United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 17-0416**
	)	**Issued: July 6, 2017**
SMITHSONIAN INSTITUTION, NATIONAL GALLERY OF ART, Washington, DC, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 15, 2016 appellant, through counsel, filed a timely appeal from an October 19, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision in this case was a March 5, 2013 decision of the Board which became final 30 days after issuance and is not subject to further review.[2] As the October 19, 2016 decision is the only decision issued within 180 days of this appeal, pursuant to

[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] *See* 20 C.F.R. § 501.6(d).

the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.[4]

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts of the case as presented in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On July 24, 2009 appellant, then a 54-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2009 he smelled a bad odor at the employing establishment and he developed an irritation in his eyes. He did not stop work.

In a July 27, 2009 attending physician's report (Form CA-20), Dr. Nicole Moffett, an optometrist, noted that appellant related being exposed to fumes at work when the electricity went out, which caused his eyes to burn. She diagnosed eye burn secondary to fumes and noted by checking a box marked "yes" that appellant's condition was causally related to an employment incident.

The employing establishment challenged appellant's claim, asserting that his eye condition was not caused by a power outage at the employing establishment. It noted that a power outage occurred when the District of Columbia electrical power substation was struck by lightning, which temporarily shut down the West Building air handling system. The employing establishment noted that there were multiple visitors and other security personnel present at the same time as appellant, but no others claimed any adverse reactions.

In a decision dated February 4, 2010, OWCP denied appellant's claim as the evidence submitted was insufficient to establish that the events occurred as alleged.

On January 20, 2011 appellant requested reconsideration.

Appellant continued to submit reports from Dr. Moffett from July 25 to August 3, 2009. Dr. Moffett noted that, on August 3, 2009, appellant reported that his eye condition had improved and diagnosed resolving eye burning.

[3] 5 U.S.C. § 8101 *et seq.*

[4] With his appeal, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated May 9, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument,* Docket No. 17-0416 (issued May 9, 2017).

[5] Docket No. 12-1721 (issued March 5, 2013).

OWCP also received medical evidence which did not pertain to his alleged eye condition. Appellant was treated by Dr. Rita Manfredi, Board-certified in emergency medicine, on June 4, 2010 for reactive airway disease and chronic obstructive pulmonary disease. On December 31, 2010 he was treated in the emergency room by Dr. Brandon J. Cole, a Board-certified emergency physician, for asthma and was provided with discharge instructions for asthma and prescribed a nebulizer.

In a decision dated June 8, 2011, OWCP denied modification of its prior decision.

On May 25, 2012 appellant again requested reconsideration and submitted additional medical evidence. In a report dated September 14, 2010, Melissa B. Daluvoy, a Board-certified ophthalmologist, related that appellant was seen for a burning sensation in his eyes. Appellant reported being exposed to fumes and odors at work one year prior, which irritated his eyes. On August 24, 2011 he was treated by Dr. Claude Cowan, an ophthalmologist, who noted that appellant underwent imaging and photographs of his eyes without complication. On August 24, 2011 appellant was treated by Dr. Neil Bien, a psychologist, for depression. Dr. Bien diagnosed depression, seizure disorder, chronic airway obstruction and financial difficulties. Appellant submitted a September 23, 2011 prescription for ointment for a skin rash and an inhaler.

On August 1, 2012 OWCP modified its prior decision to find that the employment incident occurred as alleged, but denied the claim as the medical evidence of record was insufficient to establish that appellant sustained medical condition was related to his employment.

On August 14, 2012 appellant appealed to the Board. By decision dated March 5, 2013, the Board found that appellant had not met his burden of proof to establish that his claimed conditions were causally related to the accepted incident because he had not submitted any medical reports containing a well-rationalized physician's opinion as to the cause of his eye irritation.[6]

By letter received on October 14, 2016, appellant requested reconsideration.[7] With his request, appellant submitted a narrative statement, in which he claimed that his medical condition was due to exposure to asbestos at the employing establishment.

By decision dated October 19, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

[6] *Id.*

[7] Appellant requested reconsideration from OWCP of the Board's March 5, 2013 merit decision. OWCP is not authorized to review Board decisions. Although the March 5, 2013 decision was the last merit decision, OWCP's August 1, 2012 merit decision is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[8] 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.[9]

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[10] 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 shows clear evidence of error on the part of OWCP.[11]

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.[12] The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16]

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[17] In order to demonstrate clear evidence of error, the

---

[8] 20 C.F.R. § 10.607(a).

[9] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[11] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016). OWCP's procedure further provides, "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."

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

[13] 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[15] *See Leona N. Travis*, *supra* note 12.

[16] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *See Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

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.[18]

ANALYSIS

The Board finds that, in its October 19, 2016 decision, OWCP properly determined that appellant's request for reconsideration was untimely filed. Its regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision.[19] Appellant's request for reconsideration was received on October 14, 2016, which was more than one year after the Board's March 5, 2013 merit decision. Therefore, he must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has not demonstrated clear evidence of error by OWCP in its August 1, 2012 merit decision. Appellant did not submit the type of positive, precise, and explicit evidence manifesting on its face that an error was committed.

Appellant's request for reconsideration consisted solely of a narrative statement from appellant, alleging that he was exposed to asbestos at the employing establishment and that this exposure resulted in his claimed condition. In the decision of August 1, 2012, appellant's claim was denied because he had not submitted a rationalized medical report from a physician supporting causal relationship between his eye irritation and the incident of July 23, 2009. As such, appellant's narrative statement regarding asbestos exposure does not raise a substantial question concerning the correctness of the August 1, 2012 decision, and OWCP properly determined that appellant had not demonstrated clear evidence of error in that decision.

CONCLUSION

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

[18] *See Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

[19] 20 C.F.R. § 10.607(a).

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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