

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

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F.L., Appellant)	
)	
and)	Docket No. 21-0304
)	Issued: July 13, 2021
DEPARTMENT OF THE NAVY, MARINE)	
CORPS LOGISTICS MAINTENANCE,)	
Barstow, CA, Employer)	
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Appearances:
Steven E. Brown, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 21, 2020 appellant, through counsel, filed a timely appeal from a July 10, 2020 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 19, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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.*

ISSUE

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

FACTUAL HISTORY

On June 8, 2018 appellant, then a 59-year-old retired sandblaster and parts attendant, filed an occupational disease claim (Form CA-2), alleging that he developed arsenic poisoning due to factors of his federal employment, including the effects and process of sandblasting. He noted that he first became aware of his condition and realized its relation to his federal employment on April 21, 2018. On the reverse side of the claim form, the employing establishment noted that appellant medically retired, effective January 5, 2015.³

In an April 19, 2018 summary report, Dr. Donovan Anderson, a family medicine specialist, diagnosed diabetes, atypical chest pain, nephrotoxicity, nephropathy induced by heavy metals, toxic effect of unspecified metal, heavy metal exposure, hypertension, chronic silicosis, and cadmium poisoning.

Appellant also submitted an April 20, 2018 laboratory urine test result, which revealed exposure to arsenic.

Dr. Anderson noted in an April 25, 2018 medical report that, on examination, appellant exhibited pelvic, abdominal, and back pain.

In an undated statement, the employing establishment contended that appellant previously filed a Form CA-2 for arsenic poisoning on March 15, 2012, which was denied. It alleged that he told different stories to different agency representatives and filed incomplete forms that potentially created confusion.

In a May 11, 2018 medical report, Dr. Anderson noted that appellant had elevated levels of arsenic and appellant complained that his bones were hurting all over the body.

In an undated attending physician's report (Form CA-20), Dr. Anderson indicated that appellant worked at the employing establishment from 2003 to 2014 and had no history of preexisting disease. He diagnosed arsenic poisoning and opined that it was "possible" that his condition was caused or aggravated by an employment activity.

³ The record reflects that appellant previously filed an occupational disease claim on June 13, 2006 alleging exposure to cadmium (lead) under OWCP File No. xxxxxx780. By decision dated August 11, 2006, OWCP denied his claim, finding that the medical evidence was insufficient to establish causal relationship between the claimed condition and the accepted federal employment exposure. Appellant also previously filed an occupational disease claim on March 9, 2012 for exposure to chemical substances, causing upper respiratory and other conditions, under OWCP File No. xxxxxx318. By decision dated September 6, 2012, OWCP denied his claim, finding that, as he failed to establish the employment exposure, he did not sustain an injury in the performance of duty, as alleged. Appellant's claims have not been administratively combined.

In a June 11, 2018 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a December 2, 2012 Form CA-20, an unidentifiable healthcare provider indicated that appellant was exposed to cadmium and dusts from sandblasting.

On February 4, 2013 Dr. David Bland, a Board-certified pulmonologist, completed a Form CA-20 and noted that appellant was exposed to sandblasting dusts. He reported that appellant experienced acneiform rash, shortness of breath, and a burning sensation in nose. Dr. Bland diagnosed skin, eye, and nose irritation due to exposure to sandblasting products. In CA-20 forms dated July 15, 2014 and September 3, 2015, Dr. Bland again noted that appellant experienced acneiform rash, shortness of breath, and burning chest and lungs due to exposure to sandblasting dusts.

