

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

M.T., Appellant)
and) Docket No. 25-0525
DEPARTMENT OF THE ARMY, U.S. ARMY)
CORPS OF ENGINEERS, Memphis, TN,)
Employer)
Issued: June 6, 2025

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 28, 2025 appellant filed a timely appeal from a February 21, 2025 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated September 18, 2023 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.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 20, 2022 appellant, then a 66-year-old electrical equipment repairman, filed an occupational disease claim (Form CA-2) alleging that he developed a pulmonary condition due to factors of his federal employment, including exposure to asbestos in the motor vessel engine room in January 2003. He noted that he first became aware of his condition and realized its relationship to factors of his federal employment on September 13, 2022.²

In support of his claim, appellant submitted employing establishment health unit notes. In notes bearing illegible signatures dated May 10 and June 3, 2002, he related that he had possibly been exposed to asbestos in the engine room. OWCP also received a June 30, 2003 chest x-ray report which related normal findings. Unsigned August 16 and December 21, 2021, and September 13, 2022 spirometry test results noted mild restriction, and a diagnosis of bronchitis.

OWCP also received a July 12, 2012 e-mail from Mona Miller, a registered nurse, stating that appellant had requested placement in the asbestos monitoring program. A July 26, 2012 note from Ms. Miller advised that appellant had been placed in an asbestos monitoring program and required a chest x-ray.

In August 16 and December 21, 2021, and September 13, 2022 reports, Dr. Garrettson S. Ellis, a Board-certified internist and pulmonologist, related that appellant was screened for a respiratory disorder. He related that pulmonary function studies revealed a mild restriction. Appellant's diagnosis was listed as bronchitis.

In a September 13, 2022 report, Dr. James Machin, a Board-certified diagnostic radiologist, reviewed appellant's computerized tomography (CT) scan and diagnosed nonspecific interstitial lung disease, organizing pneumonia, without significant change from a previous study.

In a development letter dated November 9, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In response appellant resubmitted medical evidence previously of record, and a March 8, 2022 report by Dr. Garrettson Ellis diagnosing bronchitis. He also responded to the questionnaire, wherein he related his alleged asbestos exposure. OWCP also received various position descriptions.

In a development letter dated January 23, 2023, OWCP requested that the employing establishment provide information regarding appellant's claim, including comments from a knowledgeable supervisor. It afforded the employing establishment 30 days to respond.

² Appellant was separated from his employment, effective June 14, 2014, based on his inability to perform essential job duties.

In a statement dated January 23, 2023, appellant summarized his medical treatment beginning on August 16, 2021 with Dr. Garrettson Ellis. He also recounted his exposure to asbestos while on board a vessel.

On May 18, 2023 OWCP referred appellant for a second opinion evaluation with Dr. Kumar P. Yogesh, a Board-certified internist and pulmonologist.

In a June 5, 2023 report, Dr. Yogesh noted appellant's history of asbestos exposure, reviewed medical records and diagnostic tests, and provided physical examination findings. He diagnosed interstitial lung disease suggestive of nonspecific interstitial pneumonitis and obstructive lung disease. Dr. Yogesh noted that the industrial dust exposure described by appellant "might" have contributed to his obstructive lung disease, but did not appear to be the only cause.

Dr. Yogesh, in an August 29, 2023 addendum, opined that appellant did not have asbestosis and that his obstructive lung disease was not due to work-related dust exposure.

By decision dated September 18, 2023, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted factors of his federal employment.

On October 18, 2023 appellant requested reconsideration.

By decision dated December 15, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On September 26, 2024 OWCP received a November 7, 2023 report from Dr. John W. Ellis, a Board-certified family medicine practitioner. Dr. Ellis evaluated appellant, summarized appellant's work history, and reviewed medical records. He diagnosed chronic obstructive pulmonary disease, airway disease due to other specific organic dusts, and contact with and (suspected) exposure to other hazardous substances, asbestos. Dr. Ellis attributed appellant's respiratory or pulmonary condition to prolonged asbestos exposure. He related that as "evidenced by his progressive and often extreme coughing episodes or 'fits,' shortness of breath, with breathing difficulty without exertion, and needing the use of inhalers and breathing treatments, it is my opinion that within a reasonable degree of medical certainty, his work-related exposure to asbestos is the major cause of his current respiratory dysfunction."

OWCP also received undated employing establishment asbestos inspection results from an industrial hygiene survey.

On February 4, 2025 appellant requested reconsideration.

By decision dated February 21, 2025, OWCP denied appellant's request for reconsideration of the merits of his claim, 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.³ 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.⁴ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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.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 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.⁹

OWCP's procedures note that clear evidence of error is intended to represent a difficult standard. The claimant must present evidence, which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated).¹⁰ Evidence such as a detailed, well-rationalized medical report, which, if submitted before the denial was issued, would have created

³ 5 U.S.C. § 8128(a); *T.T.*, Docket No. 25-0166 (issued April 7, 2025); *B.C.*, Docket No. 25-0214 (issued February 7, 2025); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁶ *T.T.*, *supra* note 3; *B.C.*, *supra* note 3; *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ See 20 C.F.R. § 10.607(b); *T.T.*, *id.*; *B.C.*, *id.*; *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *D.O.*, Docket No. 25-0135 (issued January 27, 2025); *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (September 2020).

⁹ *D.O.*, *id.*; *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *T.T.*, *supra* note 3; *B.C.*, *supra* note 3; *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 5 at Chapter 2.1602.5a (September 2020).

a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹²

ANALYSIS

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

OWCP's regulations¹³ and procedures¹⁴ establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵ The most recent adverse merit decision was OWCP's September 18, 2023 decision. As OWCP did not receive his request for reconsideration until February 4, 2025, more than one year after the September 18, 2023 merit decision, the Board finds that it was untimely filed. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in its September 18, 2023 merit decision.

On September 25, 2024 OWCP received a November 7, 2023 report from Dr. John W. Ellis wherein he diagnosed chronic obstructive pulmonary disease, airway disease due to other specific organic dusts, and contact with and (suspected) exposure to other hazardous substances, asbestos. Dr. Ellis concluded that appellant's prolonged work-related exposure to asbestos was the major cause of his current respiratory dysfunction. The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ Even 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.¹⁸ OWCP also received an undated employing establishment asbestos test report. The Board

¹¹ *Id.*

¹² *D.O.*, *supra* note 8; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹³ 20 C.F.R. § 10.607(a); *see M.M.*, Docket No. 25-0369 (issued April 10, 2025); *F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁴ *Supra* note 5 at Chapter 2.1602.4 (September 2020); *see M.M.*, *id.*; *L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ 20 C.F.R. § 10.607(b); *see M.M.*, *id.*; *Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *See supra* note 5 at Chapter 2.1602.5a (September 2020); *see also E.R.*, Docket No. 24-0681 (issued July 29, 2024); *K.W.*, Docket No. 19-1808 (issued April 2, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁷ *Id.*

¹⁸ *Id.*

finds that this evidence submitted with appellant's untimely request for reconsideration does not manifest on its face that OWCP committed an error in denying acceptance of the claim.¹⁹

As the evidence submitted on reconsideration is insufficient to raise a substantial question concerning the correctness of OWCP's September 18, 2023 merit decision, the Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error.

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2025 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁹ *T.T.*, *supra* note 3; *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).