United States Department of Labor
Employees' Compensation Appeals Board

U.C., Appellant	)	
and	)	**Docket No. 16-0855**
	)	**Issued: December 8, 2017**
NUCLEAR REGULATORY COMMISSION, REGION I, King of Prussia, PA, Employer	)	

Appearances:
Stephen J. Dunn, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 17, 2016 appellant, through counsel, filed a timely appeal from a September 23, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 18, 2006, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding it was untimely filed and failed to demonstrate clear evidence of error with respect to the August 18, 2006 merit decision.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 31, 2005 appellant, then a 62-year-old former reactor systems engineer, filed an occupational disease claim (Form CA-2) alleging that he was exposed to radiation in the performance of duty.[3] He reported having worked at the Three Mile Island facility in Middletown, PA, as well as 20 other operating reactors and spent fuel storage facilities in the Northeast and Mid-Atlantic region (NRC Region 1).[4] From April 1984 until June 1986, appellant claimed to have spent a third of his time (1,500 to 2,000 hours) at various NRC Region 1 nuclear facilities. He also alleged that NRC's radiation dosimetry records were incomplete and did not accurately reflect the full extent of his radiation exposure.

In 1986, appellant reportedly began suffering a mysterious illness that subsequently worsened. His symptoms and/or conditions included colorectal pain/bleeding, frequent urination, nausea, vomiting, acid reflux, dry mouth, loss of teeth, diabetes, cataract/ptosis, memory lapse, depression, immunodeficiency, chest pain, shortness of breath, and electrocardiogram abnormalities. Appellant indicated that April 25, 2002 was when he first realized his illness was employment related. At that time, a physician reportedly advised appellant that he was a "radiation victim."

Medical reports received concerned a variety of medical issues, including high cholesterol, Type 2 diabetes, a colon condition, adjustment disorder with anxiety and depression, post-traumatic stress disorder, reduced vision, cataract surgery, missing teeth, and tooth decay. Several of the physicians noted a history of radiation exposure and opined that the reported conditions and/or problems were consistent with radiation exposure.

In an April 19, 2005 letter, the employing establishment's Chief of Human Resources, Jacqueline F. Jackson, noted that the employing establishment disagreed in substantial part with appellant's latest occupational disease claim. First, she noted that appellant previously filed a claim for a colorectal disorder, which he attributed to employment-related stress. Ms. Jackson indicated that OWCP denied appellant's October 1998 stress-related claim in OWCP File No. xxxxxx432. She further noted that appellant's colorectal condition had also been linked to a July 1991 motor vehicle accident, which was the subject of an unsuccessful traumatic injury claim in OWCP File No. xxxxxx079. Appellant claimed his colorectal disorder, and other conditions, were linked to alleged radiation exposure while working as a nuclear power plant inspector between April 1984 and July 1986. Ms. Jackson argued that appellant's claim for radiation illness "presupposes that [he] was exposed to high levels of radiation." However, in her opinion, the evidence clearly showed that "[appellant] was not exposed to levels of radiation … that could result in the symptoms complained of in the [Form CA-2]."

Ms. Jackson explained that when appellant worked in Region 1, the employing establishment had a program for the protection of employees against ionizing radiation, which

[3] A December 28, 1999 notification of personnel action (Standard Form 50-B) indicated that appellant's disability retirement was effective January 1, 2000. His separation from service date was later changed to January 28, 2000.

[4] Appellant began working for NRC in April 1984. From 1976 to 1978, he worked at the Department of Energy's Idaho National Engineering Laboratory (INEL/INL).

was substantially similar to the program currently in place.[5] She noted that the program was designed to monitor and track possible radiation exposure, and to ensure that any such exposure was well within safe limits. Ms. Jackson further noted that the employing establishment's policy for protecting its employees against occupational radiation exposure was consistent with the standards applied to licensed operations under 10 C.F.R. Part 20 - Standards For Protection Against Radiation. She explained that the employing establishment's Directive/Handbook 10.131 established annual occupational dose limits for employees. Ms. Jackson noted that the current limit on the total effective dose equivalent (the whole body dose) was five rems per year.[6] She explained that all employees who may exceed 10 percent of the exposure limits were monitored, which involved wearing a personal dosimeter that recorded the amount of radiation that the wearer was exposed to in the course of performing his/her duties. Ms. Jackson further noted that the dosimeters were analyzed, and records were kept of each dosimeter's reading. More recent employee dosimeter records were maintained in a computer database; however, some older records (pre-1991) were retained in paper form at the employing establishment's four regional offices. Ms. Jackson also noted that employee records were separate from licensee dosimeter records. She explained that each licensee had its own radiation protection program, and therefore, an employee visiting a licensee site might also be requested by the licensee to wear an additional dosimeter provided by that particular licensee. Ms. Jackson indicated that records for licensee-provided dosimeters used by employees were not required to be submitted to the employing establishment because they were not the official record for those employees. However, those records were available directly from the licensees.

