United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 18-0017**
	)	**Issued: May 9, 2019**
DEPARTMENT OF VETERANS AFFAIRS, BAY PINES VETERANS ADMINISTRATION, St. Petersburg, FL, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2017 appellant filed a timely appeal from an April 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 22, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP rendered its April 13, 2017 decision. 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." 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 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On February 24, 2012 appellant, then a 49-year-old electronics technician, filed an occupational disease claim (Form CA-2) alleging that he developed interstitial lung disease as a result of working in an area with mold, asbestos, and moisture. He noted that he first became aware of his condition on February 15, 2011 and realized that it was causally related to his federal employment on September 30, 2011. Appellant stopped work on December 2, 2011.

In support of his claim, appellant submitted medical reports from Dr. Nathan Do, a Board-certified internist and pulmonologist, Dr. Keith E. Sommers, a Board-certified thoracic surgeon, Dr. Marela Velez, Board-certified in infectious disease, Dr. Gerald Boutin, Ph.D., a clinical psychologist, and Dr. Sara C. Vizcay, a Board-certified family practitioner. He also submitted a computerized tomography (CT) scan of the chest dated April 9, 2012, which revealed two areas of opacity in the right upper lobe and right lower lobe, noncalcified nodular densities within the left lung, and blebs noted throughout both lungs.

OWCP further developed appellant's claim, including sending him to a second opinion physician.

By decision dated September 25, 2012, OWCP denied appellant's claim, finding that he had not established that his claimed medical conditions were causally related to the established employment factors.

Appellant subsequently requested an oral hearing before a representative of OWCP's Branch of Hearings and Review and submitted additional evidence, including correspondence from the Occupational Safety & Health Administration (OSHA) dated February 16, 2012 to March 31, 2013. In the correspondence OSHA informed the employing establishment that the serious violations must be abated by June 10, 2013. Appellant also submitted a May 20, 2013 report, wherein Dr. Ginige Swanthri DeSilva, a Board-certified rheumatologist, noted treating appellant in October 2012 for persistent cough and dyspnea secondary to an allergic reaction to mold exposure in his work environment. Dr. DeSilva indicated that hypersensitivity pneumonia testing was positive for Aspergillus, micropolyspora, and thermoactinomycetes, which suggested appellant developed an allergic response to those agents.

A telephonic hearing was held on May 29, 2013. By decision dated July 22, 2013, an OWCP hearing representative affirmed the September 25, 2012 decision.

On September 8, 2013 appellant requested reconsideration and submitted an affidavit from a former colleague.

By decision dated September 17, 2013, OWCP denied appellant's reconsideration request, finding that the evidence submitted was cumulative and substantially similar to evidence already contained in the case record and previously considered.

Appellant continued to submit additional evidence, including a December 8, 2011 report from Dr. Sommers, an attending physician's report (Form CA-20) from Dr. Velez dated January 31, 2012, a CT scan of the chest dated April 9, an August 8, 2012 report from Dr. Vizcay, and correspondence from OSHA dated January 23, 2012 to May 14, 2013, all previously of record.

On January 20, 2012 Dr. Thomas V. Colby, a Board-certified pathologist, reviewed pathological slides from appellant's lung biopsy which revealed minor abnormalities in the small airways that correlated with a cough. He also noted mural thickening and healed thromboemboli indicative of pulmonary hypertension as appellant was also obese. Dr. Colby diagnosed patchy vascular changes, mild subpleural inflammation and fibrosis.

Appellant also submitted medical articles detailing pneumonia caused by penicillin and fungal spores.

In a March 11, 2013 report, Dr. Vizcay noted allergic bronchopulmonary Aspergillosis fungal infection. She noted that appellant performed dirty jobs involving exposure to mold, moldy odors, areas of duct work, air conditioning units, and filters and developed a work-related occupational disease. Dr. Vizcay referenced an air sampling and testing done which revealed predominantly Aspergillus. She noted a September 11, 2012 laboratory report for appellant revealed a large concentration of Aspergillus hyphae and she opined that his contamination and lung infection came from his work environment. Dr. Vizcay diagnosed allergic bronchopulmonary Aspergillosis, status post occupational fungal infection of lungs, and chronic bronchopneumonia secondary to chronic lung infection and opined that he was totally disabled.

