

ISSUE

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

FACTUAL HISTORY

On July 11, 2013 appellant, then a 48-year-old material handler, filed a traumatic injury claim (Form CA-1). She alleged that on June 24, 2013 while supervising the transport of merchandise from the warehouse, a worker sprayed pesticide which caused her to have an asthma attack from a restricted airway, difficulty breathing, and elevated blood pressure due to toxic fumes. Appellant's supervisor noted that an investigation revealed that there was no spraying or fogging being conducted in the area as alleged. Appellant stopped work on the date of injury and returned to work on June 28, 2013.

In a June 24, 2013 diagnostic report, Dr. Susan Pinero, a Board-certified diagnostic radiologist, advised that an x-ray of the chest revealed unremarkable soft tissue and cardiomedial silhouette and clear lungs bilaterally. A June 24, 2013 emergency department report was also submitted.

By letter dated April 8, 2014, OWCP advised appellant of the type of evidence needed to establish her claim and afforded her 30 days to reply. On April 8, 2014 it also requested that the employing establishment provide additional information regarding appellant's claim, including any comments from a knowledgeable supervisor on the accuracy of the statements provided by appellant regarding the claimed injury.

In a May 5, 2014 letter, the employing establishment advised that it did not concur with appellant's allegations. It contended that there were no pesticides used in the claimed area on the date in question. The employing establishment indicated that the department responsible for using pesticides did not have any record of her work area being treated on that date. It noted that the product appellant claimed was sprayed was "Best Yet" which is an organic based product made from cedar oil. The employing establishment provided a position description for a material handler as well as a material data sheet for a product named "Best Yet."

By decision dated July 8, 2014, OWCP denied appellant's claim. It found that appellant failed to establish the factual component of fact of injury, as the evidence of record was insufficient to establish that the events occurred as described.

On October 20, 2015 appellant returned OWCP's questionnaire. She noted that she was not exposed to any irritants or chemicals in her home or outside of her federal employment. Appellant advised that she was diagnosed with asthma in middle school and noted that she was not a smoker.

Appellant submitted additional evidence that was also received on October 20, 2015. In a June 24, 2013 statement, Donald Henry, a cook supervisor at the employing establishment, advised that on June 24, 2013, during the morning hours, he entered the warehouse area to

retrieve needed items from the freezer when he smelled an odor with a cedar-type chemical in the air.

In a June 25, 2013 statement, Douglas G. Martin, a material handler supervisor at the employing establishment, advised that on June 25, 2013, while working his assigned post in the warehouse, he noticed a spray bottle near the recycling area which contained a liquid substance. He indicated that he picked up the bottle and noticed that it had a cedar odor.

In an October 15, 2015 report, Dr. Lyndall Harrison, Board-certified in allergy and immunology, advised that appellant had been under his care for several years for asthma. He noted that on June 24, 2013 appellant related that she was exposed at her job to a pesticide containing cedar oil that was supposed to only be used outdoors. Dr. Harrison noted that within a few minutes she developed acute tightness in her chest and dyspnea when she smelled the product. He noted that the symptoms became so severe that she required care at the emergency room. Dr. Harrison indicated that appellant had a long history of asthma triggered by environmental factors and opined that it was very probable that such exposure to a pesticide caused her to develop acute asthma symptoms as she described.

By letter dated October 20, 2015, received by OWCP on October 26, 2015, appellant requested reconsideration. In a December 7, 2015 letter, received on December 17, 2015, she again requested reconsideration.

By decision dated March 23, 2016, OWCP denied appellant's request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

On appeal appellant's representative contends that the employing establishment falsely claimed on the (Form CA-1) that "an investigation revealed that there was no fogging operation being conducted in the area." He argues that this false information casts doubt on OWCP's finding that there was no clear "fact of injury." Appellant's representative notes that the employing establishment was unable to produce any investigative report and informed him that "there is no documentation regarding an injury investigation." He requests that OWCP either produce the investigative report that they utilized to deny the claim or accept the claim.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, it must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of

³ 20 C.F.R. § 10.607(a).

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

error.⁵ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁷ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁸ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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 on the part of OWCP.¹¹

ANALYSIS

In its March 23, 2016 decision, OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request dated October 20, 2015, was not received by OWCP until October 26, 2015. Because appellant's reconsideration request was not received within one year of the July 8, 2014 merit decision, appellant must demonstrate clear evidence of error by OWCP.¹²

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP in the denial of her traumatic injury claim. The evidence submitted by appellant did not raise a substantial question concerning the correctness of OWCP's decision.

In support of her reconsideration request, appellant submitted additional evidence. In a June 24, 2013 statement, appellant's coworker advised that on June 24, 2013 during the morning hours he entered the warehouse area to retrieve needed items from the freezer when he smelled an odor with a cedar-type chemical in the air. In another June 25, 2013 statement, appellant's

⁵ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁶ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011). OWCP procedures further provide that 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 an error. Evidence such as 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 clear evidence of error.

⁷ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹⁰ See *supra* note 7.

¹¹ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹² See 20 C.F.R. § 607(a) (an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought).

coworker advised that on June 25, 2013 while working his assigned post in the warehouse, he noticed a spray bottle near the recycling area, which contained a liquid substance. He indicated that he picked up the bottle and noticed a cedar-type odor. In an October 20, 2015 response to an OWCP questionnaire, appellant noted that she was not exposed to any irritants or chemicals in her home or outside of her federal employment. She advised that she was diagnosed with asthma in middle school and noted that she was not a smoker. Although these factual statements are supportive of the claim, they do not raise a substantial question as to the correctness of OWCP's July 8, 2014 decision. 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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized report, which if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of a case.¹³ As explained, it is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴

In his October 15, 2015 report, Dr. Harrison advised that appellant had been under his care for several years for asthma. He noted that on June 24, 2013 appellant related that she was exposed at her job to a pesticide containing cedar oil that was only supposed to be used outdoors. Dr. Harrison opined that it was probable that such pesticide exposure caused her to develop acute asthma symptoms. Although his report provides some support for causal relationship, it does not raise a substantial question as to the correctness of OWCP's determination that appellant did not establish the factual component of fact of injury. The Board has held that clear evidence of error is not established if appellant's new evidence does not address the issue upon which OWCP originally denied the claim.¹⁵

On appeal appellant's representative contends that the employing establishment falsely claimed on the (Form CA-1) that "an investigation revealed that there was no fogging operation being conducted in the area." He argues that this false information casts doubt on OWCP's finding that there was no clear "fact of injury." Appellant's representative notes that the employing establishment was unable to produce any investigative report and informed him that "there is no documentation regarding an injury investigation." He requests that OWCP either produce the investigative report that it utilized to deny the claim or accept the claim. However, as noted, the Board does not have jurisdiction over the merits of the claim. Furthermore, the allegation that the employing establishment falsely claimed to have conducted an investigation does not raise a substantial question as to the correctness of OWCP's decision.

Consequently, appellant has not established clear evidence of error on the part of OWCP. The Board, therefore, finds that, in accordance with OWCP's internal guidelines and Board precedent, OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹³ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁴ *See supra* note 7.

¹⁵ *See supra* note 6.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2016
Washington, DC

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

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

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