Ms. Jackson next explained that the employing establishment had provided appellant his official dosimeter records, as well as those licensee records voluntarily submitted. She then offered the following observations regarding the available data:

> "The agency dose records reflect that [appellant], if he was exposed to any radiation at all, was exposed to only minimal levels, while the available licensee records indicate that [appellant] was exposed at a level that is 'not detectable.' In the NRC's records, each recording period, whether monthly or quarterly, is listed as 'M' (minimal), which indicates a dose between zero and ten millirems. Therefore, the maximum amount of radiation that [appellant] could have been exposed to during the two[-]year course of his employment in Region I [was] 250 millirems or 0.25 rems. In comparison, the average American receives a dose of 300 millirems of radiation each year from naturally occurring sources, such as radon gas and sunlight, and a patient receiving a diagnostic x-ray would be exposed to 39 millirems. The level of exposure to [appellant], if he was in fact exposed at all, clearly cannot support a diagnosis of radiation illness."[7]

[5] Ms. Jackson provided a copy of the employing establishment's policy: Directive/Handbook 10.131 -- *Protection of NRC Employees Against Ionizing Radiation*, which was originally approved on July 23, 1996 and revised on January 17, 2003.

[6] Ms. Jackson noted that prior to 1991 the total effective dose limit had been 12 rems per year.

[7] Ms. Jackson also provided a copy of the employing establishment's Regulatory Guide 8.29 - *Instructions Concerning Risks From Occupational Radiation Exposure* (Rev. 1, February 1996).

Ms. Jackson also expressed her opinion regarding appellant's medical documentation. She surmised that appellant provided this evidence "to support his hypothetical view that his symptoms could reflect radiation illness." Ms. Jackson further commented that the "documentation presupposes that [appellant] was, in fact, exposed to significant levels of radiation, which simply was not the case." While acknowledging that appellant's gastrointestinal symptoms could be a sign of acute radiation syndrome, Ms. Jackson indicated that acute radiation syndrome occurs only after exposure to extremely high levels of radiation, generally hundreds of rems, over a very short period of time, *i.e.*, minutes or hours. She also acknowledged that individuals exposed to radiation can develop cataracts, but only after receiving a short-term dose of approximately 100 rems or a cumulative long-term dose of approximately 800 rems, but in appellant's case, Ms. Jackson noted that he was exposed to a maximum of 250 millirems, or 0.25 rems, over a two-year period.

In a January 23, 2006 report, Dr. Ernest P. Chiodo, an occupational medicine specialist, indicated that appellant had a history of Type 2 diabetes, chronic colonic condition, immunodeficiency, dry mouth, echocardiogram abnormalities, shortness of breath and chest pain, history of adjustment disorder with mixed anxiety and depression and post-traumatic stress disorder and that his vision had significantly declined with cataract formation. Dr. Chiodo noted appellant's occupational history of working for the employing establishment from April 1984 to January 2000 and that his duties included conducting inspections of multiple power plants during which he received radiation exposure. He also reviewed several reports from physicians who opined that appellant's psychiatric and physical symptoms were exacerbated by specific work stresses. Dr. Chiodo noted that medical literature showed a significant increase of incidence of psychiatric disease in persons working or living near nuclear accident sites. He concluded that appellant's visual loss and psychiatric condition were caused by his employment, and his abnormal bowel movements appeared to be a somatic manifestation of stress due to his work at a former nuclear accident site.

