

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

C.V., widow of P.V., Appellant)	
)	
and)	Docket No. 18-0751
)	Issued: February 22, 2019
DEPARTMENT OF AGRICULTURE, FOREST)	
SERVICE, Albuquerque, NM, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2018 appellant timely appealed from October 26, 2017 and January 29, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than has 180 days elapsed from OWCP's last merit decision, dated May 15, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. § 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." See 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's July 19, 2017 and January 23, 2018 requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On October 2, 2009 appellant filed a claim for compensation by a widow (Form CA-5) alleging that the death of her husband (the employee) was the result of his accepted condition of employment-related asthma.

Between 1981 and 1987, the employee worked as a forestry technician, which was primarily a firefighter position. He had an accepted occupational disease claim for smoke-induced asthma under OWCP File No. xxxxxx834, which arose on or about June 23, 1986. In March 1996, OWCP accepted, under the present claim, permanent aggravation of smoke-induced asthma, and assigned OWCP File No. xxxxxx268, with a September 4, 1987 date of injury. The employee received wage-loss compensation benefits on the periodic rolls until his death on March 11, 2009 at age 64.

The employee's death certificate listed the immediate cause of death as diffuse amyloidosis with associated heart and renal failure. The death certificate also identified congestive heart failure and airways dysfunction syndrome as other significant conditions contributing to death.

After development of the medical evidence, by decision dated February 17, 2011, OWCP denied appellant's claim for survivor's benefits.

Appellant submitted multiple requests for reconsideration that were accompanied by additional medical evidence. By decisions dated May 6 and September 20, 2011, and March 23 and September 7, 2012, OWCP denied modification of the denial of survivor's benefits. On September 17, 2012 appellant again requested reconsideration.

On November 20, 2012 OWCP determined that a conflict had been created between the second opinion physician, Dr. Maroun Tawk, a Board-certified specialist in internal medicine, pulmonary disease, critical care, and sleep medicine, and appellant's physician, Dr. W.G. Hughson, a physician Board-certified in internal medicine, pulmonary medicine, and occupational medicine. Dr. Tawk had provided reports dated August 3 and November 23, 2010, and September 9, 2011 in which he opined that the employee's death was caused by the effects of amyloidosis and that the employee's accepted condition had not, in any way, caused or contributed

³ Docket No. 15-0083 (issued October 13, 2016); *Order Dismissing Appeal*, Docket No. 18-0538 (issued January 29, 2018).

to his death. Dr. Hughson reported on January 2, 2012 that the employee's death had been caused by his previously accepted asthma condition.

OWCP referred appellant to Dr. Hsien-Wen Hsu, a Board-certified internist, for an impartial medical examination. In a May 3, 2013 report, Dr. Hsu agreed with Dr. Tawk that the employee died due to amyloidosis and opined that his accepted condition of asthma neither caused nor aggravated employee's eventual death.

By decision dated May 15, 2013, OWCP denied modification of its September 7, 2012 decision which denied appellant's claim for survivor's benefits. It determined that the special weight of the medical evidence was represented by the opinion of the impartial medical examiner, Dr. Hsu.

In an August 23, 2013 letter, appellant requested that OWCP investigate whether the employee's occupational exposure to unspecified toxic fumes, vapors, and gases contributed to his development of AL amyloidosis. She noted that none of the employee's treating physicians had considered this possible connection because AL amyloidosis was only diagnosed after his death. Appellant attached an opinion by Dr. David C. Seldin, a hematologist, who indicated that there was no doubt that the employee's exposure to smoke as a firefighter would have had the potential to contribute to the development of cancer and blood diseases like AL amyloidosis. In a similar report, dated August 6, 2013, Dr. Seldin noted that, based on the records provided to him by appellant, the employee died due to AL amyloidosis, a malignant bone marrow plasma cell disorder, and that there was a strong possibility that exposure to toxic products of combustion as a firefighter contributed to his acquiring this disease and to his death.

