

FACTUAL HISTORY

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

On February 11, 2005 appellant, then a 47-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained acute bronchitis, carbon monoxide poisoning, silicosis, and a chronic upper respiratory condition due to factors of her federal employment, including occupational exposures to silica dust, floor cleaning chemicals containing ethyl compounds, and diesel exhaust fumes. She noted that she first became aware of her conditions on January 3, 2005 and realized their relation to her federal employment on January 20, 2005. Appellant stopped work on January 20, 2005.

Appellant submitted December 7 and 14, 2001, and March 24, 2003 employing establishment environmental studies documenting the presence of carbon monoxide and trace silica dust below permissible exposure limits. She also provided medical reports and diagnostic test results dated January 6, 1999 through May 12, 2005 supporting diagnoses of chest pain, shortness of breath, atelectasis in the base of the right lung, pharyngitis, and bronchitis. On May 26, 2005 OWCP received a January 7, 2002 letter from the employing establishment confirming its use of specific chemical floor cleaners. The employing establishment submitted a June 20, 2005 statement noting that it utilized a non-alkaline floor cleaner every other day.

By decision dated June 22, 2005, OWCP accepted that appellant had been exposed to the substances documented by the environmental studies and employing establishment statements. However, it denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship between the accepted exposure and the claimed respiratory conditions.

On July 18, 2005 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, held on March 30, 2006. She subsequently submitted additional medical evidence.

By decision dated May 22, 2006, OWCP's hearing representative affirmed the prior decision. Appellant appealed to the Board.

By decision dated December 15, 2006,⁴ the Board affirmed OWCP's May 22, 2006 decision.

On December 19, 2008 appellant requested reconsideration.

³ Docket No. 18-1765 (issued June 11, 2019); Docket No. 17-1682 (issued January 18, 2018); Docket No. 15-1679 (issued December 14, 2015); Docket No. 12-0948 (issued November 28, 2012); Docket No. 09-2374 (issued June 17, 2010); Docket No. 06-1980 (issued December 15, 2006).

⁴ *Id.*

By decision dated April 3, 2009, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board.

By decision dated June 17, 2010,⁵ the Board affirmed OWCP's April 3, 2009 decision.

On June 14, 2011 appellant again requested reconsideration.

By decision dated September 21, 2011, OWCP denied reconsideration, finding that appellant's June 14, 2011 request neither raised substantive legal questions nor included new and relevant evidence. Appellant appealed to the Board.

By decision dated November 28, 2012,⁶ the Board affirmed OWCP's September 21, 2011 nonmerit decision.

On December 2, 2013 appellant again requested reconsideration.

By decision dated February 20, 2014, OWCP denied reconsideration as the evidence submitted did not raise substantive legal questions or include new and relevant evidence.

On February 19, 2015 appellant again requested reconsideration. She provided a January 29, 2015 letter from Dr. Christian Altman, an anesthesiologist who had treated her on January 20, 2005. Appellant also submitted imaging studies and test results.

In a March 9, 2015 letter, OWCP advised appellant that she could not request reconsideration of the February 20, 2014 nonmerit decision, as her only right of appeal was to the Board.

On April 8, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She reiterated her allegations of malfeasance.

By decision dated June 10, 2015, OWCP denied appellant's request for a hearing on the February 20, 2014 decision. It found that she was not entitled to a hearing as a matter of right as she had previously requested reconsideration. OWCP exercised its discretion and performed a limited review of the evidence submitted following reconsideration, and further denied the hearing request as the issue in the case would be addressed equally well by submitting new, relevant evidence or argument accompanying a valid request for reconsideration. Appellant appealed to the Board.

By decision dated December 14, 2015,⁷ the Board affirmed the June 10, 2015 nonmerit decision.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

On November 29, 2016 appellant again requested reconsideration. She contended that the evidence submitted in support of her February 19, 2015 reconsideration request was new and relevant. Appellant also argued that OWCP had failed to develop the medical evidence of record and had not referred her for a second opinion examination.

By decision dated February 27, 2017, OWCP denied reconsideration, finding that appellant's arguments on reconsideration were neither new nor relevant. Appellant appealed to the Board.

By decision dated January 18, 2018,⁸ the Board found that the case was not in posture for decision as OWCP had applied an inappropriate standard of review for timely reconsideration requests. The Board found that as appellant's November 29, 2016 reconsideration request had not been received by OWCP within one year of the Board's December 15, 2006 merit decision, the final merit decision in the claim, it was not timely filed. The Board remanded the case for OWCP to apply the clear evidence of error standard under 20 C.F.R. § 10.607(b).

