



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 25, 2016 appellant, then a 37-year-old physician, filed an occupational disease claim (Form CA-2) alleging that she developed an "itchy red rash from head-to-toe," and experienced shortness of breath, hoarseness, and significant weight loss due to workplace exposures. She explained that her symptoms started when she moved to a new clinic.<sup>3</sup> Appellant identified January 25, 2016 as the date she first became aware of her condition and March 1, 2016 as the date she first realized that it was related to her federal employment. She further indicated that the occupational health unit advised that it was likely a reaction to formalin from new building materials. Appellant did not stop work.

In a January 5, 2017 development letter, OWCP informed appellant that it had received no evidence in support of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP also requested a narrative medical report from appellant's treating physician, which contained a detailed description of findings and diagnoses, explaining how appellant's work exposure caused, contributed to, or aggravated her medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding her occupational disease claim. OWCP afforded both parties 30 days to respond.

In a February 3, 2017 response to OWCP's development questionnaire, appellant explained that she moved to a new clinic at the end of December 2015 and, within a few weeks, she began to experience headaches, shortness of breath, a cough, hoarseness, and an itchy red rash from the neck down. After several tests, the conclusion was made that she was reacting to formalin used in the new clinic. Appellant also noted that the ventilation system used in her office was not functioning properly. She indicated that she was informed that a two-week burnout period was typically used for people moving into a new space as a precaution for formalin and that this did not occur because it was urgent that she move into the new facility. Appellant was not diagnosed until seven months after moving into the clinic. She asserted that, in this time, she approached the employing establishment several times asking it to perform further investigation, but was told that her symptoms were not caused by the work environment because she was the only employee experiencing symptoms. Appellant noted that her more severe symptoms had since resolved for the most part, but she still experienced worsening asthma and irritated skin.

By decision dated February 7, 2017, OWCP denied appellant's occupational disease claim, finding that she had not submitted medical evidence signed by a qualifying physician containing

---

<sup>2</sup> Docket No. 19-0254 (issued May 9, 2019).

<sup>3</sup> Appellant reported that she was working at the Chula Vista Outpatient Clinic at the time of her alleged injury.

a diagnosis in connection with her claimed injury. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On February 5, 2018 appellant requested reconsideration of OWCP's February 7, 2017 decision.

Appellant submitted an e-mail conversation dated from April 7 to May 9, 2016 where she requested that her work area be tested for air quality and mold. The e-mails noted that the building had previously experienced mold and problems with its heating, ventilation, and air conditioning (HVAC) system and, upon inspection, it was found that the HVAC system was working unevenly some areas and that there was a musty smell in some rooms with water damage. A hygienist reported elevated carbon dioxide levels and notable dirt debris in particular units.

In a June 8, 2016 medical report, Dr. Juan Fals, Board-certified in occupational medicine, evaluated appellant for the various symptoms she had been experiencing since she moved in to a new building at work. He noted that there was a fair amount of new furniture, electronics and flooring which could well be off-gassing formaldehyde and other allergens. Dr. Fals advised that appellant continue her treatment and to keep her office and examination room as clean as possible.

By decision dated April 4, 2018, OWCP denied modification of its February 7, 2017 decision.

On June 18, 2018 appellant requested reconsideration of OWCP's April 4, 2018 decision. Dr. Fals attached a January 6, 2018 addendum to his June 8, 2016 medical report, in which he noted that she requested a follow-up note for OWCP in regard to her formaldehyde exposure/sensitization. Appellant informed him that her symptoms had gradually and markedly improved over the past 18 months consistent with off-gassing as the materials at the employing establishment aged.

By decision dated September 10, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

On November 7, 2018 appellant appealed to the Board. By decision dated May 9, 2019, the Board affirmed OWCP's September 10, 2018 decision, finding that it properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On September 3, 2019 appellant requested reconsideration of OWCP's April 4, 2018 decision. She recounted the development of her claim and asserted that OWCP improperly denied her claim because the medical evidence from Dr. Fals was sufficient to meet her burden of proof. Appellant contended while he did not provide a diagnosis, Dr. Fals clearly mentioned formaldehyde off-gassing as the cause of her symptoms. She further contended that, in response to an OWCP claims examiner's request for a diagnosis with an International Classification of Diseases (ICD) Code, Dr. Fals' diagnosed formaldehyde exposure/sensitization.<sup>4</sup> Appellant

---

<sup>4</sup> The diagnostic code used by Dr. Fals' was ICD-10 Code T59.2X1A for Formaldehyde Exposure/sensitization.

concluded by contending that OWCP erred in not clarifying what information was needed. She also submitted August 29, 2019 photographs of her formalin rash testing results and her skin.

