

FACTUAL HISTORY

On August 9, 2012 appellant filed a claim for widow's benefits (Form CA-5) due to the death of her husband (the employee) on April 21, 2011. She provided copies of a marriage license and a death certificate. With her claim, appellant submitted a narrative statement in which she alleged that the employee's death from adenocarcinoma of the lung was related to asbestos exposure in the course of his employment as a supervisory geologist at the employing establishment from September 15, 1968 through March 3, 1995.

In an asbestos assessment review dated January 13, 1991, an inspector at the employing establishment noted the presence of asbestos contamination in crawl spaces and attics.

By report dated July 29, 2010, Dr. Brian E. Staley, an anatomic and clinical pathologist, reviewed the employee's left lower lung biopsy which revealed well-differentiated adenocarcinoma.

In a report dated July 26, 2011, Dr. Alvin Schonfeld, an osteopath and Board-certified internist specializing in pulmonary medicine and occupational lung disease, reviewed the employee's medical records and occupational history. He opined that, given the employee's exposure to asbestos in the workplace, within a reasonable degree of medical certainty, the employee had bilateral asbestosis causally related to asbestos exposure. Dr. Schonfeld further opined that the employee's lung cancer and subsequent death were both causally related to asbestos exposure at work, in addition to history of smoking. He noted that the employee smoked a pack a day for 30 years.

By letter dated February 13, 2013, OWCP requested information from the employing establishment related to the employee's employment position, dates of exposure to asbestos, and any records of treatment at employing establishment medical facilities. On the same date it advised appellant that further factual and medical evidence was necessary to establish her claim. She was afforded 30 days to submit the additional evidence.

In a report dated March 28, 2011, Dr. Dan Grinstead, a Board-certified internist, diagnosed the employee with metastatic adenocarcinoma of the lung with metastases. He noted that the employee had been exposed to asbestos during his career and smoked 1 to 2 cigars per day until the year 2000.

On April 15, 2013 appellant responded to OWCP's inquiries. She noted that the employee was first diagnosed with lung cancer on July 13, 2010. Regarding his smoking, appellant noted that he had begun smoking when he was about 32 years old and that he actually stopped smoking cigars in August 1997.

On October 1, 2013 OWCP forwarded the medical documentation of record to a district medical adviser (DMA) to determine whether it was more likely than not that the employee's adenocarcinoma was caused by exposure to asbestos in the course of his federal employment and whether it was more likely than not that the adenocarcinoma hastened or contributed to his death.

In a report dated October 17, 2013, OWCP's DMA, Dr. L. Weaver, a Board-certified pulmonologist and internist, reviewed medical records and indicated that, although the employee

was exposed at very low levels and intermittently to asbestos for many years, there was no evidence for an asbestos-related disease or that such low-level potential exposure would cause, contribute to, or aggravate the adenocarcinoma of his lung. She confirmed that adenocarcinoma of the lung directly caused the employee's death.

On November 7, 2013 OWCP requested that Dr. Weaver review the January 13, 1991 asbestos assessment review, in addition to reports on the decommissioning and demolition of the employee's former workplace. It asked her to comment, after reviewing these reports, as to whether the asbestos assessment review was sufficient to alter her medical opinion.

By report dated November 26, 2013, Dr. Weaver responded that, while all the environmental reports indicated that there was a potential for minimal asbestos exposure in the workplace, the reports also indicated that the asbestos-containing material was intact, not friable, and in areas unlikely to be accessed such as the attic, crawlspaces, or under the rug, and it was therefore highly unlikely that the very minimal potential exposure caused, contributed to, or aggravated the employee's adenocarcinoma of the lung.

By decision dated February 12, 2014, OWCP denied appellant's claim for compensation. Relying on Dr. Weaver's report as the weight of medical evidence, it found that the evidence of record failed to establish that the employee's death was causally related to factors of his federal employment.

On February 9, 2015 appellant requested reconsideration of OWCP's February 12, 2014 decision. With her request, she submitted articles regarding asbestos; an obituary for a geologist who worked on dams, levees, and waterways; and a diagnostic report from Dr. Richard Bernstein, a pulmonologist, dated July 27, 2010. Dr. Bernstein noted that parenchymal abnormalities consistent with pneumoconiosis in addition to large parenchymal opacities.