By decision dated March 30, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board.

By decision dated June 11, 2019,⁹ the Board affirmed OWCP's March 30, 2018 nonmerit decision.

On June 16, 2020 appellant again requested reconsideration. She submitted a May 27, 2020 statement alleging that the employing establishment failed to issue an official injury report or fully investigate her exposure to diesel fumes, and that OWCP failed to acknowledge a December 14, 2001 report by the Department of Labor's Occupational Safety and Health Administration (OSHA) regarding diesel fume exposures. Appellant also argued that OWCP should have processed her occupational disease claim as one for traumatic injury, that OWCP's April 30, 2006 decision failed to address a January 3, 2005 meth choline challenge test report, that October 7, 2014 correspondence to the Secretary constituted a timely request for reconsideration, that all of her requests for reconsideration were timely under the Board's holding in *Eleanor Bozzacco*,¹⁰ and that the employing establishment's failure to provide a detailed statement regarding her allegations warranted a remand of her claim for additional development and a *de novo* decision under the Board's holding in *K.K.*¹¹

By decision dated September 8, 2020, OWCP denied appellant's June 16, 2020 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁸ *Id.*

⁹ *Id.*

¹⁰ Docket No. 99-1745 (issued September 11, 2000).

¹¹ Docket No. 11-1374 (issued January 4, 2012).

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.¹² Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).¹³ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted to OWCP under section 8128(a) of FECA.¹⁴

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.¹⁵ OWCP's 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 request demonstrates clear evidence of error on the part of OWCP.¹⁶

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ 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 evidence of error on the part of OWCP.¹⁹ 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.²⁰

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.²¹ The claimant must present evidence that on its face shows that

¹² 20 C.F.R. § 10.607(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.4(b) (September 2020).

¹⁴ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

¹⁵ 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019).

¹⁶ *Id.*; *supra* note 13 at Chapter 2.1602.5(a).

¹⁷ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁸ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁹ *B.W.*, *supra* note 17.

²⁰ *Id.*; *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

²¹ *Supra* note 13 at Chapter 2.1602.5(b).

OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report that, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²²

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.²³ Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons.²⁴ The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²⁵

ANALYSIS

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

The last merit decision was issued on December 15, 2006. As appellant's request for reconsideration was not received by OWCP until June 16, 2020, more than one-year after the most recent merit decision, pursuant to 20 C.F.R. § 10.607(a), the Board finds that the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.²⁶

The Board further finds that, in its September 8, 2020 decision, OWCP failed to make findings regarding the arguments and evidence submitted in support of appellant's untimely reconsideration request.²⁷ In its September 8, 2020 decision, it summarily denied appellant's request for reconsideration without analyzing whether it was sufficient to demonstrate clear evidence of error.²⁸ The September 8, 2020 decision simply noted that appellant's statement presented "previously submitted arguments considered under prior decisions." OWCP did not provide any discussion regarding the basis for its decision, nor did it address the arguments made

²² *G.B.*, *supra* note 18; *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

²³ 5 U.S.C. § 8124(a).

²⁴ 20 C.F.R. § 10.126.

²⁵ *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *supra* note 13 at Chapter 2.1400.5 (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

²⁶ 20 C.F.R. § 10.607(a).

²⁷ *See K.D.*, Docket No. 20-1186 (issued February 3, 2021).

²⁸ *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020).

by appellant in her May 27, 2020 reconsideration request.²⁹ Thus, the Board finds that OWCP did not comply with the review requirements of FECA and its implementing regulations.³⁰ Accordingly, appellant could not understand the precise defect of the claim, *i.e.*, whether she had demonstrated clear evidence that the last merit decision was incorrect, and the kind of evidence which would overcome it.³¹

The Board will therefore set aside OWCP's September 8, 2020 decision and remand the case for an appropriate decision which contains findings of fact and a statement of reasons regarding appellant's untimely reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether appellant has demonstrated clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 7, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁹ *T.J.*, Docket No. 21-0586 (issued September 30, 2021); *T.N.*, Docket No. 21-0274 (issued July 9, 2021); *see Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *R.C.*, Docket No. 16-0563 (issued May 4, 2016).

³⁰ *Supra* notes 25 and 26.

³¹ *Supra* note 13 at Chapter 2.1400.5.