Appellant also submitted medical reports and laboratory test results dated from February 2 to May 5, 2016 in which she underwent various allergy skin tests and was evaluated for her symptoms related to her history of asthma, eczema and rhinitis. In a June 16, 2016 e-mail, Dr. Anna-Maria Butera, Board-certified in family medicine, indicated that all of her laboratory results returned normal.

OWCP also received e-mails dated from October 20 to 27, 2016 in which appellant discussed the history of her symptoms over the past eight months due to her exposure at work as well as the employing establishment's response to her request for air quality testing.

By decision dated January 27, 2020, 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.<sup>5</sup> 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.<sup>6</sup> The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>7</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>8</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted to OWCP under section 8128(a) of FECA.<sup>9</sup>

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.<sup>10</sup> OWCP's regulations and procedures provide that it will reopen a claimant's case for merit review,

---

<sup>5</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

<sup>8</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>9</sup> *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

<sup>10</sup> *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting 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.<sup>12</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>13</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>14</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>15</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>16</sup> In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>17</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>18</sup>

### ANALYSIS

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

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>19</sup> As appellant did not request reconsideration until August 30, 2019, more than one year after the issuance of OWCP's April 4, 2018 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its April 4, 2018 decision.<sup>20</sup>

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied her occupational

---

<sup>11</sup> *Id.* at § 10.607(b); *supra* note 7 at Chapter 2.1602.5(a) (February 2016).

<sup>12</sup> *G.G.*, *supra* note 10.

<sup>13</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *supra* note 9.

<sup>14</sup> *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

<sup>15</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>16</sup> *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

<sup>17</sup> *A.F.*, 59 ECAB 714 (2008); *D.G.*, 59 ECAB 455 (2008).

<sup>18</sup> *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

<sup>19</sup> 20 C.F.R. § 10.607(a).

<sup>20</sup> *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

disease claim because she failed to submit medical evidence signed by a qualifying physician containing a diagnosis in connection with her claimed injury. The evidence submitted failed to raise a substantial question concerning the correctness of OWCP's April 4, 2018 decision.<sup>21</sup>

Appellant submitted a January 6, 2018 addendum to a June 8, 2016 medical report where Dr. Fals included the ICD Code for "formaldehyde exposure/sensitization." Section 10.303 of OWCP's regulations provides that simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under FECA unless the employee has sustained an identifiable injury or medical condition as a result of that exposure.<sup>22</sup> This report only contained a description of the exposure without identifying that it was an employment exposure and that, an employment-related injury resulted, it is insufficient to demonstrate clear evidence of error.<sup>23</sup> For this reason, Dr. Fals' January 6, 2018 addendum is insufficient to demonstrate clear evidence of error.

The remaining medical evidence submitted on reconsideration consisted of medical reports and laboratory test results dated from February 2 to May 5, 2016, where appellant underwent multiple allergy skin tests. However, in a subsequent June 16, 2016 e-mail, Dr. Butera indicated that all of her lab results returned normal. The Board has held that a medical report lacking a firm diagnosis and a rationalized medical opinion regarding causal relationship is of no probative value.<sup>24</sup> Consequently, this medical evidence is insufficient to demonstrate clear evidence of error.

As noted, the term clear evidence of error is a difficult standard and it is not enough to show that the evidence could be construed to produce a contrary conclusion.<sup>25</sup> None of the evidence submitted by appellant in connection with her untimely reconsideration request manifests on its face that OWCP committed an error in denying her occupational disease claim. She has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.<sup>26</sup> Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **CONCLUSION**

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

---

<sup>21</sup> See *P.T.*, Docket No. 18-0494 (issued July 9, 2018).

<sup>22</sup> 20 C.F.R. § 10.303; *J.K.*, Docket No. 18-1508 (issued February 5, 2019).

<sup>23</sup> *Beverly A. Spencer*, 55 ECAB 501 (2004).

<sup>24</sup> *P.C.*, Docket No. 18-0167 (issued May 7, 2019).

<sup>25</sup> *Supra* note 14.

<sup>26</sup> *Supra* notes 13 and 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2021  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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