On September 27 and 30, 2013 appellant again requested reconsideration. By decision dated December 20, 2013, OWCP denied reconsideration without reviewing the merits of the claim. It found that the evidence submitted was either previously reviewed or cumulative in nature. OWCP indicated that Dr. Hsu, the impartial medical examiner, had previously determined that the employee's death was unrelated to his employment as a forestry technician, and that the current request for reconsideration did not present evidence sufficient to warrant merit review of the May 15, 2013 decision.

Appellant continued to request reconsideration of the denial of the claim and submit additional evidence. By decisions dated February 3, March 3, and May 22, 2014, OWCP denied her requests for reconsideration for merit review pursuant to 5 U.S.C. § 8128(a). By decisions dated July 2 and October 9, 2014, it denied appellant's requests for reconsideration, finding that her requests were untimely filed and failed to demonstrate clear evidence of error.

On October 15, 2014 appellant appealed to the Board. By decision dated October 13, 2016, the Board affirmed OWCP's May 22, July 2, and October 9, 2014 nonmerit decisions. The Board noted that appellant's allegation at the time she filed her survivor's benefits claim in September 2009 was that the employee's amyloidosis was not employment related, but rather that employee's smoke-induced asthma had aggravated his heart condition and contributed to his ultimate heart failure. The Board indicated that OWCP developed the case based on this particular theory of causal relationship, with an emphasis on whether the employee's asthma caused his amyloidosis and/or his heart and renal failure. The Board noted that it took six merit decisions

denying survivor's benefits before appellant first raised her current theory of causal relationship in August 2013. The Board found that neither the second opinion physician, Dr. Tawk, nor the impartial medical examiner, Dr. Hsu, specifically addressed whether there was a causal relationship between the employee's occupational smoke exposure and his amyloidosis as she had not raised her alternative theory of causation until after the June 13, 2014 request for reconsideration. The Board therefore found that appellant had not raised a substantial question concerning the correctness of OWCP's May 15, 2013 merit decision.⁴

On January 27, 2017 appellant filed a new claim for compensation by a widow (Form CA-5) alleging that her husband's death had been caused by his amyloidosis. She asserted that the new medical evidence was sufficient to reopen the claim. Appellant alleged that this should have been treated as a new claim because it was based on amyloidosis, not a prior accepted condition.

In a letter to OWCP dated April 25, 2017, appellant alleged that her delay in submitting her claim for amyloidosis was because the employee's physicians did not know about the causal relationship between this disease and the employee's federal employment as it is a rare disease and many physicians were unaware of its cause. She stated that she was not claiming that the employee's amyloidosis had anything to do with his asthma, rather she alleged that his federal employment contributed to the amyloidosis. Appellant resubmitted medical evidence.

In a letter dated July 6, 2017, OWCP explained that the Board had found that OWCP sufficiently and correctly developed and adjudicated all claimed theories per FECA guidelines.⁵

On July 19, 2017 appellant submitted a request for reconsideration. She stated that her survivor's claim was for widow's benefits due to the employee's AL amyloidosis, a claim she filed on January 27, 2017. Appellant stated that her deceased husband's claim was for asthma, and that asthma and AL amyloidosis had nothing to do with each other. She stated that the delay in her filing a survivor's benefits claim alleging amyloidosis as the cause of the employee's death was because at first, the physicians only opined that his asthma contributed to his death. Appellant noted that Dr. John W. Ellis, Board-certified in family and environmental medicine, now admitted that he was wrong in his prior report. She stated that the employee's amyloidosis developed during his time as a firefighter, but that it was not known until his autopsy. Appellant argued that asthma did not cause the amyloidosis, but the mechanisms of exposure were the same. She contended that as soon as she knew that her husband's amyloidosis was causally related to his federal employment, she submitted a request for reconsideration.

On July 19, 2017 appellant submitted a September 9, 2014 medical report wherein Dr. Ellis opined, after a review of further medical evidence, including Dr. Seldin's August 6, 2013 report, that the employee's amyloidosis was caused by his exposure to toxic fumes while working as a firefighter for the employing establishment.