A February 12, 2017 medical report by Dr. William Rappoport, Board-certified in cardiovascular disease and internal medicine, noted that appellant previously worked as a sandblaster for 13 years with the employing establishment, where he worked on a large variety of equipment including vehicles, engines, and artillery. Appellant reported that he worked in a poorly ventilated area with a compressor that was assembled improperly for approximately five years and that his health problems began three to four years prior. Dr. Rappoport noted that appellant had known about his pulmonary issues since 2011 and his previous physician thought that cadmium, toxins and heavy metals could be the cause of his health conditions. He reported that appellant had metallic taste in his mouth for the past few years and experienced burning pain in his feet and intermittent sharp pain in his lower extremity up to his chest. Dr. Rappoport conducted a physical examination and diagnosed chest pain, benign essential hypertension, hyperlipidemia, chronic obstructive pulmonary disease, carotid artery stenosis, chronic kidney disease, diabetes, abdominal mass, and obesity.

In a March 15, 2017 medical report, Dr. Kahroba Jahan, Board-certified in cardiovascular disease and internal medicine, indicated that appellant had a history of heavy metal toxicity from occupational exposure in 2004, which resulted in tubulointerstitial nephropathy. She noted that appellant requested a cardiac biopsy to detect cadmium levels in his heart.

In a May 11, 2018 letter, Dr. Anderson noted that appellant was seen for possible cadmium exposure from work. He indicated that appellant might have inhaled some suspected heavy molds while working as a sandblaster for over 10 years. Dr. Anderson noted that a heavy metal screen test revealed no cadmium exposure but demonstrated elevated levels of arsenic. He explained that appellant was never tested for arsenic exposure until the April 19, 25, and May 11, 2018 evaluations.

In a June 19, 2018 statement, appellant alleged that his supervisors engaged in improper behavior and needed to be investigated. He contended that the employing establishment improperly removed employees' documents and produced unlawful working conditions, creating improper exposure to metals, leads, and unclean oxygen. Appellant asserted that his cadmium level was extremely high.

In a June 20, 2018 medical report, Dr. Anderson indicated that appellant was no longer able to work due to exposure to variety of heavy metals, including cadmium and arsenic. He opined that appellant's exposure to cadmium and arsenic occurred when he worked at the employing establishment. Dr. Anderson indicated that appellant's work environment was improperly ventilated and that he breathed in a lot of dusts. He also noted that removing paint from metals was appellant's daily job. Dr. Anderson found that there was no evidence of excessive arsenic level previously reported and that appellant was unaware of high levels of arsenic.

In a June 28, 2018 statement, appellant asserted that he previously received no medical treatment for arsenic poisoning.

By decision dated July 19, 2018, OWCP denied appellant's occupational disease claim, finding that it was untimely filed. It found that appellant's claim had not been filed within the three years filing requirement of the date of last exposure or from the perspective of "latent" disability, noting that the similarity of the current claim to appellant's prior claims in OWCP File Nos. xxxxxx780 and xxxxxx318 provided further evidence that appellant was aware of his illness. OWCP also found that there was no evidence to support exceptional circumstances to allow for a waiver of the timely filing requirement.

In an undated statement, appellant contended that the employing establishment engaged in unlawful conduct including removing employees' documents and falsifying his document.

On July 9, 2019 appellant requested reconsideration and submitted additional evidence.

In a January 23, 2019 report, Dr. Muhammad A. Nayer, a Board-certified neurologist, diagnosed paresthesia of skin, idiopathic progressive neuropathy, and bilateral leg pain.

Dr. Suraj A. Muley, a Board-certified neurologist, noted in a February 25, 2019 medical report that appellant had a history of significant pelvic pain, diabetes, and chronic kidney disease. Appellant reported to him that he was exposed to cadmium in 2011 and then to arsenic in 2014. Dr. Muley noted that appellant developed symptoms of facial numbness and pain as well as temperature sensitivity of the face in 2012. He opined that it was possible that he had nerve damage from exposure to cadmium in 2011.

Appellant also submitted an April 15, 2019 electromyography (EMG) study.

By decision dated July 12, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

Appellant resubmitted Dr. Muley's February 25, 2019 report and the April 15, 2019 EMG study.