In an October 26, 2004 report, Dr. Domenick P. Coletti, D.D.S., M.D., P.C., F.A.C.S, an oral and maxillofacial surgeon, indicated that appellant reported a history of being employed as a nuclear physicist with full-body radiation exposure upon inspection of multiple power plants. Over the course of several years, he had a history of conditions which would be secondary to this environmental hazard. Dr. Coletti indicated that appellant was evaluated for dental implants due to significant xerostomia and missing teeth and, on October 11, 2004, endosseous implants were placed.[8] He stated that appellant's healing was slower than expected, which was most likely secondary to his radiation exposure and/or diabetes mellitus.

Multiple medical reports and records concerning appellant's eye conditions were received. In a January 25, 2006 report, Dr. Harry Huang, an ophthalmologist and ophthalmic surgeon, stated that appellant presented to him on August 5, 2005 with blurred vision and subjective glare. Past ocular history included radial keratotomy in both eyes approximately 22 years prior and his medical history included radiation exposure. Dr. Huang diagnosed bilateral cataracts with decreased vision. He noted that a second opinion specialist had confirmed cataracts and posterior vitreous detachments in both eyes and left asteroid hyalosis. Appellant underwent uneventful right cataract and implant surgery on December 1, 2005, but still had

[8] In an October 11, 2004 operative report to implant missing teeth and bone graft, Dr. Coletti noted that appellant reported an unknown amount of full-body radiation while working for the employing establishment.

blurring, dry eye syndrome, and discomfort from post radial keratotomy cornea. Dr. Huang indicated that appellant would have left cataract surgery in the near future. He opined that cataracts and dry eyes were well known side effects of radiation and were consistent with appellant's history of radiation exposure.

Other medical reports opined that the resultant conditions or problems were due to other causes. In a June 24, 1994 report, Dr. Victor M. Fazio, a colorectal surgeon, reported that appellant developed bowel problems following a July 1991 motor vehicle accident, where he had sustained injuries to his lower back and neck and underwent multiple surgeries. He also noted a medical history of diabetes and hemorrhoid surgery in the past. Dr. Fazio diagnosed anal incontinence and constipation, which he opined were probably secondary to pudendal nerve neuropathy secondary to spinal injury. Reports from Dr. Lester I. Marion, a gastroenterologist, from 1999 indicated that appellant had chronic, debilitating and probably functional colonic condition. He opined that stress from appellant's work environment exacerbated his underlying irritable bowel difficulties.

By decision dated March 10, 2006, OWCP denied the claim as the medical evidence failed to establish that his multiple conditions were caused, aggravated, accelerated or precipitated by factors of employment as alleged. It found that the employing establishment's measurements and conclusions did not demonstrate that appellant was exposed to any extreme or excessive levels of radiation and appellant failed to provide evidence to the contrary to establish such exposure. OWCP also noted that while several physicians have indicated that appellant experienced a medical condition because of "excessive" radiation, there was no evidence that they were referring to specific factors of employment exposure levels to substantiate their conclusions.

On April 12, 2006 OWCP received appellant's April 8, 2006 request for review of the written record.

Appellant submitted Google search results and articles on radiation, his performance appraisal summary, an NRC Cumulative Occupational Dose History, and various e-mails from him concerning nuclear facilities and radiation exposure. He also included medical reports from 1987 through 2006 which discussed his multiple medical conditions. Some reports referred to appellant as a radiation victim, or noted that he was exposed to large amounts of radiation while working, or reported that appellant had indicated that he had full-body radiation exposure.

In an April 6, 2006 report, Dr. Mayam Seifi, D.D.S., a cosmetic dentist, noted that she had treated appellant for a periapical infection, problems with crowns and multiple cavities, as well as dry mouth. She opined that "this may very well be a symptom of previous radiation exposure. [Appellant] did mention that he had a previous history of radiation exposure and considered himself a "radiation patient." X-rays of the mouth were received.

In a February 17, 2006 report, Dr. Daniel Lahr, an orthopedic surgeon, stated that appellant had a right ankle lesion removed. He opined that given appellant's history of full-body radiation exposure, it was reasonable to assume that this lesion was secondary to that exposure. The pathology report was included.

Also received were a tongue biopsy report and pages from the website, "Radiation epidemiology."

In a January 12, 2006 statement, an attorney from the employing establishment's office of general counsel, reiterated that appellant was exposed only to minimal levels of radiation, if any. Test findings concerning appellant's radiation exposure were included.

