United States Department of Labor
Employees' Compensation Appeals Board

V.L., Appellant	)	
and	)	**Docket No. 17-1108**
	)	**Issued: October 16, 2017**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING COMMAND, Norfolk, VA, Employer	)	

Appearances:
Gregory Klein, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 27, 2017 appellant, through counsel, filed a timely appeal from a November 10, 2016 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated October 15, 2015, 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 lacks jurisdiction over the merits of the claim.[3]

[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.*

[3] The record provided the Board includes evidence received after OWCP issued its November 10, 2016 decision. However, the Board is precluded from reviewing evidence that was not part of the record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1).

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 case has previously been before the Board.[4] The facts as presented in the Board's prior decision are incorporated herein by reference. The relevant facts pertaining to this appeal are as follows.

In January 1999, OWCP accepted that appellant, then a 45-year-old administrator, sustained the condition of multiple chemical sensitivities due to exposure to substances in the workplace, including Basidiospore, Penicillium, and Aspergillus strains of fungi/mold.

In a March 3, 2011 decision,[5] the Board affirmed OWCP's August 12, 2009 decision as modified to reflect that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 11, 2004, but that there was a conflict in the medical opinion evidence regarding continuing work-related residuals after July 11, 2004 which required remanding the case to OWCP for further development. The Board found that the April 23, 2004 report of Dr. Elizabeth Ann Raitz-Cowboy, a Board-certified pulmonary specialist serving as an OWCP referral physician, justified the termination of appellant's wage-loss compensation and medical benefits effective July 11, 2004 because it contained a well-rationalized medical opinion finding that appellant's work-related residuals had ceased.[6] However, the Board found that there was a conflict in the medical opinion evidence between the medical opinion of Dr. Raitz-Cowboy and that of Dr. Allan Lieberman, an attending Board-certified occupational medicine physician.[7] The Board remanded the case to OWCP for referral of appellant to an impartial medical specialist for an examination and opinion regarding whether she continued to have residuals of the accepted multiple chemical sensitivities condition after July 11, 2004. The Board directed OWCP to issue an appropriate decision on her claim after carrying out this development.

[4] Docket No. 10-0328 (issued March 3, 2011).

[5] *Id.*

[6] The Board noted that Dr. Raitz-Cowboy indicated in her April 23, 2004 report that pulmonary function testing performed on appellant was within normal limits and that a chest x-ray was also within normal limits. Dr. Raitz-Cowboy did not see any signs of multiple chemical sensitivities or anything to support the diagnosis of toxic encephalopathy, noting that all heavy metal levels were negative. She indicated that there was one discussion of perhaps a mild restrictive disease on a set of breathing tests from October 2000, but noted that even these limited results were not reproduced in the more current test results.

[7] In reports dated November 9, 2004 and October 11, 2005, Dr. Lieberman indicated that specific testing with the individual molds identified in the environmental analyses of appellant's workplace provoked many of the signs and symptoms complained about by appellant. He posited that the allergens that she was exposed to in the workplace were adequate to cause her to suffer from the accepted multiple chemical sensitivities condition after July 11, 2004.

On remand, OWCP referred appellant to Dr. Kyle Enfield, a Board-certified internist, for an impartial medical examination and opinion regarding whether she had residuals of her accepted employment injury on or after July 11, 2004.[8]

In an October 11, 2013 report, Dr. Enfield provided an opinion that appellant had idiopathic environmental intolerance or multiple chemical sensitivities based on her symptom history and noted that there was a temporal relationship between her symptom history and work exposure. He noted, "However, I cannot establish causation," and recommended that appellant be seen by a physician who was Board-certified in toxicology or occupational/environmental medicine.

OWCP determined that, given the opinion expressed by Dr. Enfield in his October 11, 2013 report, it was necessary to refer appellant to another impartial medical specialist.[9] In August 2015, it referred her to Dr. Donald J. McGraw, a Board-certified occupational medicine physician, for an impartial medical examination and opinion regarding whether she had residuals of her accepted employment injury on or after July 11, 2004.

In a September 15, 2015 report, Dr. McGraw discussed appellant's factual and medical history and reported the findings of the examination he conducted on that date. He noted that she was dermatologically intact with no erythema, edema, or any type of lesions, and that her chest was clear to auscultation. Dr. McGraw indicated that his medical interview and physical examination of appellant detected no objective clinical abnormalities of any type and advised that her strong emotional convictions regarding her described clinical problems were not supported objectively by findings on clinical examination. He noted that, while appellant claimed allergies to a number of agents including sulfa, formaldehyde, molds, mildews, tobacco, smoke, fragrances, and perfume, there was no objective clinical evidence to support those allergies. Dr. McGraw noted that she did not use prophylactic anti-allergenic medication to block any type of allergic reaction. He discussed medical literature concerning multiple chemical sensitivities and recounted his own experiences evaluating patients who had been diagnosed with this condition by other physicians. Dr. McGraw discussed his inability to find objective evidence of multiple chemical sensitivities in these patients, noting that many of the offending agents identified with this condition, including Penicillium and Cladosporium fungi/mold, were ubiquitous in the environment. He indicated that he was unable to identify any disabling medical condition after July 11, 2004, which was in any way related to appellant's accepted condition of multiple chemical sensitivities. Dr. McGraw indicated that he could not identify any objective clinical evidence to support physical limitations from work after July 11, 2004.

