

**United States Department of Labor  
Employees' Compensation Appeals Board**

E.T., widow of T.H., Appellant	)	
	)	
and	)	<b>Docket No. 16-1912</b>
	)	<b>Issued: March 6, 2017</b>
<b>DEPARTMENT OF ENERGY, BONNEVILLE</b>	)	
<b>POWER ADMINISTRATION, Portland, OR,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 29, 2016 appellant filed a timely appeal of an August 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was the July 14, 2014 decision of the Board.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> Appellant filed a petition for reconsideration of this decision on August 14, 2014 and the Board issued an *Order Denying Petition for Reconsideration* on January 20, 2015. With respect to the findings made in the Board's July 14, 2014 decision, these matters are *res judicata*. The decisions and orders of the Board will be final upon the expiration of 30 days from the date of issuance unless the Board has fixed a different period of time therein. 20 C.F.R. § 501.6(d).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

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

## FACTUAL HISTORY

This claim has previously been before the Board.<sup>3</sup> On July 31, 2012 appellant filed a claim for compensation by widow (Form CA-5) noting that the employee, a personnel officer, died on December 12, 2011, at 82 years of age, due to fibrotic lung disease and acute kidney failure. She identified the employee's work-related condition as melanoma.<sup>4</sup> The employee worked with the Atomic Energy Commission from July 2, 1962 through September 10, 1964. The employee retired on March 22, 1978 from the employing establishment.

Appellant submitted the employee's medical records from 2009. The record shows that on August 17, 2009 the employee underwent a chest computerized tomography (CT) scan which demonstrated abnormalities representative of interstitial lung disease. The CT scan demonstrated evidence of fibrosis more than expected for age-related fibrosis with multiple bilateral pulmonary nodules. In a report dated August 24, 2009, Dr. Allen B. Adolphe, a Board-certified internist, reviewed appellant's CT scan findings of fibrosis and multiple small pulmonary nodules. He noted that the employee was exposed to "nuclear weapons" in the distant past and noted, "whether this is in relation to that [the CT findings] is unknown." Dr. Richard E. Crowell, a Board-certified pulmonologist, examined appellant on September 17, 2009 due to the findings of the CT scan. At that time, the employee reported a history of smoking about two packs of cigarettes a day for 20 years. He also worked for two years for the Atomic Energy Commission transporting radioactive and other types of waste. The employee noted that he wore a badge religiously and was never told that this badge exhibited any exposure problems. Dr. Crowell noted that the employee did not appear to have any unusual environmental or occupational exposures.

Medical records reflect that the employee underwent a second chest CT scan on October 26, 2011 which demonstrated multiple pulmonary opacities. These findings were largely similar to his prior CT scan with a slight interval worsening of fibrotic lung disease. The employee also had new nonspecific ground-glass opacities. The employee sought treatment from his physician on November 3, 2011 due to hypoxia and was sent to the hospital due to pneumonia. He requested a discharge but, after his symptoms worsened at home, returned to the hospital where he was placed on mechanical ventilation. The employee was diagnosed with a history of interstitial lung disease with unknown etiology. He developed kidney dysfunction. The employee died on December 12, 2011 with diagnoses of respiratory failure, hypertension, sepsis, encephalopathy, anemia, and diabetes. The death certificate listed the employee's cause of death as pneumonia and acute kidney failure.

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<sup>3</sup> Docket No. 14-0861 (issued July 14, 2014); *Order Denying Petition for Reconsideration*, Docket No. 14-0861 (issued January 20, 2015).

<sup>4</sup> Appellant filed a claim under the Energy Employees Occupational Illness Compensation Program Act on May 7, 2012.