On April 3, 2006 the employing establishment included information from their January 12, 2006 statement and indicated that it was unaware of any medical condition prior to appellant's filing of the 1992 claim for his motor vehicle accident. It represented:

> "Nowhere in any of the extensive documentation related to this first claim does appellant indicate that he had been suffering from any medical conditions prior to the 1991 car accident. Likewise, appellant's 1998 workers' compensation claim makes no mention of any illness other than the colorectal disorder, and does not indicate that this illness or any other illness began before his 1991 automobile accident."

The employing establishment stated that the level of radiation exposure to appellant, if he was in fact exposed at all, could not support a diagnosis of radiation illness. While it conceded that appellant had repeatedly visited reactor sites in the performance of his duties, the dosimetry readings supported only minimal, if any exposure. Discussion regarding the protections in place against exposure to radiation was provided. The employing establishment indicated that it had no reason to believe appellant did not comply with its radiation protection policies. This was supported by the fact that his dosimeter reports indicated that he was not exposed to any more than 0.25 rems over a two-year period, which was far below the radiation exposure limits established in Management Directive 10.131, "Protection of NRC Employees Against Ionizing Radiation." It indicated that policy for protecting its employees against occupational radiation exposure was consistent with the standards applied to licensed operations, published at 10 C.F.R. Part 20. There was also no record of appellant being involved in any incidents or uncontrolled accidental exposure. The employing establishment concluded that there was no evidence that appellant was the victim of radiation-related illness as his exposure during the two years he worked as a reactor inspector in the NRC-1 regional office was less than the average person's environmental exposure during the course of a year. It additionally noted that appellant's own medical history offered ample evidence that his various medical conditions were not radiation related.

On July 3, 2006 a copy of appellant's request for review of the written record was sent to the employing establishment for review and comment. The employing establishment resubmitted their January 12, 2006 statement. In a July 21, 2006 statement, it argued that appellant had not presented new material or error on a point of law to substantiate his claim. The employing establishment reiterated that appellant's radiation exposure was much less than the minimum required for radiation sickness and that the levels to which he was exposed (if any) were "below that of low-level naturally occurring exposures received by the average American."

In a January 11, 2006 affidavit, Dr. Claude Caidoux, Medical Director for the employing establishment and Board-certified in emergency medicine and occupational medicine, reviewed appellant's dosimetry readings and reports from numerous healthcare providers, as well as

medical information supplied by appellant in his two previous workers' compensation claims and opined that appellant had not sustained a radiation illness. He rationalized that each of appellant's diagnoses or complaints, taken separately or together, could be readily explained by nonradiation etiologies. These include irritable bowel syndrome, cataracts, diabetes mellitus, dental disease, urinary frequency, nausea, vomiting, "reduced immune system," memory lapse, chest pain and other complaints. Neither the dosimetry records nor documentation from appellant's physicians supported his claim that those medical conditions were caused by ionizing radiation. Further, many of these conditions, such as diabetes mellitus and memory lapse, were not commonly associated with acute or chronic radiation illness. Dr. Caidoux noted that appellant's primary complaint of irritable bowel syndrome had previously been diagnosed by his physicians as having been caused by an automobile accident in 1991 and exacerbated by workplace stress. He discussed the effects of stress on appellant's health conditions and concluded it was more likely that appellant's chronic conditions were due to other factors when due consideration was given to the dosimetry readings, which indicated only minimal radiation exposure at most. Dr. Caidoux also provided some clarification concerning the diagnosis of a "nuclear cataracts," noting that the term referred to the central eye lens site where common eye cataracts form, *i.e.*, in the "nucleus," and was not a reference to nuclear energy or ionizing radiation.

By decision dated August 18, 2006, an OWCP hearing representative affirmed the March 10, 2006 OWCP decision. She indicated that while appellant attributed his colon, dental, vision, heart and emotional conditions to radiation exposure, the record established on multiple occasions that appellant had no colon problems prior to this 1991 automobile accident and the evidence supported that appellant was exposed to a very minimal amount of radiation, if any. The hearing representative further found that the medical reports of record which noted a causal relationship between the diagnosed conditions and excessive radiation exposure or long-term radiation exposure were not substantiated by the evidence of record and none of the physicians were provided with the official dosimetry records.

