

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

D.F., claiming as widow of, T.F., Appellant)	
)	
and)	Docket No. 20-1387
)	Issued: January 10, 2022
DEPARTMENT OF THE ARMY, ROCKY)	
MOUNTAIN ARSENAL, Commerce City, CO,)	
Employer)	
)	

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 July 16, 2020 appellant filed a timely appeal from a March 23, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 27, 2018, 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² 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.*

ISSUE

The issue is whether OWCP properly denied appellant's March 18, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On March 10, 2017 the employee, then a 73-year-old munitions operator, filed an occupational disease claim (Form CA-2) alleging that he had developed myelodysplastic disease due to factors of his federal employment. He indicated that he first became aware of his condition on June 11, 2009 and first related it to factors of his federal employment on April 21, 2015. On the reverse side of the claim form, the employing establishment indicated that the employee stopped work on April 15, 1968 and first reported his condition on February 6, 2018.

In a narrative statement, the employee indicated that he worked at the employing establishment from 1967 through 1969 in underground bunkers. He noted that the employing establishment no longer existed and requested any documents regarding his employment. The employee alleged that he made weapons with mustard gas and other chemicals for eight hours a day. He asserted that he was not provided with special equipment to protect him from the gas and chemicals that he touched and inhaled every day at work. The employee "left" after an explosion at the employing establishment during one of his work shifts.

On February 14, 2018 appellant³ filed a claim for compensation by widow (Form CA-5) alleging that her husband, the employee, passed away on July 19, 2017 and his death was due to factors of his federal employment.

In a report dated September 18, 2016, Dr. Robert E. Fisher, a Board-certified oncologist, indicated that he first examined the employee on June 11, 2009. He noted that the employee "routinely came into cutaneous and inhalant contact" with chemical agents, including nitrogen mustard agent poisons manufactured at the employing establishment during his employment without protective clothing and without the opportunity to remove these agents from his skin. The employee reported that he was also not provided with protective devices to avoid inhalation and developed immediate cutaneous irritation, respiratory illness, and symptoms of nausea, sickness, and illness while at work. In early 2009, the employee developed progressive fatigue, lack of normal energy, and the inability to complete his usual daily activities. He also exhibited bruising, dyspnea on exertion, and rapid pulse which progressed over time. Dr. Fisher found continuous pancytopenia due to severe bone marrow disease over seven years resulting in the need from transfusions, toxic chemotherapy, and other hematologic treatments. He diagnosed myelodyaplastic syndrome with multiple cryogenic abnormalities as a result of prior chemical agent exposure. Dr. Fisher opined that the employee developed myelodysplastic syndrome as a direct effect of his exposure to chemical agents that were part of his routine employment duties. He explained that it was known and expected that this exposure would lead to the development of severe bone marrow disorder many decades later and was consistent with the latency period. Dr. Fisher asserted that during its chemical weapons production through 1969 the employing

³ Appellant provided a copy of her marriage certificate indicating that the employee and she were married on July 27, 1983.

establishment manufactured both conventional and chemical weapons including white phosphorus, napalm, mustard gas, lewisite, and chlorine gas. He noted that the medical, toxicology, and chemical literature documented the acute and chronic hematologic toxicity of the chemical agents the employee was exposed to at the employing establishment which typically caused DNA damage to the bone marrow which manifested as myelodysplastic syndrome decades after the chemical exposure.

The employee's death certificate dated July 10, 2017 listed his causes of death as multiple organ failure, hyperlipidemia, and ventricular tachycardia due to myelodysplastic disease.

In a March 9, 2018 development letter, OWCP advised appellant of the deficiencies of the employee's claim. It requested additional factual and medical evidence from appellant, and provided a questionnaire for her completion. OWCP afforded 30 days for a response.

Appellant provided a notification of personnel action Standard Form (SF)-50 which indicated that the employee's appointment as a munitions operator was terminated effective April 15, 1968.

In her March 20, 2018 response to OWCP's development questionnaire, appellant noted that the employee worked at the employing establishment from October 15, 1965 through April 15, 1968 as a munitions operator. She asserted that he manufactured weapons with mustard gas and other chemicals. Appellant contended that the employee was not provided with protective gear and worked with toxic materials in an underground bunker. She noted that there was an explosion at the employing establishment while the employee was at work. Appellant asserted that the employee did not smoke and was not exposed to other chemicals or carcinogens.

On April 5, 2018 appellant's congressional representative provided brief responses to OWCP's development questionnaire. In an April 17, 2018 letter, OWCP requested additional factual information regarding the employee's work exposures to hazardous chemicals. It noted that much of this information would be best provided by the employing establishment and noted that the March 9, 2018 development letter was also sent to the employing establishment.

On July 18, 2018 appellant's congressional representative provided additional information, including reports from Dr. Fisher dated July 29, 2009 through March 2, 2017.

By decision dated July 27, 2018, OWCP denied appellant's claim finding that she had not established that the employee sustained an employment injury. It found that appellant had not established the employee's exposures to toxic chemicals in the course of his federal employment. Additionally, OWCP stated, "It is also noted that since this Occupational Disease case is not accepted, the consequential death as a result of the claimed case cannot be accepted."