In a narrative statement, appellant noted that asbestosis was a fibrotic lung disease and that this disease was also known as pneumoconiosis. She further argued that length and degree of exposure to asbestos was not necessarily relevant to the development of lung disease, and that the employee complained that his work area was "always dusty." Appellant noted that exposure to asbestos significantly increased the risk of developing lung cancer.

On February 20, 2015 OWCP forwarded the evidence of record, including all evidence received on reconsideration, to Dr. Weaver to determine whether the employee's exposure to asbestos more likely than not caused or contributed to his diagnosed adenocarcinoma, and whether the adenocarcinoma hastened or contributed to his death. It also forwarded a statement of accepted facts (SOAF) dated February 20, 2015 to her which noted that the employee worked as a supervisory geologist from 1968 through 1975.

In a report dated March 5, 2015, Dr. Weaver reviewed the evidence submitted on reconsideration. She indicated that the March 10, 2015 SOAF misstated the employee's tenure at the employing establishment. Based on a review of the medical evidence, however, Dr. Weaver noted that Dr. Bernstein's report was insufficient to find that the employee's adenocarcinoma was causally related to asbestos exposure.

On March 10, 2015 OWCP issued a corrected SOAF, noting that the employee worked as a supervisory geologist at the employing establishment from 1968 through 1995. On March 10, 2015 it again forwarded the updated SOAF to Dr. Weaver and requested that she answer whether the correction altered her opinion.

On March 24, 2015 Dr. Weaver responded, noting that the obituary of record was of a person unrelated to the employee, and as such it did not support the claim for benefits. She further responded that the corrected period of employment did not alter her opinion as set forth on March 5, 2015. Dr. Weaver noted that there was no job description for the employee in the case file.

By decision dated March 25, 2015, OWCP reviewed the merits of appellant's claim and denied modification of its February 12, 2014 decision. It found that the report of Dr. Bernstein, while relevant to the claim, was insufficient to conclude that the employee's death from adenocarcinoma was caused by exposure to asbestos in the course of his federal employment. OWCP noted that the weight of medical evidence remained with Dr. Weaver.

On March 22, 2016 OWCP received appellant's March 17, 2016 request for reconsideration of its March 25, 2015 decision. Appellant noted that she had attempted to secure the employee's job description, but that she had been unable to secure one. She submitted a letter from the Office of Personnel Management (OPM) dated December 4, 2015 stating that it did not maintain a repository of position descriptions, as well as an e-mail from an OPM representative stating that record copies of position descriptions, including certain information, were destroyed two years after the position was either abolished or the description was superseded. Appellant submitted a response to a Freedom of Information Act request, noting that no records could be located related to the employee's position description. In addition, she submitted a civilian performance plan dated January 29, 1992, in which it was noted that the employee would make visits to construction sites and project offices. OWCP also received an undated and unsigned document entitled "Justification for Special Act or Service Award," wherein it was noted that the employee had "accepted responsibility for other assignments, primarily the new mission for the asbestos inspection and abatement surveys for the entire Umatilla Depot Activity. In this assignment the employee would also provide for the inspection and removal of asbestos for the District projects. Appellant also submitted numerous general articles related to asbestos, including articles from medical journals and articles related to use of asbestos in construction. She argued that these articles established that the employee was exposed to asbestos in the course of his employment, as he visited construction sites.

By decision dated April 11, 2016, OWCP declined to review the merits of appellant's claim.³ It found that she had submitted no relevant arguments or evidence not previously considered in support of her claim. Specifically, OWCP found that appellant's arguments regarding causation were both speculative and not from a physician; that the medical literature submitted to the record did not pertain to the employee's specific circumstances; and that the other documents submitted did not contain specific workplace exposure data or how such exposure caused or contributed to the employee's lung cancer.

³ This decision erroneously referenced a decision dated March 25, 2016. No decision with that date exists in this case file. The last merit decision of record was the decision dated March 25, 2015.

By letter dated March 2, 2017, received on March 17, 2017, appellant again requested reconsideration of OWCP's March 25, 2015 decision. She noted the existence of a document from the National Cancer Institute which indicated that there was no safe level of asbestos exposure, and she related that the employee was regularly exposed to asbestos. Appellant further noted that she had hired a legal researcher who performed legal and medical research on her behalf. The legal researcher obtained records regarding asbestos abatement at a facility belonging to the employing establishment, Umatilla Depot; scope of work identification of asbestos abatement; records listing all sites that were part of the Defense Environmental Restoration Program (DERP); and a contract designating the employee as a Contract Officer's Representative for Asbestos Abatement for Walla Walla dated July 28, 1989. Appellant noted that the employee had accepted responsibility at Umatilla Depot for inspection and removal of asbestos, and that due to the lack of an official job description, she had been forced to reconstruct duties of his employment from the available resources. She noted that she had obtained a document listing all project locations where her late husband had worked on asbestos abatement in Oregon, Washington, and Idaho. Appellant requested that OWCP allow her newly-submitted evidence to be reviewed by Dr. Weaver.

