

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 an 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.

2023, 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.³

ISSUE

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

FACTUAL HISTORY

On September 10, 2021 appellant, then a 47-year-old social worker, filed an occupational disease claim (Form CA-2) alleging that she developed severe and chronic sinus and upper respiratory problems due to exposure to mold and asbestos in the building where she worked. She noted that she first became aware of her condition on July 5, 2019, and realized its relationship to her federal employment on September 9, 2021. Appellant did not stop work.

After initial development, by decision dated October 19, 2021, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the claimed exposure occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 24, 2022, appellant, through her representative, requested reconsideration, arguing that she was exposed to poor air quality in the building where she worked. Appellant's representative related that he was submitting results from the employing establishment's industrial hygienist who performed air quality testing and found elevated levels of aspergillus, carbon dioxide, and surface samples of mold spores which revealed high cladosporium, which were known to be toxic. He also noted that the claim was not controverted.

OWCP received an industrial hygiene summary report dated September 30, 2021, and a September 13, 2021 microbiology chain of custody/riverfront safety and health report, which related air quality results for the building where she worked.

By decision dated September 26, 2022, OWCP modified the October 19, 2021 decision to find that appellant had established that the exposure to mold occurred, as alleged; however, the claim remained denied as the medical evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted employment exposure. It explained that exposure alone was insufficient to establish a work-related medical condition.

² 5 U.S.C. § 8101 *et seq.*

³ 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." 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.*

On September 25, 2023, appellant, through her representative, requested reconsideration.

OWCP received e-mail correspondence between the employing establishment and the employing establishment safety officer; and results of specimen testing dated May 10, 2023, showing mold.

In an August 9, 2023 report, Dr. Carrie Carda, Board-certified in obstetrics and gynecology, noted that appellant was seen on October 10, 2022 for treatment of chronic allergy symptoms, myalgia, and chronic fatigue. She opined that exposure to mold at the workplace aggravated appellant's underlying allergies and myalgia with development of persistent fatigue. Dr. Carda explained that she had treated appellant for more than five years, and appellant had recently experienced an increase in a myriad of symptoms, including sneezing, runny/stuffy nose, postnasal drip, itchy/watery eyes, dyspnea, dry cough, sinus pressure, sinus tenderness, debilitating fatigue, and exacerbation of pain secondary to increased inflammatory response from environmental irritants. She noted that appellant related that mold was growing at the employing establishment and she was employed at the employing establishment for many years. Dr. Carda noted that appellant had laboratory tests which were positive for Epstein-Barr virus (EBV), and her human leukocyte antigen (HLA) typing revealed chronic fatigue and susceptibility to molds and other agents. She opined that the environmental irritants at the employing establishment contributed to appellant's declining health. Dr. Carda explained that ongoing exposure to mold can be a health hazard that significantly aggravates appellant's symptoms and underlying conditions, and that appellant reported improvement in symptoms with removal from the environment. She noted that the best way to manage the allergy was to avoid triggers.

By decision dated October 10, 2023, OWCP denied modification of the September 26, 2022 decision. It again found that there was no evidence of a medically diagnosed condition.

On March 1, 2024, appellant, through her representative, requested reconsideration.

By decision dated March 5, 2024, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a).

On November 20, 2024, appellant, through her representative, again requested reconsideration. She argued that the medical evidence from Dr. Carda included a diagnosis.

In support of reconsideration, appellant submitted a February 15, 2024 report, wherein Dr. Carda explained that appellant was seen on October 10, 2022 for treatment of chronic allergy symptoms, myalgia, and chronic fatigue. She reiterated that she had treated appellant for more than five years and appellant had recently experienced a myriad of symptoms, including sneezing, runny/stuffy nose, postnasal drip, itchy/watery eyes, dyspnea, dry cough, sinus pressure, sinus tenderness, debilitating fatigue, and exacerbation of pain secondary to increased inflammatory response from environmental irritants. Dr. Carda related appellant's complaints of mold growing at the employing establishment where appellant had worked for many years. She noted that appellant had laboratory tests which were positive for EBV, and her HLA typing revealed chronic fatigue and susceptibility to molds and other agents. Dr. Carda explained that appellant had an exacerbation of her fibromyalgia and allergic rhinitis that affected her quality of life and hindered her ability to do activities of daily living. She opined that it was her medical opinion that the

environmental irritants at the employing establishment contributed to appellant's declining health. Dr. Carda explained that ongoing exposure to mold can be a health hazard that significantly aggravates appellant's symptoms and underlying conditions. She noted that appellant reported significant improvement in symptoms with removal from the environment at the employing establishment. Dr. Carda opined that the best way to manage an allergy was to avoid exposure to the triggers. She noted that appellant was currently on medications, as needed, to keep her allergic reactions to mold under some control, and that action was needed to remediate the mold to reduce flare up of her condition.

By decision dated November 26, 2024, OWCP denied appellant's request for reconsideration of the merits of the claim, finding that it was untimely 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.⁴ To be entitled to a merit review of an OWCP decision, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ 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).⁶ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

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 that OWCP's most recent merit decision was in error.⁸ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request demonstrates clear evidence of error on the part of OWCP.⁹ In this regard,

⁴ *Supra* note 2 at § 8128(a); *see M.M.*, Docket No. 21-1203 (issued December 22, 2022); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (September 2020).

⁷ *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *see also id.* at § 10.607; *supra* note 6 at Chapter 2.1602.5a (September 2020).

OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

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.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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.¹⁴

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹⁵ The claimant must present evidence, which on its face shows that OWCP erred in its last merit decision.¹⁶ 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.¹⁷

ANALYSIS

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

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.¹⁸ As appellant's request for reconsideration was not received by OWCP until November 20, 2024, more than one year after the October 10,

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ 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).

¹² *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹³ *Id.*

¹⁴ *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

¹⁵ *Supra* note 6 at Chapter 2.1602.5a (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁶ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁷ *Id.*

¹⁸ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, *supra* note 10; *see supra* note 6 at Chapter 2.1602.5a (September 2020); *see also J.S.*, *supra* note 15.

2023 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its October 10, 2023 decision.

The Board further finds that the evidence of record submitted prior to the issuance of OWCP's October 10, 2023 decision is sufficient to demonstrate clear evidence of error.¹⁹

On reconsideration, appellant argued that the medical evidence from Dr. Carda included a diagnosis. In the August 9, 2023 report, Dr. Carda related that appellant had laboratory tests which were positive for EBV. On reconsideration, she reiterated that appellant had previous laboratory tests which were positive for EBV. The underlying issue is whether the evidence of record contained a medical diagnosis in connection with the accepted employment exposure. As recounted by Dr. Carda, appellant had been diagnosed with EBV. As the evidence of record established a diagnosis of a medical condition in connection with the accepted employment exposure, the Board finds that it raises a substantial question concerning the correctness of OWCP's October 10, 2023 merit decision.²⁰ Thus, OWCP improperly determined that appellant's request for reconsideration failed to demonstrate clear evidence of error.

As such, OWCP abused its discretion in failing to reopen appellant's claim for further merit review. The Board shall, therefore, reverse OWCP's November 26, 2024 decision and remand the case for an appropriate decision on the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

¹⁹ *R.G.*, Docket No. 25-0043 (issued December 19, 2024); *S.M.*, Docket No. 18-1499 (issued February 5, 2020) (OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's request for reconsideration shows clear evidence of error on the part of OWCP).

²⁰ *R.G.*, Docket No. 25-0043 (issued December 19, 2024); *S.M.*, Docket No. 18-1499 (issued February 5, 2020).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2024 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: March 12, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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