On August 2, 2018 appellant submitted medical reports and test results from Dr. Fisher dated May 22, 2009 through July 12, 2017. A June 17, 2009 pathology report from a bone marrow biopsy found no evidence of myelodysplastic syndrome, lymphoproliferative disorder, or plasmacytosis. On February 10, 2011 a similar test showed histologic findings consistent with myelodysplastic syndrome. She also submitted records of the employee's hospitalizations on August 1 and October 21, 2011, May 5, 7, and June 9, 2017.

Appellant resubmitted her March 20, 2018 narrative response to OWCP's development questionnaire, as well as that from her congressional representative.

In an April 21, 2017 report, Dr. Peter A. McSweeney, a Board-certified internist specializing in hematology, examined the employee due to myelodysplastic syndrome diagnosed in 2009 and noted his history of medical treatment. He reported that appellant had two brothers with pancreatic cancer and a sister who had ovarian cancer. On May 2, 2017 Dr. Harmeet Singh, a cardiovascular and pulmonary disease specialist, diagnosed myelodysplastic syndrome and edema. In a May 9, 2017 note, Dr. Richard H. Moseley, a Board-certified gastroenterologist, reported examining appellant due to swelling and water retention.

Appellant's congressional representative provided a December 3, 1967 notice of injury or occupational disease completed by the employee indicating that on December 2, 1967 while he was loading a munitions canister, the mine exploded. The employee was using a "potato masher" and asserted that he sustained a right wrist sprain.

On March 18, 2020 appellant requested reconsideration of the July 27, 2018 decision. She resubmitted the December 3, 1967 claim form.

By decision dated March 23, 2020, OWCP denied appellant's March 18, 2020 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error. It stated, "We did consider your request under 20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that [OWCP's] last merit decision was incorrect."

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ OWCP's regulations⁵ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one-year also accompanies any subsequent merit decision on the issues.⁶ Timeliness is determined by the document receipt date, the received date in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision

⁴ 5 U.S.C. § 8128(a); *L.H.*, Docket No. 19-1174 (issued December 23, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert F. Stone*, 57 ECAB 292 (2005).

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

⁸ *S.T.*, Docket No. 18-0925 (issued June 11, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

was in error.⁹ Its 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, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to demonstrate that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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.¹⁷ 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.¹⁸

⁹ *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001).

¹¹ *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *S.T.*, *supra* note 8; *C.V.*, *supra* note 9; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *S.T.*, *supra* note 8; *E.P.*, *supra* note 11; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *L.B.*, Docket No. 19-0635 (issued August 23, 2019); *V.G.*, *supra* note 11; *C.V.*, *supra* note 9; *Leon J. Modrowski*, *supra* note 9; *Jesus D. Sanchez*, *supra* note 9.

¹⁵ *V.G.*, *supra* note 11; *E.P.*, *supra* note 11; *Leona N. Travis*, *supra* note 13.

¹⁶ *L.B.*, *supra* note 14.

¹⁷ *D.G.*, *supra* note 10; *Leon D. Faidley, Jr.*, *supra* note 8.

¹⁸ *C.V.*, *supra* note 9; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS

The Board finds that OWCP properly determined that appellant's March 18, 2020 request for reconsideration was untimely filed.

The most recent merit decision was OWCP's July 27, 2018 decision which found that appellant had not met her burden of proof to establish that the employee sustained an employment-related injury. As appellant's request for reconsideration was not received by OWCP until March 18, 2020, more than one year after the July 27, 2018 decision, it was untimely filed.¹⁹ Consequently, she must demonstrate clear evidence of error by OWCP in denying the claim.

The Board further finds, however, that the case is not in posture for decision as to whether appellant's March 18, 2020 reconsideration request demonstrated clear evidence of error.

OWCP summarily denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.²⁰ 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.²¹ Its regulations at section 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²² As well, OWCP's procedures provide 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.²³

In denying appellant's untimely reconsideration request, OWCP failed to analyze whether it was sufficient to demonstrate clear evidence of error. The March 23, 2020 decision simply noted: "We did consider your request under 20 C.F.R. § 10.607(b) to determine whether you presented clear evidence that [OWCP's] last merit decision was incorrect." However, OWCP did not address or provide discussion relative to the medical evidence submitted.²⁴

¹⁹ 20 C.F.R. § 10.607(b); *C.S.*, Docket No. 20-1075 (issued December 31, 2020); *Debra McDavid*, 57 ECAB 149 (2005).

²⁰ *M.D.*, Docket No. 20-0868 (issued April 28, 2021); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607.

²¹ 5 U.S.C. § 8124(a).

²² 20 C.F.R. § 10.126.

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²⁴ *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).

The Board finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.²⁵ The Board will therefore set aside OWCP's March 23, 2020 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that OWCP properly determined that appellant's March 18, 2020 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for proceedings consistent with this decision of the Board.

Issued: January 10, 2022
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

²⁵ OWCP 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (February 2016).