Appellant came under the treatment of Dr. Himanshu Chandarana, a Board-certified internist, on May 24 and June 13, 2013 for persistent cough and shortness of breath. Dr. Chandarana noted that appellant had an abnormal CT scan of the chest and underwent a lung biopsy and was tentatively diagnosed with exposure to Aspergillus mold. OSHA correspondence revealed that visible mold was seen in the air ducts where appellant worked. He opined that appellant was apparently exposed to mold and mildew while working and had allergic bronchopulmonary Aspergillosis, possibly Aspergillus pneumonia. Dr. Chandarana noted that upon return to work appellant's symptoms had worsened. In a report dated June 30, 2014, he treated appellant for persistent respiratory symptomology with episodic cough and shortness of breath. Dr. Chandarana reviewed all the medical records and extensive history and opined that appellant had exposure to mold and mildew probably from his work in an aged building and developed allergic bronchopulmonary Aspergillosis, and hypersensitivity pneumonitis.

On October 1, 2013 Dr. Do opined that appellant's symptoms were related to hypersensitivity pneumonitis secondary to mold exposure.

Appellant submitted an attending physician's report (Form CA-20a) from Dr. Velez dated June 6, 2014, who diagnosed hypersensitivity, and pneumonitis secondary to lung mold exposure. Dr. Velez noted with a checked box marked "yes" that his condition was caused or aggravated by an employment duty. She opined that based on her assessment appellant's lung exposure to molds was likely occupational as his condition improved while out of work. Dr. Velez recommended that he avoid work-related mold exposure.

In a July 1, 2014 report, Dr. DeSilva noted that appellant underwent a hypersensitivity pneumonitis panel which was positive for Aspergillus, micropolyspora, and thermactonomyces. Appellant was treated with antifungal mediation and prednisone. He reported the onset of symptoms correlated with the increased mold exposure in his work environment. Dr. DeSilva opined that the mold exposure was responsible for appellant's lung disease. In an attending physician's report (Form CA-20) dated July 16, 2014, she diagnosed hypersensitivity pneumonia and checked a box marked "yes" that his condition was caused or aggravated by an employment activity. Dr. DeSilva opined that appellant was unable to return to the work environment if he would be exposed to mold because the exposure exacerbates his coughing and difficulty breathing.[3]

Appellant also submitted a January 25, 2013 employing establishment notice of separation for medical inability to perform his position.

Appellant was examined by Dr. Angelo M. Alves, a Board-certified neurologist, on May 20, 2015, who diagnosed cervical and lumbar radiculopathy, bilateral carpal tunnel syndrome, bilateral ulnar entrapment neuropathy, peripheral neuropathy, and pituitary ademona. Dr. Alves opined that appellant had significant musculoskeletal problems which prevented him from returning to work.

An October 28, 2015 report from Dr. Boutin noted appellant's treatment for depression and anxiety related to his work environment.[4]

Appellant also submitted a newspaper article on mold and the employing establishment facilities.

On April 5, 2017 appellant requested reconsideration and submitted additional evidence.

Appellant submitted reports from Dr. Chandarana dated August 16 and December 7, 2016, and March 21, 2017, who treated him for persistent cough and worsening shortness of breath. Dr. Chandarana diagnosed chronic cough, chronic bronchitis, chronic obstructive pulmonary disease, and history of exposure to mold and mildew in the workplace.

[3] On October 14, 2014 and June 16, 2015 appellant appealed the September 17, 2013 OWCP decision to the Board. By orders dated December 23, 2014 and October 1, 2015, the Board dismissed his appeal finding that it was untimely filed pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(a). *Order Dismissing Appeal*, Docket No. 15-0085 (issued December 23, 2015); *Order Dismissing Appeal*, Docket No. 15-1419 (issued October 1, 2015).

[4] On October 29, 2015 appellant filed a petition for reconsideration of the Board's October 1, 2015 decision. On November 4, 2015 he also filed an appeal of the Board's October 1, 2015 decision and this appeal was inadvertently docketed as Docket No. 16-0163. On June 22, 2016 the Board dismissed appellant's appeal and denied the petition for reconsideration. The Board found that his appeal docketed as Docket No. 16-0163 must be dismissed as it was untimely filed pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(a). It further noted that the petition for reconsideration was denied as appellant failed to establish any error of fact or law warranting further consideration by the Board. *Order Dismissing Appeal and Denying Petition for Reconsideration*, Docket Nos. 15-1419 & 16-0163, (issued June 22, 2016).

