

On appeal, appellant submitted additional evidence and argues that the evidence was sufficient to establish her claim.³

FACTUAL HISTORY

On November 10, 2011 appellant, then a 53-year-old nurse, filed an occupational disease claim (Form CA-2) for an allergic reaction to fumes from a floor cleaner. In a narrative statement, she indicated that her first exposure was on October 27, 2011 as her office was cleaned and waxed the prior evening. Appellant sneezed and felt nauseated and flushed. She submitted reports indicating that she received hospital treatment on October 27, 2011.

By decision dated December 20, 2011, OWCP denied the claim because it found that the factual evidence did not establish an incident and that the medical evidence did not establish a diagnosed injury related to federal employment.

Appellant requested a review of the written record by an OWCP hearing representative. She submitted additional evidence regarding treatment on October 27, 2011. In addition, appellant submitted evidence with respect to treatment in 2007 for an allergic reaction to cleaners.

In a decision dated March 16, 2012, the hearing representative affirmed the December 20, 2011 decision. She found that it was not clear whether appellant was claiming an injury resulting from one exposure on October 27, 2011, or multiple exposures. The hearing representative also found the medical evidence did not establish an injury casually related to exposure in federal employment.

On April 2, 2012 appellant requested reconsideration. She submitted a January 30, 2012 report from Dr. Paula Waddy, who stated that appellant was seen for coughing, nausea, vomiting, and sneezing after she had arrived at work. Dr. Waddy diagnosed allergic reaction to ammonia.

OWCP reviewed the merits of the claim and by decision dated May 7, 2012, denied modification. It found the medical evidence was insufficient to establish the claim.

Appellant again requested reconsideration on February 26, 2013. By decision dated April 23, 2013, OWCP found the evidence was insufficient to warrant merit review of the claim.

On October 2, 2014 OWCP received a request for reconsideration. Appellant reported in a September 21, 2014 letter that the exposure at work occurred on October 27, 2011, January 30, 2012, April 24, May 21, and October 25, 2013, and June 18, 2014. She submitted CA-2 forms dated November 1, 2013 and June 18, 2014, alleging an allergic reaction. Appellant included e-mail correspondence about a request for an accommodation by the employing establishment for her allergic reactions.

³ The Board's review of a case is limited to evidence that was before OWCP at the time of the final decision on appeal. 20 C.F.R. § 501.2(c)(1).

As to medical evidence, appellant submitted a brief report dated May 21, 2013 from Dr. Colette Hawthorne, a Board-certified internist. Dr. Hawthorne indicated that appellant was treated for an allergic reaction. She reported appellant had a known history of allergic reaction to cleaners. Appellant submitted a June 20, 2013 report from Dr. Miguel Battle, a family practitioner. Dr. Battle stated that appellant had been treated for several years for allergies which could be triggered by floor cleaners and products with ammonia. Despite this statement, he also opined that it might be difficult to know what had caused appellant's reaction. In a report dated October 25, 2013, Dr. Eugene Gnida, a Board-certified internist, stated that appellant had needed a wheelchair and the staff reported that she had fainted in response to cleaning chemicals. Appellant submitted a report dated June 14, 2014 from Dr. Andrew Reidy, an osteopath, indicating that she was treated on June 11, 2014 for an allergic reaction. Dr. Reidy indicated that appellant reported she had an allergy to cleaning products and the floors had just been cleaned at work. He provided results on examination and diagnosed allergic reaction.

By decision dated October 10, 2014, OWCP found appellant's reconsideration request was untimely. It denied the request without merit review of the claim, finding that the request failed to show clear evidence of error.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁴ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁶ This section gives OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁸ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ OWCP will consider an untimely application only if the application demonstrates clear evidence of error in its most recent merit decision. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁰

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.605 (2012).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Under section 8128 of FECA, "[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."

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 20 C.F.R. § 10.607 (2012).

¹⁰ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but 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.¹¹ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ 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.¹⁴

ANALYSIS

Appellant had filed an occupational illness claim alleging an injury causally related to exposure to fumes from floor cleaners. The last decision on the merits of the claim was dated May 7, 2012. The application for reconsideration was received on October 2, 2014. As this is more than one year after the May 7, 2012 decision, it is untimely.

Because the application for reconsideration was untimely, appellant must show clear evidence of error by OWCP. OWCP had denied the claim based on both the factual and medical evidence. As of the May 7, 2012 decision, appellant had discussed an October 27, 2011 incident, but submitted medical evidence with respect to allergic reactions in 2007, as well as October 27, 2011 and January 30, 2012 incidents. OWCP properly noted that there was some confusion as to the specific incidents of exposure appellant was alleging contributed to a diagnosed injury. On reconsideration appellant has further expanded her claim and discussed additional incidents of alleged allergic reactions through June 2014. This does not support a finding of clear evidence of error by OWCP in its May 7, 2012 decision. The claim was for an occupational illness that occurred from employment factors over more than one workday. OWCP denied the claim in part because the medical evidence did not contain a reasoned medical opinion, based on a complete background, with respect to a diagnosed condition causally related to the employment factors.

The medical evidence submitted on reconsideration does not establish clear evidence of error. The report from Dr. Hawthorne refers to a May 21, 2013 reaction, Dr. Gnida to an October 25, 2013 allergic reaction, and Dr. Reidy to a June 11, 2014 incident. None of these physicians provide a complete medical and factual history discussing the prior incidents of employment exposure, or a reasoned opinion as to a diagnosed condition causally related to the identified employment incidents. Dr. Battle refers to treatment over several years for allergies, without providing a complete history or a probative medical opinion on causal relationship between a diagnosed condition and federal employment exposure.

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *K.N.*, Docket No. 13-911 (issued August 21, 2013); *J.S.*, Docket No. 10-385 (issued September 15, 2010).

Moreover, even if appellant submitted medical evidence that could be construed to support a finding contrary to OWCP's finding, this is not clear evidence of error.¹⁵ For the reasons stated, the Board finds that appellant has not shown clear evidence of error.

On appeal appellant argues that OWCP dismissed all of her diagnoses and medical treatment for the episodes of exposure to cleaners and fumes. The Board does not have jurisdiction over these issues regarding the merits of the claim for compensation. Appellant did not show clear evidence of error and OWCP correctly denied the reconsideration request in this case.

CONCLUSION

The Board finds that OWCP properly determined appellant's application for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 10, 2014 is affirmed.

Issued: August 5, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Supra* note 12.