In an October 30, 2015 decision, OWCP determined that appellant was not entitled to further wage-loss compensation and medical benefits after the termination of such benefits

[8] Appellant's appearance at the impartial medical examination with Dr. Enfield was delayed by appellant's own request to not attend the examination until she had recovered from a nonwork-related broken right leg.

[9] Another delay occurred due to OWCP's difficulty in finding an appropriate medical specialist whose office was close to appellant's home.

effective July 10, 2014.[10] It found that the weight of the medical evidence regarding residuals of the accepted employment injury rested with the well-rationalized September 15, 2015 report of Dr. McGraw.

In a September 12, 2016 letter received on September 19, 2016, appellant noted that the appeal rights associated with an October 30, 2015 letter with an enclosed "Notice of Decision" provided that a reconsideration request must be signed, dated, and received within one calendar year of the date of the decision. She asserted that the "Notice of Decision" had no date and requested that OWCP provide the date of the "Notice of Decision."[11]

In an October 25, 2016 letter received on November 1, 2016, counsel requested reconsideration of OWCP's October 30, 2015 decision.[12] He argued that Dr. McGraw's previous court appearances and publications clearly establish that he was not an impartial medical examiner and instead was a professional witness who testified only on behalf of employing establishments or insurance companies against the interests of injured workers. Counsel noted that a search through the Lexis legal research service revealed that Dr. McGraw participated in litigation in 14 different cases, and that in each case he was hired by the employing establishment/insurance company and submitted an opinion which was favorable to the party that was paying his bill rather than the injured worker. He felt that these cases showed that Dr. McGraw had a documented history of bias against injured workers. Counsel summarized Dr. McGraw's role in the 14 cases, which were heard in the U.S. District Court for the Western District of Pennsylvania or the Commonwealth Court of Pennsylvania, providing brief notations such as, "Dr. McGraw testified that the employee was not disabled," "[employing establishment] requested that Dr. McGraw perform a fitness[-]for[-]duty evaluation," and "[employing establishment] retains Dr. McGraw to testify that employee's workplace injury did not cause him to die."[13]

In his October 25, 2016 letter, counsel also argued that further evidence of Dr. McGraw's bias was provided by his article entitled "Multiple Chemical Sensitivities -- Modern Medical Conundrum or Old Story with a New Title?" which was published by the American College of

[10] OWCP actually indicated that it had terminated appellant's wage-loss compensation and medical benefits effective January 12, 2004, but this was not an accurate description of the issue at hand because she had not received wage-loss compensation and medical benefits since January 10, 2004 and the Board, in its March 3, 2011 decision had affirmed OWCP's termination of such benefits effective January 10, 2004. As noted below, after termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *See infra* notes 23 through 25. Therefore, OWCP effectively found in its October 30, 2015 decision that appellant did not meet her burden of proof to establish entitlement to wage-loss compensation and medical benefits after January 10, 2014.

[11] The record does not contain any response by OWCP to this letter. As discussed *infra*, appellant subsequently submitted the appeal request form that accompanied OWCP's October 30, 2015 decision. The top portion of the appeal request form identified appellant, her OWCP file number, and noted the date of the decision as "October 30, 2015."

[12] The record also contains a form, signed on October 28, 2016 and received on November 1, 2016, in which appellant requested reconsideration of OWCP's October 30, 2015 decision.

[13] The record contains copies of the fourteen cases referenced by counsel.

Occupational and Environmental Medicine. He asserted that, in this article, Dr. McGraw opined that "the parade of patients" diagnosed with multiple chemical sensitivities did not have such a condition and that the diagnosis of multiple chemical sensitivities constituted an unsubstantiated theory which fell under the category of "fringe medicine." Counsel indicated that he was providing a copy of this article, but the article was not, in fact, submitted to the case record. He also discussed a May 26, 2016 report of Dr. Bettina Herbert, an attending Board-certified physical medicine and rehabilitation physician, which he characterized as containing an opinion that appellant continued to suffer from work-related multiple chemical sensitivities causing disability from work. However, the record does not contain a copy of a May 26, 2016 report of Dr. Herbert.

In a November 10, 2016 decision, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that her reconsideration request was untimely because it was received on November 1, 2016, a date more than one year after the issuance of its October 30, 2015 merit decision. OWCP found that the evidence appellant submitted in support of her untimely reconsideration request failed to demonstrate clear evidence of error in its October 30, 2015 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.[14]

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.[15] However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.[16]

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. *Id.* Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[16] *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

To demonstrate 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.[17] The Board notes that clear evidence of error is intended to represent a difficult standard.[18] Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.[19] It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.[20] 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.[21] The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.[22]

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[23] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[24] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.[25]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[26] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of

[17] *Annie L. Billingsley*, 50 ECAB 210 (1998).