On April 16, 2020 appellant, through counsel, requested reconsideration, contending that his claim was timely filed because he was unaware of his condition until April 21, 2018, when he was first tested for arsenic poisoning. He further argued that OWCP erred in finding that his prior claims for exposure to other hazardous chemicals was related to the present claim for arsenic poisoning.

Counsel also submitted an internet article discussing heavy metals and the adverse effects one's health.

By decision dated July 10, 2020, OWCP denied appellant's reconsideration request, finding that it 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, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's reconsideration request is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁷ If a request demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁸

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁹ is positive, precise, and explicit, and is manifest on its face that OWCP committed an error.¹⁰ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must 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 reconsideration is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error.¹¹ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹² A determination of whether the claimant has demonstrated clear evidence of error entails a limited

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ 5 U.S.C. § 8128(a); *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(b); *B.C.*, Docket No. 18-1496 (issued May 22, 2019).

⁸ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *see also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

⁹ *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Id.*

¹¹ *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

¹² *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

In the last merit decision, dated July 19, 2018, OWCP denied appellant's occupational disease claim, finding that he did not file his claim within the three-year limitation period provided in 5 U.S.C. § 8122(b). As it received appellant's request for reconsideration on April 16, 2020, more than one year after the July 19, 2018 merit decision, the Board finds that OWCP properly determined that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying his claim for compensation.¹⁴

The Board further finds that appellant has demonstrated clear evidence of error by OWCP in its July 19, 2018 decision.

In its July 19, 2018 decision, OWCP denied appellant's claim, finding that it was untimely filed. It found that appellant's claim had not been filed within the three years filing requirement of the date of last exposure or from the perspective of "latent" disability, noting that the similarity of the current claim to appellant's prior claims in OWCP File Nos. xxxxxx780 and xxxxxx318 provided further evidence that appellant was aware of his illness.

On reconsideration, counsel contended that OWCP erred by equating one type of toxic exposure with several others and that appellant timely filed his claim when he became aware of his arsenic poisoning for the first time on April 21, 2018. Appellant has consistently, throughout the development of his claim, asserted that he received no past medical treatment for arsenic poisoning. It is well established that in cases of latent disability, the time for filing a claim does not begin to run until the claimant is aware, or by exercise of reasonable diligence, should be aware of the causal relationship between his condition and his employment.¹⁵ The record reflects that, although appellant previously filed claims under OWCP Nos. xxxxxx780 and xxxxxx318 for exposures to cadmium and other chemical substances, he was never diagnosed with arsenic poisoning until April 2018. In a May 11, 2018 letter and a June 20, 2018 report, Dr. Anderson noted that appellant was not previously tested for arsenic exposure until April 2018. A review of the record shows that appellant did not become aware of the connection between arsenic poisoning and factors of his federal employment until April 21, 2018 when he received the results from an April 20, 2018 laboratory urine test that revealed exposure to arsenic. Accordingly, as appellant's request for reconsideration is sufficient to shift the weight of the evidence and raise a substantial question as to the correctness of OWCP's decision, the Board finds that appellant has demonstrated

¹³ *Supra* note 11.

¹⁴ 20 C.F.R. § 10.607(a); *F.B.*, Docket No. 20-0910 (issued April 23, 2021); *L.W.*, Docket No. 17-1630 (issued June 7, 2018).

¹⁵ 5 U.S.C. § 8122(b). *See also L.S.*, Docket No. 20-0705 (issued January 27, 2021); *D.D.*, Docket No. 19-0548 (issued December 16, 2019); *J.M.*, Docket No. 10-1965 (issued May 16, 2011).

clear evidence of error on the part of OWCP in its July 19, 2018 decision. Thus, OWCP abused its discretion in failing to reopen appellant's claim for merit review. The Board will reverse OWCP's July 10, 2020 decision and remand the case for an appropriate decision on the merits of his claim.

CONCLUSION

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed. The Board further finds that appellant has demonstrated clear evidence of error in OWCP's July 19, 2018 merit decision and, thus, OWCP improperly denied his request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 13, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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