In a factual recitation, appellant noted that the employee worked as a courier for the Atomic Energy Commission transporting radioactive and explosive materials. She alleged that he was exposed to radiation, beryllium, asbestos powder, gaseous materials, and other toxic substances. Appellant asserted that the employee left the Atomic Energy Commission to return to college and that after graduation he worked for the Air Force and retired from the Bonneville Power Administration in 1978. She noted that the employee had 31 skin biopsies, 478 liquid nitrogen procedures, and 3 Efudex skin treatments. The employee was diagnosed with two basal cell carcinomas, two melanomas, five squamous cell carcinomas, and prostate cancer.

By decision dated June 19, 2013, OWCP denied the claim finding that there was no medical opinion evidence supporting a causal relationship between the employee's death and his federal employment.

Appellant requested reconsideration on October 8, 2013. She submitted a form report dated August 9, 2013 signed by Dr. Adolphe noting that the employee had a history of prior exposure to "nuclear weapons" and diagnosing pulmonary fibrosis. Dr. Adolphe related that the employee's pneumonia was exacerbated by underlying pulmonary fibrosis and acute renal failure. He indicated by checking a box marked "yes" that the employee's death was due to exposure to nuclear weapons.

By decision dated October 18, 2013, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It found that the medical evidence of record was not sufficiently detailed to establish a causal relationship between the employee's diagnosed conditions resulting in his death and any employment exposures. Appellant appealed to the Board. The Board affirmed the October 18, 2013 decision, finding that appellant had failed to submit the necessary rationalized medical opinion evidence to establish a causal relationship between the employee's work exposures and his death.<sup>5</sup> The Board concluded that appellant had not met her burden of proof to establish a death benefits claim.

Appellant requested reconsideration on July 27, 2016. She argued that Dr. Adolphe's reports had not been properly reviewed by OWCP or by the Board, and provided quotations from these reports to support her arguments.

By decision dated August 3, 2016, OWCP declined to reopen appellant's claim for further consideration of the merits as her request for reconsideration was untimely and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>6</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>7</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or

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<sup>5</sup> *Supra* note 3.

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

terminating a benefit unless the application for review is received within one year of the date of that decision.<sup>8</sup> The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.<sup>9</sup>

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether the claimant has demonstrated clear evidence of error.<sup>10</sup> OWCP's procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>12</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> 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.<sup>16</sup> To demonstrate evidence of error, 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.<sup>17</sup> The Board must make an independent determination of whether a claimant has demonstrated clear evidence of

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<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (February 2016).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *Supra* note 9 at Chapter 2.1602.5 (February 2016).

<sup>12</sup> *Supra* note 7.

<sup>13</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>14</sup> *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>17</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>18</sup>

### **ANALYSIS**

The Board finds that appellant's request for reconsideration was untimely filed. As noted above, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>19</sup> As appellant's request for reconsideration was not received by OWCP until July 27, 2016, more than one year after issuance of the most recent merit decision, the Board's July 14, 2014 decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its decision finding that she had not established that the employee's death was causally related to his federal employment.

In accordance with internal guidelines and Board precedent, OWCP properly proceeded to perform a limited review to determine whether appellant's request for reconsideration demonstrated clear evidence of error, which would warrant reopening her case for merit review under section 8128(a) of FECA, notwithstanding the untimeliness of her application. It reviewed the argument submitted in support of her reconsideration request, but found that it did not demonstrate that OWCP's prior decisions were in error.

The Board finds that the argument submitted by appellant in support of her reconsideration does not raise a substantial question as to the correctness of OWCP's decision and is insufficient to demonstrate clear evidence of error. The underlying issue is a medical one, and had to be established through the submission of medical evidence. Appellant did not submit any additional medical evidence in support of her request for reconsideration, but instead provided her review of the medical evidence in the record. This evidence had been considered and reviewed by the Board in its prior merit decision. Appellant's request for reconsideration does not demonstrate on its face that OWCP's merit decision was erroneous. Therefore, the Board finds that appellant has not demonstrated clear evidence of error in OWCP's finding that she failed to establish that the employee's death was due to his federal employment.

### **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.

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<sup>18</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>19</sup> 20 C.F.R. § 10.607(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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