

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

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M.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Boise, ID, Employer)
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Docket No. 24-0340
Issued: May 13, 2024

Appearances:

Stephanie Leet, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 14, 2024 appellant, through counsel, filed a timely appeal from a January 18, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated October 18, 2021 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 denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 6, 2020 appellant, then a 52-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed lead poisoning due to factors of his federal employment including removing lead paint with a heat gun for 15 days. He first became aware of the condition and realized that it was caused or aggravated by duties of his federal employment on September 3, 2020.

In progress notes dated September 14, 2020, Dr. Jerrold N. Flyer, a Board-certified surgeon, diagnosed lead poisoning. He noted that appellant had been removing paint at work over the past year and the area he had worked in for the past three weeks tested positive for lead.

In a November 17, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a second development letter of even date, OWCP requested additional information from the employing establishment regarding appellant's potential exposure to lead. It afforded both parties 30 days to submit the requested evidence.

Thereafter OWCP received a September 24, 2020 report from Dr. Jacob Kammer, a Board-certified occupational medicine physician. Dr. Krammer recounted appellant's history that he had been stripping off lead paint from a building at work for three weeks in August and subsequently felt fatigue and had a metallic taste in his mouth. He reported examination and diagnostic findings and diagnosed contact with and (suspected) exposure to lead, with an injury date of August 1, 2020.

On December 4, 2020 OWCP also received an undated response, from T.M., appellant's supervisor, who disagreed with appellant's exposure statement noting he had not been removing lead paint for 15 days, but rather that appellant completed this work in 12 hours over a 3-day period. It also received a December 2, 2020 statement from B.L., who related observing that appellant was not following his instructions to wet scrape loose materials prior to lead paint removal. Instead, appellant was using a heat gun to remove paint. He related that appellant was instructed to stop working and was sent to the health unit for lead exposure testing. B.L. was informed that appellant's levels were slightly higher than normal, and another test would be performed in a few weeks.

By decision dated March 19, 2021, OWCP denied appellant's occupational disease claim as the factual component of fact of injury was not established. It found that the evidence was insufficient due to inconsistent dates of injury and exposure at work.

Thereafter OWCP received progress notes from Dr. Flyer dated September 14, 2020 which reiterated appellant's history of injury and noted appellant's current test results. It also received a September 16, 2020 statement from the employing establishment confirming appellant's lead exposure. In a narrative statement dated July 2, 2021, D.L., Chief of the employing

establishment's facility management safety section, related that appellant's claim for lead exposure should be approved as the employing establishment placed appellant at risk by not following OSHA regulations for lead paint removal.

On July 20, 2021 appellant requested reconsideration.

By decision dated October 18, 2021, OWCP modified the denial of the claim. It found that the evidence of record was sufficient to establish fact of injury. However, OWCP found the medical evidence was insufficient to establish a causal relationship between the accepted factors of employment and the diagnosed condition.

Thereafter OWCP received a September 9, 2020 report from an urgent care facility noting appellant had slightly elevated lead levels.

On October 25, 2023 appellant, through counsel, requested reconsideration. In support of his request, appellant resubmitted medical and factual evidence. OWCP also received additional progress notes dated September 11, 2020 from L. Carrico, a physician assistant, advising appellant that he had abnormal lead test results. It also received a July 2, 2021 email from the employing establishment stating his claim should be accepted.

Counsel submitted a brief dated October 24, 2023 wherein she argued that appellant had established causal relationship through probative medical evidence, by the submission of a new medical report. She argued that the evidence of record had at least established a *prima facie* case of causal relationship, requiring remand for further development of the medical evidence. Counsel also argued that the employing establishment supported appellant's claim that he sustained injury due to exposure to lead at work.

OWCP received a September 19, 2023 report from Dr. Joshua Chong, an osteopathic Board-certified family medicine physician. Dr. Chong reviewed medical records and statements from appellant and the employing establishment. He described the impact of lead exposure noting that appellant symptoms could be attributed to the low-level lead exposure at work. Dr. Chong indicated that: "[L]ead exposure causes damage to the body chiefly through the generation of reactive oxygen species and by decreasing the generation of antioxidants. Lead inactivates glutathione, a powerful antioxidant found in cells, and thereby increases oxidative stress on cells within the body. This includes cells within the nervous system that are typically protected by the blood brain barrier. Lead has a blood half-life of approximately 30 days, during which it can penetrate soft tissues and cause damage to the kidneys, liver, brain, and bone marrow." Dr. Chong concluded that appellant's prolonged lead exposure at work "can be directly linked to his subsequent increase in memory deficits, poor concentration, impaired cognitive ability, and muscle weakness."

By decision dated January 18, 2024, OWCP denied appellant's request for reconsideration, 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 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.⁴ 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).⁵ The Board has found that the imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

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.⁷ 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.⁸

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.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence, which on its face shows that OWCP

³ 5 U.S.C. § 8128(a); *G.V.*, Docket No. 23-1005 (issued February 15, 2024); *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 2.1602.4(b) (September 2020).

⁶ *G.V.*, *supra* note 3; *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).

⁷ *See* 20 C.F.R. § 10.607(b); *M.M.*, Docket No. 22-1204 (issued April 7, 2023); *R.S.*, Docket No. 19-0180 (issued December 5, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *G.V.*, *supra* note 3; *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 5 at Chapter 2.1602.5(a) (September 2020).

⁹ 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).

¹⁰ *See G.V.*, *supra* note 3; *G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *G.V.*, *id.*; *B.W.*, *supra* note 9.

¹² *See supra* note 5 at Chapter 2.1602.5a (September 2020); *see also S.T.*, *id.*; *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

made an error.¹³ 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.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

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

As noted above, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁶ As appellant's request for reconsideration was not received by OWCP until October 25, 2023, more than one year after the issuance of OWCP's October 18, 2021 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error on the part of OWCP.¹⁷

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in its October 18, 2023 decision. The evidence submitted with the untimely request for reconsideration must on its face establish that the October 18, 2021 decision was issued in error.

On reconsideration appellant submitted a brief from counsel raising several arguments that OWCP committed error in denying appellant's claim, as well as another email from the employing establishment requesting that appellant's claim be accepted. He also resubmitted progress notes and an additional progress note dated September 11, 2020 from L. Carrico, a physician assistant, relating that appellant had abnormal lead test results. This additional evidence did not manifest error in the October 18, 2021 decision by establishing causal relationship in the medical evidence of record at the time of the October 18, 2021 decision.¹⁸

Additionally, the Board finds that Dr. Chong's October 25, 2023 report also did not manifest error in OWCP's October 18, 2021 decision. This report did not demonstrate that OWCP improperly concluded in its October 18, 2021 decision that appellant failed to establish a work-related injury.¹⁹ However, as noted above, clear evidence of error is intended to represent a difficult standard.²⁰ Even a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further

¹³ *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁴ *Id.*

¹⁵ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁶ *Supra* note 4.

¹⁷ 20 C.F.R. § 10.607(b); *J.A.*, Docket 21-0655 (issued July 6, 2023).

¹⁸ *Supra* note 10.

¹⁹ *See supra* notes 10 and 15.

²⁰ *Supra* note 12.

development is insufficient to demonstrate clear evidence of error.²¹ The Board finds that the argument and evidence submitted on reconsideration does not establish that OWCP committed error in its October 18, 2021 decision.

As appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Board finds that OWCP properly denied appellant's request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

²¹ *Supra* note 13.