By decision dated March 21, 2017, OWCP denied appellant's request for reconsideration. It found that her request was untimely filed and failed to demonstrate clear evidence of error.

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.⁴ 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.⁵

OWCP 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 error.⁶ 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.⁷

⁴ 20 C.F.R. § 10.607(a).

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

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 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."

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

The Board makes an independent determination of whether a claimant has demonstrated 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.¹³ In order to demonstrate clear 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.¹⁴

ANALYSIS

The Board finds that in its March 21, 2017 decision OWCP properly determined that appellant filed an untimely application for review. OWCP's regulations provide that the one-year time limitation period for requesting reconsideration begins on the date of the last merit decision. The last merit decision in this case was on March 25, 2015.¹⁵ Appellant's request for reconsideration was received on March 17, 2017, which was over one year after the March 25, 2015 decision. Therefore, she must demonstrate clear evidence of error with regard to the decision of March 25, 2015.

The Board further finds that appellant has failed to demonstrate clear evidence of error with regard to the decision of March 25, 2015. Appellant did not submit the type of positive, precise, and explicit evidence manifesting on its face that OWCP committed error in the denial of this claim.

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁴ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ The Board finds that the erroneous reference to a decision dated March 25, 2016 in OWCP's decision dated April 11, 2016 constituted harmless error. There is no decision dated March 25, 2016 of record.

Appellant submitted a document from the National Cancer Institute which indicated that there was no safe level of asbestos exposure and she alleged that the employee was regularly exposed to asbestos. She also submitted various other general articles related to asbestos and exposure to asbestos. This evidence did not deal with the employee's actual and particular exposure to asbestos.¹⁶ Therefore, this evidence does not constitute the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its June 27, 2013 decision.¹⁷

Appellant also submitted records regarding asbestos abatement at a facility belonging to the employing establishment, Umatilla Depot; scope of work identification of asbestos abatement; records containing all sites that were part of the DERP; a contract designating the employee as a Contract Officer's Representative for Asbestos Abatement for Walla Walla dated July 28, 1989; and her own statement asserting that a document existed which listed all project locations where the employee had worked on asbestos abatement in Oregon, Washington, and Idaho. This evidence again did not manifest on its face that an error was committed in OWCP's decision dated March 25, 2015. It is additional evidence establishing some existence of asbestos at the employing establishment, but does not demonstrate clear evidence of error in the prior decision. The documents submitted on reconsideration were of insufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the denial of her claim.¹⁸ The documents do not establish that reliance on Dr. Weaver's medical reports was in error at the time of the March 25, 2015 decision. As such, appellant has not submitted the type of positive, precise, and explicit evidence which would manifest on its face that OWCP committed error in its March 25, 2015 decision.¹⁹ The term clear evidence of error is intended to represent a difficult standard.²⁰ Even a detailed, well-rationalized medical report, which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, is insufficient to demonstrate clear evidence of error.²¹ It is not enough to show that evidence could be construed so as to produce a contrary conclusion.²² Instead, the evidence must shift the weight in appellant's favor.²³

¹⁶ See *R.R.*, Docket No. 17-1132 (issued November 22, 2017); see also *Roger G. Payne*, 55 ECAB 535 (2004) (excerpts from publications have little probative value in resolving medical questions unless a physician shows the applicability of the general medical principles discussed in the articles to the specific factual situation in a case).

¹⁷ See *E.C.*, Docket No. 17-1229 (issued December 13, 2017).

¹⁸ See *B.G.*, Docket No. 16-1239 (issued November 28, 2016).

¹⁹ See *K.W.*, Docket No. 15-1187 (issued August 19, 2015).

²⁰ *D.B.*, Docket No. 16-1405 (issued January 9, 2017).

²¹ *Id.*

²² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

²³ *Id.*

For these reasons, the evidence and argument submitted by appellant does not raise a substantial question concerning the correctness of OWCP's March 25, 2015 decision and OWCP properly determined that she did not demonstrate clear evidence of error in that decision.

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 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2018
Washington, DC

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

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

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