On August 21, 2007 OWCP received appellant's August 17, 2007 request for reconsideration. Appellant argued that OWCP's hearing representative received his 365-page appeals file by certified mail on August 17, 2007 and denied it with no time to review the 365 pages he submitted. He indicated that the hearing representative had left out several items. Appellant also noted that, since the August 18, 2006 denial, he had lesions of his left thigh removed and a dental implant. He also asserted that he was exposed to neutron radiation at DOE's Idaho National Laboratory (INL) with no multiple dosimeters to detect/record the neutron radiation energies from uranium and plutonium fission (operating test reactors at the LOFT and PBF facilities), decay of fission products and spent fuel storage from November 1976 to January 1979 at DOE's INL sites. Appellant indicated that his dental implants were a result of the decay/loss of his teeth in acid reflux due to nausea and vomiting from his colorectal pain and diarrhea (radiation sickness), which an independent court-appointed dentist confirmed. He alleged that the employing establishment fabricated information, which OWCP would find out.

Appellant submitted multiple documents, including medical reports from numerous physicians addressing his medical conditions and symptoms from 1990 to 2007, letters to various administrators, his response to questions, diagnostic testing, radiation exposure reports, arbitration decisions dated November 27 and December 18, 1995, a settlement agreement,

internet publications, e-mails, scientific journals, Northern Idaho Falls Police Report dated May 29, 2007, operative reports, and surgical reports.

By decision dated November 19, 2007, OWCP denied appellant's request for reconsideration without conducting merit review. It found that the medical evidence was repetitious and/or irrelevant to the matter at hand and the reconsideration request neither raised substantive legal questions, nor included new and relevant evidence sufficient to warrant a review of the prior decision dated August 18, 2006.

On March 4, 2008 OWCP received appellant's February 26, 2008 letter requesting the status of his request for reconsideration of the August 18, 2006 denial of his claim. In a May 10, 2008 letter, it advised him that it had issued its decision on November 19, 2007.

On June 4, 2014 OWCP received appellant's May 7, 2014 request for reconsideration. Appellant alleged that he never received OWCP's November 19, 2007 decision. He contended that the employing establishment concealed or left out the fact that neutron radiation comes from operating reactors or spent fuel storage areas. New medical evidence as well as additional/complete exposure data was submitted. OWCP did not address the request for reconsideration.

On June 25, 2015 OWCP received appellant's June 19, 2015 letter. Appellant asserted that he never received the November 19, 2007 decision or any response to his letter asking the status of it. He noted that he received a favorable decision from the Department of Health and Human Services regarding his Medicare dental radiation claim for his teeth. OWCP treated this correspondence as a request for reconsideration.

Appellant also provided a 28-page letter dated April 30, 2015 wherein he argued that there were 21 errors in OWCP's August 18, 2006 decision. He asserted that the employing establishment submitted altered and incomplete pages of his workers' compensation file with obsolete NRC Rules and Regulations; he never received a copy of OWCP's November 19, 2007 decision; OWCP's hearing representative never reviewed his 365-page comments and rushed his hearing process instead of using the allotted 90 days; his second appeal for reconsideration was denied without a merit review although it was timely filed; numerous requests for copies of his file were ignored, which denied him due process; copies of his timely appeals were lost in his appeal file; the Federal Bureau of Investigation and Inspector General Investigators tried to intimidate/incriminate him; it took nine years and six repeated Freedom of Information Act (FOIA) requests to receive his file, which was missing sensitive pages; he never received the hearing representative's request for comments to counter the employing establishment's negative comments concerning his case; he won before various administrative agencies his claims for cataracts and surgeries on both eyes as well his radiation claims pertaining to his teeth, but OWCP ignored those favorable rulings as well as the medical evidence which supported his exposure to radiation to plutonium, uranium and uranlynitrate; by not releasing his OWCP files, there was evidence of cover-up/collusion with OWCP and the employing establishment to deny his claims; the employing establishment covered up the fact that his job included inspection/enforcement of the high radiation spent fuel storage areas; OWCP/EEOICP DMC already certified his exposure to radiation of plutonium, uranium and uranyl nitrate for eight cataract surgeries in 1982, 2005 and 2008; but his compact disc of his file did not contain that fact. He also submitted a copy of a compact disc, copies of nine new medical expert reports and

factual data, including the list of 654 toxic chemicals, which he asserted existed at INL and was evidence that OWCP erred in its August 18, 2006 decision.