[18] *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

[19] *Jimmy L. Day*, 48 ECAB 652 (1997).

[20] *Id.*

[21] *Id.*

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

[23] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[24] *Id.*

[25] *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[26] 5 U.S.C. § 8123(a).

such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[27]

ANALYSIS

The Board finds that OWCP properly determined that appellant's November 1, 2016 request for reconsideration was untimely filed. For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the received date as recorded in iFECS.[28] The most recent merit decision was OWCP's October 30, 2015 decision and appellant had one year from that date to timely file for reconsideration. The last day of the one-year filing period fell on Sunday, October 30, 2016. Therefore, appellant had until Monday, October 31, 2016 to timely request reconsideration.[29] Because her request was not received by OWCP until November 1, 2016, it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP with respect to its October 30, 2015 decision.[30]

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its October 30, 2015 decision. Appellant did not submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its October 30, 2015 decision.[31] In support of the reconsideration request, counsel submitted an October 25, 2016 letter in which he presented various arguments on behalf of appellant. He argued that Dr. McGraw's previous court appearances and publications clearly establish that he was not an impartial medical examiner and instead was a professional witness who testified only on behalf of employing establishments or insurance companies against the interests of injured workers. Counsel noted that Dr. McGraw participated in litigation in 14 different cases, and that in each case he was hired by the employing establishment/insurance company and submitted an opinion which was favorable to the party that was paying his bill rather than the injured worker. He felt that these cases showed that Dr. McGraw had a documented history of bias against injured workers and, therefore, his opinion could not serve as the weight of the medical evidence regarding work-related residuals after July 11, 2004.[32] Counsel summarized Dr. McGraw's role in the 14 cases, which were heard in the U.S. District Court for the Western District of Pennsylvania or the Commonwealth Court of Pennsylvania, and submitted copies of the case to the record.

The Board finds that this evidence and argument fails to demonstrate clear evidence of error by OWCP in its October 30, 2015 decision. The evidence and argument submitted by counsel on behalf of appellant did not raise a substantial question concerning the correctness of

[27] *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

[28] *Supra* note 15 at Chapter 2.1602.4; *see C.B.*, Docket No. 13-1732 (issued January 28, 2014).

[29] *See id.* at Chapter 2.1602.4b.

[30] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[31] *See supra* note 16.

[32] *See supra* notes 26 and 27, regarding the weight accorded well-rationalized reports of impartial medical specialists.

OWCP's decision.[33] Counsel did not adequately explain how the mere fact that the submitted court cases addressed medical opinions of Dr. McGraw, which he believed were unfavorable to the claimants in those cases, showed bias on the part of Dr. McGraw. The Board has carefully reviewed the court cases and notes that they do not establish evidence of bias by Dr. McGraw against injured workers. Nor did counsel explain how the facts of these cases, totally unrelated to the present case, proved bias against appellant by Dr. McGraw when producing his September 15, 2015 report in his role as an impartial medical specialist. Counsel also made reference to an article authored by Dr. McGraw which he felt showed that he did not accept the validity of the diagnosis of multiple chemical sensitivities, but he did not submit a copy of this article or adequately explain how it established bias with respect to appellant.[34] Moreover, the Board has carefully reviewed the September 15, 2015 report of Dr. McGraw and notes that it does not show any bias against appellant.

The Board finds that appellant's application for review does not show on its face that OWCP committed error when it found in its October 30, 2015 decision that appellant was not entitled to wage-loss compensation and medical benefits on or after July 11, 2004.[35] As noted above, clear evidence of error is intended to represent a difficult standard.[36] In essence, appellant has simply challenged the sufficiency of the opinion of Dr. McGraw by claiming bias, but such a generalized, unsupported argument would not show on its face that OWCP committed error in its October 30, 2015 decision.[37]

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's October 30, 2015 decision and OWCP properly determined that appellant did not show clear evidence of error in that decision.

[33] *See supra* note 19.

[34] Counsel also discussed a May 26, 2016 report of Dr. Herbert, an attending physician, which he characterized as containing an opinion that appellant continued to suffer from work-related multiple chemical sensitivities causing disability from work. However, the record does not contain a copy of a May 26, 2016 report of Dr. Herbert and counsel's mere characterization of this report would not show clear evidence of error in OWCP's October 30, 2015 decision.

[35] *See S.F.*, Docket No. 09-0270 (issued August 26, 2009). On appeal, counsel provided similar arguments claiming bias by Dr. McGraw, but he does not provide any convincing argument that the evidence of record supports such finding of bias.

[36] *See supra* note 16.

[37] As noted above, 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. *See supra* note 17. Even if, for the sake of argument, appellant had shown that Dr. McGraw was biased and that his opinion could not represent the weight of the medical evidence, there would still be a continuing conflict in the medical evidence regarding whether appellant established work-related disability or need for medical care on or after July 11, 2004 and she would not have shifted the weight of the evidence in her favor. *See supra* notes 26 and 27.

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 November 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2017
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