By decision dated April 13, 2017, OWCP denied appellant's April 5, 2017 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.[5] 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.[6] 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.[7] Imposition of this one-year filing limitation does not constitute an abuse of discretion.[8]

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.[9] If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.[10]

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

OWCP's procedures note that 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

[5] 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

[6] 20 C.F.R. § 10.607(a).

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

[8] *G.G.*, Docket No. 18-1072 (issued January 7, 2019)*; E.R.*, Docket No. 09-0599 (issued June 3, 2009)*; Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018)*; Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *supra* note 7 at Chapter 2.1602.5 (February 2016); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b).

[11] *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.[12] The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.[13]

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

By decision dated April 13, 2017, OWCP 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.[14] The last merit decision in this case was dated July 22, 2013. Because appellant's request for reconsideration was received on April 5, 2017, more than one year after the July 22, 2013 merit decision, OWCP properly determined that it was untimely filed.[15] Therefore, he must demonstrate clear evidence of error on the part of OWCP with regard to its July 22, 2013 decision.

The Board finds that appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its July 22, 2013 merit decision, which affirmed the denial of his claim. In support of his request for reconsideration appellant submitted copies of medical reports from Drs. Sommers, Velez, Vizcay, and Colby as well as OSHA reports, which were previously of record. The Board has held that repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.[16] Appellant has not sufficiently explained how the submission of this evidence raises a substantial question concerning the correctness of OWCP's decision.[17] Therefore, they are insufficient to demonstrate clear evidence of error.

Appellant also submitted new medical reports from Drs. Vizcay, Do, Chandarana, and Alvez. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/disability was related to employment factors.[18] The Board finds that these medical reports do not provide medical rationale to establish causal relationship and therefore they are insufficient to demonstrate error

[12] *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

[13] *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

[14] *Supra* note 6.

[15] *Id.* at § 10.607(a) (2011).

[16] *See P.B.*, Docket No. 18-0265 (issued September 5, 2018); *M.P.*, Docket No. 17-0367 (issued March 12, 2018).

[17] *Id.*

[18] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

with respect to the July 22, 2013 decision affirming the September 25, 2012 finding that appellant had not established a medical condition causally related to the accepted factors of his federal employment. The Board has held that the submission of a detailed, well-rationalized report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, does not demonstrate clear evidence of error.[19] Because these reports do not raise a question as to the correctness of OWCP's July 22, 2013 decision, they are insufficient to demonstrate clear evidence of error.[20]

Drs. Velez and DeSilva provided medical opinions which consisted merely of a check mark on a form report. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[21] These reports are therefore insufficient to demonstrate that OWCP committed an error in denying appellant's occupational disease claim, nor raise a question as to the correctness of OWCP's July 22, 2013 decision.[22]

The October 28, 2015 report from Dr. Boutin does not provide an opinion on the claimed lung conditions and as it is irrelevant to the underlying issue of whether appellant has established a condition causally related to the accepted factors of his federal employment. Therefore, this report is also insufficient to demonstrate clear evidence of error.[23]

The various statements, personal records, and OSHA reports are also irrelevant to the threshold issue of causal relationship as they were prepared by lay persons and do not constitute competent medical evidence. Because these documents do not raise a question as to the correctness of OWCP's July 22, 2013 decision they are insufficient to demonstrate clear evidence of error.[24]

Consequently, the Board finds that OWCP properly denied appellant's April 5, 2016 request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant argues that he submitted sufficient evidence to establish that his workplace exposure to mold caused his lung condition. As previously noted, the Board does not have jurisdiction over the merits of the claim and he has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

[19] *E.K.*, Docket No. 18-0422 (issued August 22, 2018).

[20] *See P.B., supra* note 16.

[21] *See M.O.*, Docket No. 18-1056 (issued November 6, 2018); *Deborah L. Beatty*, 54 ECAB 340 (2003).

[22] *See supra* note 19.

[23] *See M.P., supra* note 16.

[24] *Id.*

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2019
Washington, DC

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

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

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