In a July 28, 2015 letter, counsel stated that OWCP's November 19, 2007 decision not to review the merits was based on the mistaken belief that the request was not filed within a year of OWCP's August 18, 2006 merit decision.[9]

By decision dated September 23, 2015, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant in his April 30, 2015 letter had listed 21 errors in OWCP's August 18, 2006 decision, but had not provided evidence to support his contentions that an error was committed by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[10] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[11] One such limitation is that the request for reconsideration must be made within one year of the date of the decision for which review is sought.[12] OWCP will consider an untimely request for reconsideration only if the request demonstrates "clear evidence of error" on the part of OWCP in its "most recent merit decision."[13] The request must demonstrate, on its face, that such decision was erroneous.[14] Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[15]

[9] In an August 13, 2015 letter, appellant noted that the attorney was no longer representing him, which the attorney confirmed in an August 25, 2015 letter.

[10] This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.607.

[12] *Id*. at § 10.607(a). For merit decisions issued on or after June 1, 1987 through August 28, 2011, a request for reconsideration must be mailed to OWCP within one year of the decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4e (February 2016).

[13] 20 C.F.R. § 10.607(b).

[14] *Id.* To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[15] 20 C.F.R. § 10.608(b).

ANALYSIS

The last merit decision is dated August 18, 2006. Appellant previously requested reconsideration on August 17, 2007, which OWCP denied by decision dated November 19, 2007. However, appellant claimed not to have received OWCP's November 19, 2007 nonmerit decision.[16] The Board notes that there is no evidence that the November 19, 2007 decision was returned to OWCP as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.[17] This presumption is commonly referred to as the "mailbox rule."[18] It arises when the record reflects that the notice was properly addressed and duly mailed.[19] The current record is devoid of evidence to rebut the presumption that appellant received OWCP's November 19, 2007 nonmerit decision in due course. Appellant's latest request for reconsideration postdated OWCP's August 18, 2006 merit decision by more than 9½ years. Because more than one year elapsed since the last merit decision, appellant's June 25, 2015 request for reconsideration is untimely.[20] Consequently, he must demonstrate clear evidence of error on the part of OWCP in determining that he failed to establish fact of injury.[21]

The Board finds that the arguments and evidence submitted by appellant in support of his request for reconsideration did not raise a substantial question as to the correctness of OWCP's August 18, 2006 decision.

Appellant submitted a 28-page reconsideration request 9½ years after the last merit decision outlining numerous grievances he harbored relative to the administration of his claim, as well as a series of editorial comments about the claims process. He also submitted a CD which contained his complete case file consisting of 1,219 pages, copies of nine new medical expert reports and factual data, including a list of 654 toxic chemicals, which he asserted existed at INL and was evidence that OWCP erred in its August 18, 2006 decision. OWCP referenced and addressed his reconsideration request indicating that he had not submitted evidence to support his contentions.

The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.[22] Appellant's argument on reconsideration is of insufficient probative value to shift the weight in his favor and raise a

[16] Appellant also claims not to have received another copy of the decision OWCP sent him on March 10, 2008. According to counsel, appellant did not receive a copy of the November 19, 2007 decision until February 2014, when OWCP provided him a copy of the complete case file.

[17] *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

[18] *Id.*

[19] *Id.*

[20] 20 C.F.R. § 10.607(a).

[21] *Id*. at § 10.607(b).

[22] *Leon D. Faidley, Jr*., 41 ECAB 104 (1989).

substantial question as to the correctness of OWCP's August 18, 2006 merit decision. Likewise medical evidence submitted by appellant after OWCP's August 18, 2006 merit decision is insufficient to demonstrate clear evidence of error. With regard to evidence previously of record, appellant failed to explain how such evidence raised a substantial question as to the correctness of OWCP's decision.[23] Although appellant submitted additional factual data not previously of record, which included a list of 654 toxic chemicals which he asserted existed at INL, this evidence neither addressed the cause of his condition, nor related his symptoms to a work event, exposure to radiation. As noted, the term clear evidence of error is intended to represent a difficult standard. The Board finds that this evidence does not rise to the level of clear evidence of error.

As appellant has failed to demonstrate clear evidence of error, OWCP properly declined to reopen his claim for consideration of the merits.

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 September 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] *See S.E.*, Docket No. 16-1258 (issued December 5, 2016).