

Appellant was treated by Dr. Thomas J. Ungarino, a Board-certified pulmonologist, for a syncopal episode on September 3, 2009. He reported becoming short of breath after being exposed to a fan at work that was cleaned with toxic chemicals listed as M-99. Dr. Ungarino diagnosed reactive airway disease and toxic inhalation with chronic tobacco use and recommended that appellant seek an alternative workstation.

By letter dated August 14, 2012, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim, particularly a physician's reasoned opinion addressing the relationship of his claimed condition to his specific employment factors.

In a narrative statement appellant indicated that he was exposed to M-99 and chlorine used to clean a fan while at work. He indicated that he started his job as a rotoblaster, went outside to cool off in front of a portocool fan, was exposed to fumes, and became ill. Appellant was treated in the emergency room by Dr. James V. Palazzolo, a Board-certified pulmonologist, on September 3, 2009 and was admitted for shortness of breath, toxin inhalation, rule out pulmonary embolism, and tobacco abuse with chronic obstructive pulmonary disease (COPD) with acute exacerbation. Dr. Palazzolo diagnosed shortness of breath improved, toxin inhalation, chronic tobacco abuse, and probable COPD. In a coding abstract dated September 3, 2009, he noted that appellant was admitted to the hospital from September 3 to 8, 2009 and diagnosed shortness of breath, toxic effect of gas/vapor, fumes/vapor bronchial pneumonia, poison/gas vapors, COPD, and tobacco use disorder. Also submitted was blood work from September 3, 2009.

Appellant was treated by Dr. Jyotir Mehta, a Board-certified internist, from March 30, 2010 to July 31, 2012, for reactive airway disease secondary to exposure of M-99 chemical and phosgene gas inhalation. On March 30, 2010 Dr. Mehta noted that appellant reported being exposed to a fan which was cleaned with chemical M-99, degreasing solution and bleach which created a phosgene gas. Appellant reported that the fan was blowing directly on him and he was not required to use a mask. Dr. Mehta diagnosed reactive airway disease secondary to the exposure of M-99 chemical, phosgene gas inhalation, and bronchial asthma new onset after exposure to chemicals. In a report dated August 19, 2012, he diagnosed severe obstructive sleep apnea. Appellant submitted a disabled person license plate affidavit dated December 13, 2010.

In a statement dated September 27, 2012, the employing establishment controverted appellant's claim and indicated that the use of "cirtridat" and M-99 for steam cleaning in the prescribed manner was approved by the Occupational Safety and Health Administration (OSHA) and posed no respiratory or toxic risks. Upon investigation, it found that neither the steam cleaning room nor the entire shop area had chlorine present or near the work area, the use of bleach was a controlled substance, and that it was used only by authorized personnel required to break down and clean the cooling fans. The employing establishment noted the process took place in a different building and under strict guidelines. It submitted witness statements from two employees who claimed they never saw cooling fans being washed with Clorox or bleach.

On October 30, 2012 OWCP denied appellant's claim for compensation as the evidence was insufficient to support that the injury or event occurred as alleged.

On May 15, 2013 appellant requested an oral hearing. He submitted a coding abstract dated September 3, 2009 from Dr. Palazzolo, blood work from September 3, 2009, a December 13, 2010 disabled person's license plate affidavit, a report from Dr. Mehta dated August 19, 2012, and a copy of the October 30, 2012 OWCP decision, all previously of record. Appellant also submitted a witness statement from another coworker who worked in the steam/blast area from 2005 to 2008 at which time she witnessed employees mix M-99 degreaser and chlorine bleach in a spray canister to remove cosmoline off vehicles.

By decision dated October 30, 2013, OWCP denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied as the issues in this case could equally be addressed by requesting reconsideration from the district office.

On September 15, 2014 appellant requested reconsideration. He submitted a copy of OWCP's decision dated October 30, 2013 previously of record. Appellant submitted an emergency room report from Dr. William Flowers, a Board-certified emergency room physician, who treated appellant for upper airway irritation. He reported a history of inhalation of noxious fumes and a chemical spill at work. Appellant noted a history of inhaling chemicals four years prior which had caused several lung-related issues. He further alleged current exposure to chemicals at work. Dr. Flowers noted a portable chest x-ray revealed no acute abnormalities, lung fields were clear and normal cardiac shadow. He noted mild respiratory distress, normal respiratory rate and volume, no evidence of upper airway obstruction, no cough, diffuse auscultatory findings with a few scattered wheezes. Dr. Flowers diagnosed acute bronchospasm and toxic effect of gas/fumes or vapors.

By decision dated October 21, 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.”¹

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

¹ 5 U.S.C. § 8128(a).

one year of the date of OWCP's decision for which review is sought.² 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.³

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.⁴ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ 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.⁷ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.⁸

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.⁹ As appellant's request for reconsideration was not received by OWCP until October 7, 2014, more than one year after issuance of the October 30, 2012 merit decision, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in its October 30, 2012 decision denying his claim for compensation.

The Board finds that appellant has not established clear evidence of error on the part of OWCP. In his September 15, 2014 reconsideration request, appellant disagreed with OWCP's decision denying his claim for compensation. While he addressed his disagreement with the denial of his compensation claim, this does not raise a substantial question as to the correctness of OWCP's decision.

² 20 C.F.R. § 10.607(a).

³ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁴ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁵ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ 20 C.F.R. § 10.607(a).

In support of his reconsideration request, appellant also submitted several documents. Appellant submitted a coding abstract dated September 3, 2009 from Dr. Palazzolo, blood work dated September 3, 2009, a December 13, 2010 disabled person's license plate affidavit, a report from Dr. Mehta dated August 19, 2012, a copy of the October 30, 2012 initial denial decision, and a copy of OWCP's decision dated October 30, 2013 denying an oral hearing. All of this evidence had previously been considered by OWCP and failed to demonstrate that OWCP had committed an error in denying his claim for compensation.

Appellant submitted a new emergency room report from Dr. Flowers dated September 18, 2014. Dr. Flowers diagnosed acute bronchospasm and toxic effect of gas/fumes or vapors. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as 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.¹⁰

Appellant also submitted a statement from a coworker who worked in the steam/blast area from 2005 to 2008 and during that time she witnessed employees mix M-99 degreaser and chlorine bleach in a spray canister to remove cosmoline off vehicles. However, this evidence is insufficient to show clear evidence of error. She did not witness appellant's exposure to toxic fumes, specifically, M-99 degreaser and chlorine bleach and does not establish exposure by appellant to hazardous chemicals. The Board notes that clear evidence of error is intended to represent a difficult standard.¹¹ This evidence does not raise a substantial question as to the correctness of OWCP's decision.

Consequently, appellant has not established clear evidence of error by OWCP in its October 30, 2012 decision.

On appeal, appellant reiterated assertions that he made before OWCP that he was at work when he was exposed to fumes that caused him to be ill. 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.

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992); *Leona N. Travis*, 43 ECAB 227 (1991). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (March 2011).

¹¹ *D.G.*, 59 ECAB 455 (2008).

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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