



On appeal, counsel asserts that the medical record establishes that she sustained a respiratory condition due to exposure to mold at work.<sup>2</sup>

### **FACTUAL HISTORY**

On July 28, 2011 appellant, then a 35-year-old general attorney, filed an occupational disease claim (Form CA-2) alleging that she sustained upper respiratory infections and gastrointestinal issues related to “mold poisoning.” She asserted that she was exposed to mold in areas of Building 25, including her paralegal’s office. Appellant asserted that, when a ceiling in an unspecified area was replaced on June 25, 2011, allegedly due to mold contamination, her “symptoms all returned tenfold and [she] realized the stemmed from the prevalent mold.”

In an August 25, 2011 letter, OWCP advised appellant of the additional evidence needed to establish her claim, including a detailed description of the alleged workplace exposures, the precise locations of any mold, the length and frequency of her exposures, and “supporting physical evidence or witness statements” to support her claim. It also requested a statement from her attending physician explaining the medical reasons why those exposures would cause the claimed conditions. OWCP afforded appellant 30 days to submit such evidence.

In a September 23, 2011 letter, the employing establishment noted that a mold survey was conducted “for the office where Regional Counsel is located” and that the “two employees who filed the claim were allowed to work from home until they were moved to another building while they are working on replacing the tiles.”

In a September 29, 2011 decision, OWCP denied appellant’s claim. It found that she did not submit sufficient evidence to establish that she was exposed to mold at work as alleged.

In an October 28, 2011 letter, appellant requested reconsideration. She submitted a July 27, 2011 industrial hygiene survey showing the presence of mold spores in Building 25, particularly in Small Conference Room No. 319 and an air vent in Library No. 320. Appellant also provided the August 1 and 30, 2011 reports of Dr. Kirk A. Nelson, an attending osteopathic physician, opining that workplace exposure to mold caused allergic asthma. She also submitted August 1 and 30, 2011 medical history forms, an August 2, 2011 spirometry report and August 22, 2011 chest x-ray.

By decision dated January 31, 2012, OWCP denied modification, finding that the additional evidence submitted was insufficient to establish fact of injury. It found that the new documents did not establish that appellant was exposed to mold at work.

In a January 31, 2013 form, received by OWCP on February 6, 2013, appellant requested reconsideration, asserting that she developed asthma and reactive airway disease because the employing establishment knew that mold was present in her work area but unreasonably delayed abatement procedures. She submitted October 8, 2012, June 26 and August 8, 2013 reports from

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<sup>2</sup> Appellant submitted new evidence accompanying her request for an appeal. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final merit decision in the case. 20 C.F.R. § 501.2(c).

Dr. Nelson relating appellant's account of respiratory issues developing after workplace exposures to mold in 2011. Dr. Nelson opined that the exposures aggravated appellant's extrinsic asthma.

Appellant also submitted a December 23, 2013 employing establishment form approving her request to telework to avoid mold exposure. She also provided a March 2, 2012 industrial hygiene report summarizing the July 27, 2011 mold spore report.

By decision dated August 9, 2013, OWCP denied appellant's request for reconsideration on the grounds that her request was not timely filed and failed to present clear evidence of error. It found that her letter was received on February 6, 2013, more than one year after the January 31, 2012 decision, the final merit decision in the claim. OWCP further found that Dr. Nelson's October 8, 2012 report did not address the critical issue of fact of injury, as his opinion did not establish that appellant was exposed to mold at work.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>3</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>4</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is received within one year of the date of that decision.<sup>6</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>7</sup>

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>8</sup> OWCP regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>9</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>5</sup> *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>6</sup> 20 C.F.R. §§ 10.607(a); 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>7</sup> *Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 5.

<sup>8</sup> 20 C.F.R. § 10.607(b); *Thankamma Mathews*, *supra* note 4.

<sup>9</sup> *Id.* at § 10.607(b).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error by OWCP.<sup>14</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

In its August 9, 2013 decision, OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision on January 31, 2012. Appellant's reconsideration request was received by OWCP on February 6, 2013, more than one year after issuance of the January 31, 2012 decision. OWCP denied the request by August 9, 2013 decision on the grounds that it was not timely filed and failed to present clear evidence of error. As it is now settled that the February 6, 2013 reconsideration request was not timely filed, it must now be determined whether the request demonstrated clear evidence of error in OWCP's January 31, 2012 merit decision.

In her February 6, 2013 letter, appellant asserted that the employing establishment knew that mold was present in her work area but unreasonably delayed the abatement procedures. The Board finds that this argument does not raise a substantial question as to whether OWCP's January 31, 2012 decision was in error or shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error.

The October 8, 2012, June 26 and August 13, 2013 reports from Dr. Nelson, an attending Board-certified orthopedic surgeon, duplicate his August 1 and 31, 2011 reports previously of record. Similarly, the March 2, 2012 industrial hygiene report summarizes the July 27, 2011 industrial hygiene survey previously of record. The Board has held that evidence that repeats or duplicates evidence previously submitted is insufficient to *prima facie* shift the weight of the evidence in favor of the claimant.<sup>16</sup> The term clear evidence of error is intended to represent a

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<sup>10</sup> *Thankamma Mathews*, *supra* note 4.

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 5.

<sup>13</sup> *Leona N. Travis*, *supra* note 11.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Gregory Griffin*, *supra* note 6.

<sup>16</sup> *D.E.*, 59 ECAB 438 (2008).

difficult standard. Appellant must present evidence which on its face shows that OWCP made an error.<sup>17</sup>

The December 23, 2013 accommodations form does not address the underlying issue of whether appellant was actually exposed to mold at work in 2011. Evidence which is irrelevant to the claim does not establish clear evidence of error.<sup>18</sup>

The Board finds that the additional evidence submitted does not demonstrate clear evidence of error. Appellant has not provided argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of OWCP's January 31, 2012 merit decision. Consequently, OWCP properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

On appeal, appellant asserts that the medical evidence is sufficient to establish that workplace mold exposures caused the claimed respiratory condition. This argument pertains to the merits of the claim, which are not before the Board on the present appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 9, 2013 is affirmed.

Issued: May 7, 2014  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>18</sup> *Leona N. Travis*, *supra* note 11.