

On appeal, appellant contends that delays in filing his request for reconsideration were not as a result of his error or failure to respond. He specifically indicated that OWCP's request for further information was sent to the employing establishment at an improper address and he failed to timely file his reconsideration request because he had been assisting his sister who had a heart transplant. Appellant submitted additional information that supported his claim that should have been discussed by OWCP.

FACTUAL HISTORY

On July 27, 2010 appellant, then a 55-year-old maintenance systems analyst, filed an occupational disease claim alleging asbestosis as a result of his federal employment. He worked at the employing establishment since 1973 and was exposed to asbestos since 1984. Appellant listed the date of awareness of his condition as June 30, 2010. He did not submit any evidence with his claim.

By letter dated August 4, 2010, OWCP requested further information from appellant. By another letter of that date, it asked the employing establishment to provide further information. By letter dated August 11, 2010, the employing establishment controverted the claim. Appellant did not file a timely response to OWCP's letter.

By decision dated September 9, 2010, OWCP denied appellant's claim. It found that he had not established that he experienced the claimed occupational exposure at the time, place and in the manner alleged.

By letter dated February 29, 2012, appellant requested reconsideration. He stated that the purpose of his claim was to create a record based on his June 29, 2010 examination at the employing establishment's medical clinic. During the physical, a physician noted evidence of what could be attributed to an old exposure to asbestos. At the time, appellant had no medical condition requiring treatment, but wanted to ensure that the findings were documented. He had been employed at the employing establishment since June 24, 1973 in various capacities in multiple buildings. To the best of appellant's knowledge, his work did not require him to work directly with any asbestos impregnated materials, but in many of the buildings where he worked, steam pipes and floor tiles were impregnated with asbestos.

Appellant submitted a note dated February 21, 1985 from W.S. Tyson, Jr., Director of Health Services at the employing establishment. Mr. Tyson noted that appellant was potentially exposed to asbestos fibers on the second floor of Building 345 during the week of November 5, 1984 as a result of a contractor's error. Appellant also submitted results and reports from Texas Research Institute, Inc. Dr. John W. Goodwin, an industrial hygienist, noted that, on November 6, 1984, he received a telephone call from a supervisor in building 345/2 that asbestos was scattered everywhere by the removal contractor from the night before. He advised that sweeping be stopped and that workers be relocated until an investigation was made. Dr. Goodwin noted that testing confirmed the matter as asbestos and that asbestos samples taken that date showed .117 fibers/cc, .236 fibers/cc and .037 fibers/cc. He advised that the permissible limit for asbestos fibers over 2 fibers per cc. The air samples taken on November 8, 1984 were interpreted as negative. Dr. Goodwin noted that on November 13, 1984 a repeat

inspection was made and the conditions were found to be satisfactory. Appellant also submitted newspaper clippings with regard to this incident.

Appellant submitted chest x-rays obtained from May 5, 2003 to November 17, 2011 which was interpreted as evincing possible prior asbestos exposure. He also submitted copies of his annual fitness evaluations for the employing establishment. Evaluations noted that an asbestos questionnaire was reviewed and appellant also had a history of tobacco use and allergic rhinitis.

By decision dated May 29, 2012, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.² The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.³

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁴ OWCP regulations and procedure 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(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁶ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). OWCP's procedures further provide: "The term 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). 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." *Id.* at Chapter 2.1602.3c

⁶ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ 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.¹⁰ To show 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original decision.¹² As appellant's February 29, 2012 request for reconsideration was submitted more than one year after the last merit decision, *i.e.*, the September 9, 2010 decision denying his claim, his request was untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for reconsideration.

Appellant has not established clear evidence of error. In support of his reconsideration, he submitted evidence indicating that there was an asbestos exposure incident at this place of employment, but this evidence does not establish that he was working near the asbestos on the date of the incident. Although Mr. Tyson indicated that appellant was "potentially" exposed to asbestos there was no positive proof establishing that fact. The newspaper articles do not constitute relevant evidence as the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment injury involved.¹³ The Board further notes that appellant has not submitted medical evidence diagnosing a medical condition. Although the x-rays show evidence of possible asbestos exposure, there is no diagnosis of asbestosis. Even if there had been such medical evidence, the Board has found that even a well-rationalized medical report that, if timely filed could have created a conflict in medical evidence, is insufficient to establish clear evidence of error.¹⁴

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

¹² 20 C.F.R. § 10.607(b).

¹³ *K.T.*, Docket No. 11-1570 (issued February 2, 2012).

¹⁴ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Joseph R. Santos*, 57 ECAB 554 (2006).

The term clear evidence of error is intended to represent a difficult standard.¹⁵ In order to establish clear evidence of error, the evidence submitted must be of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.¹⁶ The evidence appellant submitted on reconsideration fails to meet this standard.

On appeal, appellant asserts that OWCP's follow-up letter to the employing establishment was not sent to the proper address. The Board notes that the letter was sent to the employing establishment on August 4, 2010 and it controverted not only the timeliness but also the merits of his claim by memorandum dated August 11, 2010.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 29, 2012 is affirmed.

Issued: December 13, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ S.S., Docket No. 11-1579 (issued April 24, 2012).

¹⁶ See *Veletta C. Coleman*, 48 ECAB 367 (1997).