⁴ *Id.*

⁵ The Board notes that OWCP's July 6, 2017 letter was not a final decision and OWCP has not issued a final decision regarding appellant's January 27, 2017 claim.

By decision dated October 26, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On January 23, 2018 appellant filed another request for reconsideration and enclosed a January 17, 2018 report by Dr. Judy Schmidt, a physician Board-certified in hematology, internal medicine, and medical otology.

In a January 17, 2018 report, Dr. Schmidt noted that AL amyloidosis was a curable disease when diagnosed in a timely fashion. She reviewed the employee's medical and employment history. Dr. Schmidt noted that the employee did not have a diagnosis of amyloidosis until his death. She noted that the employee started having edema around March 2007, and that at that time an echocardiogram, BNP, troponin, uric acid, serum immunofixation, serum free light chains, and 24-hour urine study should have been done to diagnose systemic amyloidosis. If done, the employee would have been referred to a hematologist and an amyloid center and offered curative hematopoietic stem cell transplantation. Dr. Schmidt noted that drugs used conventionally to treat hypertension such as ACE inhibitors and angiotensin receptor blocking agents would have been avoided, thereby reducing the employee's chance of sudden death. She noted that the employee had been given medications which increased his risk of sudden death/arrhythmia nearly until his death as his amyloidosis went unrecognized. Dr. Schmidt noted that the employee was not referred to a cardiologist until February 2009 and was not referred to a nephrologist until March 9, 2009 two days prior to his death. She noted that the nephrologist would have diagnosed amyloidosis at the first sign of renal insufficiency in December 2008 and more likely when there was persistent edema in March 2007. Dr. Schmidt concluded that the employee had occupational asthma and systemic amyloidosis, and that amyloidosis was the cause of this death in March 11, 2009. She noted that there was a two-year delay in diagnosis of amyloidosis due to the physician's preoccupation with the employee's asthma. Dr. Schmidt opined that the employee should have been diagnosed with cardiac amyloidosis when he had persistent edema in March 2007. Due to this delay in diagnosis, she noted that the employee had not been offered curative therapy with hematopoietic stem cell transplant.

By decision dated January 29, 2018, OWCP denied appellant's request for reconsideration as it was not timely filed and failed to demonstrate clear evidence of error. It determined that the new evidence explained the difficulties the physicians had in providing a correct medical diagnosis. OWCP found that the newly presented evidence raised concerns regarding the initial diagnosis and treatment of the employee, but failed to demonstrate error in the May 15, 2013 merit decision.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ Timeliness is determined by the document receipt date *i.e.*,

⁶ 5 U.S.C. § 8128(a); *see also R.S.*, Docket No. 18-0505 (issued July 24, 2018).

⁷ 20 C.F.R. § 10.607(a).

the “received date” in OWCP’s integrated Federal Employees’ Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

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.¹⁰ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

To demonstrate clear evidence of error a claimant must submit evidence relevant to the issue which was decided by OWCP,¹² is positive, precise, and explicit and manifests on its face that OWCP committed an error.¹³ The evidence must not only be of sufficient probative value to create a conflict in the medical opinion or demonstrate a clear procedural error, but also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision for which review is sought.¹⁴

Evidence that does not raise a substantial question as to the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹⁵

ANALYSIS

The Board finds that appellant’s requests for reconsideration dated July 19, 2017 and January 23, 2018 were untimely filed and failed to demonstrate clear evidence of error.

On July 19, 2017 and January 23, 2018 OWCP received appellant’s requests for reconsideration. As these requests were made more than a year after the latest merit decision, dated May 15, 2013, the requests for reconsideration were untimely filed pursuant to 20 C.F.R.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *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 *Id.* at § 10.607(b).

¹² *See D.T.*, Docket No. 17-1734 (issued January 18, 2018).

