

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

A.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newtown, MA, Employer**

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**Docket No. 15-17
Issued: February 27, 2015**

Appearances:
Richard Heavey, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 2, 2014 appellant, through counsel, filed a timely appeal from an April 17, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request as it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed between the most recent OWCP merit decision, dated March 1, 2013 and the filing of this appeal on October 2, 2014, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

² On appeal appellant's counsel also submitted new evidence. However, the Board may not consider new evidence for the first time on appeal as its review of a case is limited to the evidence that was before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On September 10, 2012 appellant, then a 51-year-old mail carrier, filed a (Form CA-1), traumatic injury claim, alleging that on September 7, 2012 he was exposed to carbon monoxide due to a leak in the exhaust system of his mail truck. He stopped work on September 8, 2012 and returned to work on September 12, 2012.

Appellant submitted a September 7, 2012 report from Dr. Mark Lemon, a Board-certified emergency room physician, who diagnosed possible carbon monoxide exposure. Dr. Lemon found appellant's carboxyhemoglobin level was 1.8, which was a "physiologic" level. He indicated that it was hard to tie all of appellant's symptoms together and suggested the employing establishment test the carbon monoxide level in the mail truck. In a September 14, 2012 excuse note, Dr. Richard Dupee, a Board-certified internist, noted that appellant could not work beginning September 9, 2012 due to an illness.

By letter dated December 20, 2003, OWCP advised appellant that his claim was originally received as a simple, uncontroverted case, which resulted in minimal or no time loss from work. It indicated that his claim was administratively handled; however, the merits of the claim had not been formally adjudicated. OWCP advised that, because a claim for wage loss was received, appellant's claim would be formally adjudicated. It requested that he submit additional information, including a comprehensive medical report from his treating physician with a reasoned explanation as to how the specific work factors or incidents identified by him had contributed to his claimed injury.

Appellant submitted statements dated January 14 and February 22, 2013. He stated he had reported to management that the exhaust in his mail truck made loud noises and he believed that he was poisoned over a period of time through carbon monoxide exposure. Appellant indicated that his mail truck was overdue for repairs and on September 7, 2012 the employing establishment had the entire exhaust system replaced.

Appellant submitted emergency room records from Dr. Lemon dated September 7, 2012 who noted appellant's symptoms were consistent with possible carbon monoxide exposure. He found that screening results were normal and the carboxyhemoglobin level was normal at 1.8. In a September 11, 2012 report, Dr. Dupee diagnosed toxic effect of carbon monoxide, unspecified sleep apnea, secondary hypertension, and obesity. Appellant reported carbon monoxide poisoning from an exhaust leak in his work vehicle. In reports dated January 10 and 18, 2013, Dr. Dupee noted that appellant returned to work but was not able to perform his daily duties due to ongoing carbon monoxide poisoning. He opined that appellant's symptoms in conjunction with the broken exhaust pipe in his mail truck, and the replacement of the truck's entire exhaust system by the employing establishment, supported that his condition was work related.

Appellant submitted a report from Dr. Bryan K. Ho, a Board-certified neurologist, who treated appellant on September 19, 2012 for headaches, memory loss, and concentration issues and opined his symptoms could be consistent with low level carbon monoxide exposure. An October 1, 2012 magnetic resonance imaging (MRI) scan of the brain was normal. Appellant was treated by Dr. Nicholas Hill, Board-certified in pulmonary disease, from October 18, 2012 to January 10, 2013, for dizziness, nausea, and headaches. He reported that on September 7, 2012

his symptoms worsened while he was driving his mail truck, which had a hole in his exhaust system. Dr. Hill opined that this did not seem to be a carbon monoxide poisoning as the carbon monoxide level at the emergency room on September 7, 2012 was normal. On October 26, 2012 appellant was treated by Dr. Amy Chi, a Board-certified cardiologist, who conducted a cardiopulmonary stress test which was normal.

On March 1, 2013 OWCP denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that a medical condition was diagnosed in connection with the claimed event or work factors.

In an appeal form dated February 21, 2014 and received by OWCP on March 3, 2014, appellant's counsel requested reconsideration.³ In a statement dated February 25, 2014, appellant asserted that he had carbon monoxide poisoning and submitted new medical records. He submitted a report from David Penny, PhD., a physiologist specializing in toxicology, dated November 13, 2013, a report from Dr. Dupee dated February 20, 2014, and maintenance records from the employing establishment showing an exhaust leak in his mail truck. Counsel contended that the evidence conclusively showed that appellant was subjected to carbon monoxide poisoning. Appellant further provided a carbon monoxide fact sheet, a report from Dr. Hill dated January 10, 2013, a copy of his statement dated February 22, 2013, and a copy of the March 1, 2013 OWCP decision, all previously of record.

Dr. Dupee's February 20, 2014 report noted treating appellant after the September 7, 2012 incident for possible carbon monoxide poisoning. He reviewed emergency room records, a brain MRI scan, neurological examination findings, cardiopulmonary examination, and a toxicology report and the tests revealed no physiological brain damage, no neurological or cardiopulmonary issue that may have caused the symptoms appellant experienced on September 7, 2012. Dr. Dupee noted, however, all the symptoms of concentration, confusion, and fatigue were characteristic of carbon monoxide exposure occurring over time at low levels. He opined that appellant's symptoms on September 7, 2012 of nausea, headache, and dizziness were caused by chronic carbon monoxide poisoning syndrome from August to September 7, 2012. Dr. Dupee noted that appellant was totally disabled from September 7 to 25, 2012 due to carbon monoxide exposure. Appellant submitted a May 6, 2013 employing establishment work order which noted that on September 8, 2012 an automobile was repaired for exhaust leak, flashers, brakes, seat belts with a notation that the gasket exhaust outlet pipe, and gasket exhaust system were replaced. He submitted a questionnaire which documented residual symptoms and intensity based on self-reporting.

