

On appeal appellant contends that her request for reconsideration was timely filed.

FACTUAL HISTORY

Appellant, a 55-year-old electronics technician instructor, filed an occupational disease claim (Form CA-2) on September 26, 2013 alleging that she developed a respiratory condition causally related to employment factors. She asserted that her worksite had ongoing mold issues, but that while some improvements were made to room 103 in LSTC Building #211 within the past couple of years, a permanent fix was not accomplished. Appellant explained that instructors who had been in the building for the majority of a workweek had allergies sneezing, and coughing. She stated that her whole body itched, her eyes also burned, and she had bad, constant headaches.

On October 9, 2013 OWCP advised appellant that it required factual and medical evidence to determine whether she was eligible for compensation benefits. It requested that she submit a comprehensive report from her treating physician describing her symptoms, the medical reasons for her condition, and an opinion as to whether her claimed condition was causally related to her federal employment. OWCP afforded appellant 30 days to submit this evidence.

In a report dated September 24, 2013, Dr. Gregg S. Govett, Board-certified in internal medicine, noted that appellant was examined on August 26, 2013 for a three-year history of malaise, fatigue, insomnia, throat irritation, gastroesophageal reflux disease, coughing, dyspnea, irritable bowel syndrome, left forearm pain, back pain, cervical spine pain, blurred vision, carpal tunnel symptoms, hives, and chemical sensitivities that developed after being exposed to mold in her workplace. He noted that her laboratory testing was positive for tricothecenes, a mycotoxin secreted by several species of mold, most notably stachybotris, the “black mold.” Allergy testing did not indicate any evidence of mold allergy. Laboratory testing was normal except for a positive titer for autoimmune thyroiditis. Dr. Govett concluded that appellant was currently infected with the mycotoxin tricothecenes, which could cause other illness. He advised that she must stop the pollution from entering her body by completely avoiding all moldy buildings.

On October 27, 2013 OWCP received a supplemental statement from appellant wherein she described in detail her alleged employment-related exposure.

By decision dated February 7, 2014, OWCP denied appellant’s claim. It accepted that she had become infected with mycotoxin tricothecenes, and that the alleged work factors occurred, but found that she failed to submit sufficient medical evidence to establish that her claimed condition was causally related to the accepted work factors.

By letter dated February 4, 2015, received on February 10, 2015 appellant requested reconsideration.

With her request for reconsideration appellant submitted a supplemental statement. She asserted that her employing establishment had the responsibility to make her work environment a pleasant and safe place to work. Appellant explained that her employing establishment was aware that the Heating Ventilation and Air Conditioning (HVAC) units were oversized for the rooms in LSTC Building #211 causing relative humidity levels to regularly exceed 70 percent in

the building. She also noted that annual inspections of the building, if properly conducted, would have revealed evidence of roof leaks, and water entry from all sides of the building due to improper ground levels and improper caulking. Appellant alleged that the employing establishment knew of excess humidity and mold occurring in the LSTC Building #211 since 2008, but only took minimal steps to correct the situation at that time. She further outlined that, from September 2008 until August 2013, she worked in the LSTC Building #211, averaging 50 hours/week. Appellant concluded that, due to high humidity levels, having oversized HVAC units that could not draw out excess moisture, and having high temperatures in the building due to energy conservation mandates, the building became moldy, and as a result, her work environment became unpleasant and unsafe. She stated that she exhibited symptoms of mold exposure. Appellant noted that she had sinus problems with a constant headache and new neurological symptoms including odd senses of smell, tingling back sensations, and constant skin itch of the head, back, and especially nose. She related that she tested positive for tricothecene mycotoxins on September 3, 2013. Appellant stated that she moved out of the LSTC Building #211 in August 2013 and began a daily medical regimen by Dr. Govett to rid her body of tricothecene mycotoxins. After the employing establishment advised that, mold abatement had been completed (approximately mid-May 2014), she was advised that employees could reenter the L5TC Building #211. However, proper mold abatement included cleaning building to ensure no dust remains after work has been finished. The LSTC Building #211 was not clean. Heavy dust covered everything that had remained in the building during the abatement process only after cleaning 95 percent of the lab, was appellant informed that management had provided cleanser to use when wiping the mold. Appellant concluded that as of February 2015 her condition had improved.

Appellant submitted a September 3, 2013 mycotoxin panel report, which noted that she tested positive for tricothecene. She also submitted a December 2, 2014 report from Dr. Govett, wherein he reported that she was initially seen on August 26, 2013 with a number of symptoms, after mold exposure. Dr. Govett noted that upon testing appellant was found to have diagnoses of autoimmune thyroiditis, adrenal hypofunction, food sensitivities, and tricothecenes. He concluded that, after treatment, she had resolved most of her initial complaints and her repeat urinalysis showed a significant reduction in triothecenes.

OWCP also received from appellant a September 25, 2006 booklet entitled “Guidance for Management of Mold in FAA Facilities.”

By decision dated July 27, 2015, OWCP denied appellant’s request for reconsideration without a merit review, finding the request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP’s decision denying or terminating a benefit, a claimant’s application for review must be received within one year of the date of that decision.³

³ 20 C.F.R. § 10.607(a).

The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

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 decided by OWCP. The evidence must be positive, precise and explicit and it must manifest on its face that OWCP committed an error.⁵

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.⁶

Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ 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.⁹ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on February 7, 2014. Appellant's request for reconsideration was received by OWCP on February 10, 2015. Therefore, the Board finds that the request was untimely as it was received outside of the one-year time limit.

The Board further finds that appellant's February 10, 2015 untimely request for reconsideration failed to demonstrate clear evidence of error. OWCP has accepted that she was diagnosed with mycotoxin tricothecenes, and that the alleged work factors occurred, but found that she failed to submit sufficient medical evidence to establish that her claimed condition was causally related to the accepted work factors. With her request for reconsideration, appellant submitted the mycotoxin panel report and Dr. Govett's December 2, 2014 report, both of which

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁶ *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁷ *Jimmy L. Day*, 48 ECAB 652 (1997).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

confirmed the diagnosis. She did not however submit medical evidence which explained how her diagnosed condition was caused by the accepted employment factors. Appellant did not submit medical evidence sufficient to *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of OWCP's decision. Consequently, she has failed to demonstrate clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review.

CONCLUSION

The Board finds that OWCP properly determined that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board