed to the employee's death. Evidence such as a well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion is not clear evidence of error.<sup>14</sup> Therefore, these reports are insufficient to show clear evidence of error by OWCP.

The Board notes that clear evidence of error is intended to represent a difficult standard. 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.<sup>15</sup>

Thus, appellant has not established clear evidence of error by OWCP in its May 28, 2013 decision.

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<sup>13</sup> *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>14</sup> *See Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>15</sup> *Id.*

**CONCLUSION**

The Board finds that appellant's request for reconsideration dated May 13, 2013 was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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