¹³ *See D.D.*, Docket No. 17-1750 (issued March 8, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Robert G. Burns*, 57 ECAB 657, 659-60 (2006).

¹⁵ *See J.S.*, Docket No. 10-0385 (issued September 15, 2010); *B.W.*, Docket No. 10-0323 (issued September 2, 2010).

§ 10.607(a).¹⁶ As such, appellant must demonstrate clear evidence of error with respect to OWCP's last merit decision.¹⁷

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 9, 2014 decision because the Board considered that evidence in its October 13, 2016 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸

The Board notes that the underlying issue decided in the May 15, 2013 merit decision was whether appellant established that the employee's death was causally related to his accepted asthma condition.

Subsequent to the Board's October 13, 2016 decision, appellant submitted a September 9, 2014 medical opinion by Dr. Ellis wherein he noted that after reviewing Dr. Seldin's August 6, 2013 report he agreed that the employee's amyloidosis was caused by the exposure to toxic fumes while he was working as a firefighter for the employing establishment. While the report of Dr. Ellis is generally supportive of causal relationship, it does not demonstrate clear error on the part of OWCP. As the Board explained in the prior decision, appellant's theory of causal relationship, which was decided in this claim, was that the employee's death was causally related to his accepted asthma condition. Therefore, Dr. Ellis' opinion is insufficient to demonstrate clear evidence of error as he did not provide an opinion which was manifest on its face that the employee's death was caused by his accepted asthma condition.¹⁹

The opinion of Dr. Schmidt is also insufficient to demonstrate clear evidence of error. Initially, the Board notes that she provided a discussion of the development of the employee's occupational asthma and systemic amyloidosis, and clearly opined that amyloidosis was the cause of his death on March 11, 2009. Dr. Schmidt also indicated that the delay in the employee receiving a proper diagnosis of amyloidosis was caused by the physician's preoccupation with his employment-related diagnosis of asthma, which delayed his receipt of proper treatment and caused him to be placed on medications that would have been contraindicated if he had received a proper diagnosis of amyloidosis in a timely fashion. However, as the Board explained in the prior decision, appellant's post May 15, 2013 new claim regarding the cause of the employee's death did not adversely reflect the propriety of its May 15, 2013 decision, which found that she had not established asthma as the cause of death.²⁰ At the time of the filing of the appeal to the Board in this matter, OWCP had not issued a final decision regarding her claim that the employee's death was caused employment-related amyloidosis. Dr. Schmidt's opinion regarding the employee's

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ *Supra* note 8; *see also* A.W., Docket No. 18-0362 (issued July 26, 2018).

¹⁸ *See J.L.*, Docket No. 17-1460 (issued December 21, 2018).

¹⁹ *Supra* note 13.

²⁰ *Supra* note 3.

death due to amyloidosis therefore does not raise a substantial question as to the correctness of the May 15, 2013 decision at the time that the decision was issued.²¹

Clear evidence of error is intended to represent a difficult standard.²² To demonstrate clear evidence of error, the evidence submitted 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.²³ Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have been sufficient to require additional development of the claim, and is insufficient to demonstrate clear evidence of error.²⁴ To determine clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁵ The Board makes an independent determination as to 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.²⁶

The evidence received with appellant's requests for reconsideration did not establish clear error in OWCP's May 15, 2013 finding that the employee's death was not caused by his accepted asthma condition. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's July 19, 2017 and January 23, 2018 requests for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

²¹ See *A.C.*, Docket No. 18-0201 (issued June 20, 2018).

²² *B.W.*, Docket No. 17-0182 (issued July 5, 2018).

²³ *E.P.*, Docket No. 17-1086 (issued October 13, 2017).

²⁴ *A.C.*, *supra* note 21.

²⁵ *M.B.*, Docket No. 17-1505 (issued January 9, 2018).

²⁶ *D.J.*, Docket No. 17-1556 (issued December 22, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 29, 2018 and October 26, 2017 are affirmed.

Issued: February 22, 2019
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