In his November 13, 2013 report, Dr. Penny reviewed appellant's medical records and performed cognitive testing and opined that he was exposed to carbon monoxide for an extended period of time such that chronic carbon monoxide poisoning existed intermittently for several weeks during the summer of 2012. He noted that the medical records from September 7, 2012 were consistent with possible carbon monoxide poisoning and that a carboxyhemoglobin level of 1.8 was high for a nonsmoker as normal is .4 to 1.4 percent. Dr. Penny indicated that although an MRI scan of the brain was normal this finding did not eliminate the possibility that carbon

³ With the reconsideration request, appellant's counsel submitted a U.S. Postal Service mailing label indicating that the request was sent to OWCP on February 25, 2013 with an expected date of delivery of February 27, 2013.

monoxide exposure produced functional damage. He opined that appellant's physical symptoms, sensory/motor and gross neurologic symptoms, cognitive memory, and affective emotional conditions were all consistent with long-term effects of carbon monoxide poisoning. Dr. Penny opined that the analysis indicated a causal relationship between the carbon monoxide poisoning in August and September 2012 and appellant's health impairments. Appellant submitted a carbon monoxide fact sheet dated March 3, 2014.

By decision dated January 17, 2014, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁴

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.⁶

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 *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.⁷ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that

⁴ 5 U.S.C. 8128(a).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁷ *Annie L Billingsley*, 50 ECAB 210 (1998).

⁸ *Jimmy L. Day*, 48 ECAB 652 (1997).

the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹¹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹² As appellant's request for reconsideration was not received by OWCP until March 3, 2014, more than one year after issuance of the March 1, 2013 merit decision, it was untimely.¹³ Consequently, he must demonstrate clear evidence of error by OWCP in its March 1, 2013 decision denying his claim for a traumatic injury.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his February 25, 2014 statement, appellant's counsel indicated that he submitted sufficient medical evidence to show work-related carbon monoxide poisoning. Counsel argued that the evidence submitted conclusively showed carbon monoxide poisoning. While appellant addressed his disagreement with OWCP's decision denying his claim for a traumatic injury, his general allegations do not raise a substantial question as to the correctness of OWCP's decision.

In support of his reconsideration request, appellant submitted a report from Dr. Hill dated January 10, 2013, a copy of his statement dated February 22, 2013 and a copy of the March 1, 2013 OWCP decision. OWCP had previously considered this evidence. Resubmission of this evidence is not sufficient to raise a substantial question as to the correctness of the OWCP's decision. Thus, these reports are found to be insufficient to discharge appellant's burden of proof.

The Board notes that the underlying issue is medical in nature and that, on reconsideration, appellant submitted additional medical evidence. Appellant submitted a report from Dr. Dupee dated February 20, 2014, who noted treating appellant after the September 7, 2012 incident for possible carbon monoxide poisoning. Dr. Dupee reviewed appellant's treatment records and opined that his symptoms of concentration, confusion, and fatigue were characteristic of carbon monoxide exposure that occurs over time at low levels. He opined that appellant's symptoms of nausea, headache, and dizziness presented on September 7, 2012 were

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

¹² *See supra* note 4.

¹³ Although counsel submitted a U.S. Postal Service document with the reconsideration request indicating that the request was scheduled for delivery on February 27, 2014, the record indicates that the request was not received by OWCP until March 3, 2014, more than one year after the March 1, 2013 decision.

caused by chronic carbon monoxide poisoning syndrome. However, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision. Even if this report offered reasoned support for causal relationship, it would be insufficient to establish clear evidence of error. This evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. 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 sufficient to establish clear evidence of error.¹⁴

Appellant also submitted a report from Dr. Penny, a physiologist, who opined that appellant was exposed to carbon monoxide for an extended period of time such that chronic carbon monoxide poisoning existed intermittently for several weeks during the summer of 2012. However, a physiologist is not a physician as defined under FECA.¹⁵ The Board has found that medical documents not signed by a physician are not probative medical evidence.¹⁶

Appellant submitted a carbon monoxide fact sheet. However, the Board has held that medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether a specific condition claimed is related to the particular employment factors alleged by the employee.¹⁷ Appellant also submitted an employing establishment work order for a mail truck dated May 6, 2013 and a questionnaire in which appellant documented residual symptoms of his carbon monoxide exposure. However, as noted above, the underlying issue is medical in nature and therefore this evidence is not so positive, precise, and explicit that it manifests on its face that OWCP committed an error. Therefore, this evidence is insufficient to raise a substantial question as to the correctness of OWCP's decision.

For these reasons, appellant has not established clear evidence of error by OWCP in its March 1, 2013 decision.

On appeal, appellant asserted that the reconsideration request was submitted timely as the merit decision was issued on March 1, 2013 and the reconsideration request was mailed on February 25, 2013. The Board notes that pursuant to OWCP regulations 20 C.F.R. § 10.607(a) an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁸ As appellant's request for reconsideration was not

¹⁴ *D.G.*, 59 ECAB 455 (2008).

¹⁵ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

¹⁶ See *R.M.*, 59 ECAB 690 (2008); *Bradford L. Sullivan*, 33 ECAB 1568(1982) (where the Board held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in FECA).

¹⁷ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁸ 20 C.F.R. § 10.607(a).

received by OWCP until March 3, 2014, more than one year after issuance of the March 1, 2013 merit decision, it was untimely. He reiterated his assertions that Dr. Dupee and Dr. Penny provided rationalized opinions as to how the diagnosed condition and disability was related to the September 7, 2012 incident. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not established clear evidence of error by OWCP.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 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