United States Department of Labor
Employees' Compensation Appeals Board

LILY HUANG, Appellant	)	
and	)	**Docket No. 04-2101**
	)	**Issued: January 25, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Steven Yip, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 26, 2004 appellant filed a timely appeal from the July 2, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for further review of the merits of her claim. The last merit decision of record was a November 7, 2002 decision denying her claim of a left upper extremity injury. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On August 14, 2002 appellant, then a 50-year-old mail processor, filed an occupational disease claim alleging that she sustained tendinitis of her left hand and wrist due to the repetitive duties of her job which included lifting, carrying, grasping and reaching with both hands and arms.[2]

By letter dated September 11, 2002, the Office requested that appellant submit additional factual and medical evidence in support of her claim, including a comprehensive medical report describing the nature of her claimed condition, the medical treatment provided and the cause of the condition.

Appellant submitted an October 2, 2002 statement describing the treatment of her alleged condition. She did not submit any medical evidence in support of her claim.

By decision dated November 7, 2002, the Office denied appellant's claim on the grounds that she did not submit medical evidence establishing that she sustained an employment-related injury of her left upper extremity. The Office accepted the employment factors as alleged, but found no medical evidence relating these job factors to the claimed condition.

By letter dated March 24, 2004, appellant requested reconsideration of her claim. She asserted that the medical evidence she was submitting would support her claim for an employment-related injury.[3]

Appellant submitted a March 5, 2004 report in which Dr. Benjamin C.K. Lau, an attending physician Board-certified in physical medicine and rehabilitation, indicated that she presented to him for the first time on that date with complaints of a "left upper extremity injury." He stated that he had no medical records for review and noted that appellant reported that she sustained an "industrial injury" on May 6, 2002. Dr. Lau detailed the findings of his examination and diagnosed repetitive strain injury of the upper extremities, worse on the left, myofascial pain syndrome which was essentially related to the first diagnosis and tenosynovitis of the upper extremities, worse on the left. He stated, "Based on above information, provided that appellant is reliable, which I think she is, her injury is industrial related. There are no other medical records to contest her statement or injury."

Appellant also submitted a May 17, 2004 report in which Dr. Judy Hsu, an attending physician,[4] indicated that she first treated appellant for left hand tendinitis on June 25, 2001. She

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[2] Appellant claimed that she first became aware of her condition in May 2000 and first realized that it was employment related in June 2001. She continued to work at the employing establishment after filing her claim. Appellant's supervisor indicated on the claim form that appellant's physician recommended she work in a limited-duty position and noted that the "medical documentation" showed a diagnosis of left hand tendinitis. It is unclear whether the record contains the medical documentation referred to by the supervisor.

[3] The record also contains a February 24, 2004 letter to the Office in which appellant requested assistance with her claim, but she did not explicitly request reconsideration of her claim at that time.

[4] Dr. Hsu is not listed as Board-certified in the relevant directories of medical specialties.

noted that appellant complained of having pain in her left hand, wrist and forearm during the prior year and stated, "This type of tendinitis can be exacerbated by repetitious lifting." In a September 18, 2002 statement, a coworker noted that appellant complained of persistent wrist pain after engaging in repetitive duties at work.

By decision dated July 2, 2004, the Office denied further review of the merits of appellant's claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.[5]

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[7]

The Office, 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, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office regulations and procedure provide that the Office 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 the Office.[9]

ANALYSIS

In its July 2, 2004 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Her reconsideration request was filed on March 18, 2004 more than one year after the Office's November 7, 2002 decision. Therefore, she must establish clear evidence of error on the part of the Office in issuing this decision.

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[5] The record also contains an April 21, 2002 letter in which the Office suggested that it would not reopen appellant's claim because the submitted evidence was insufficient to require such a reopening. It is unclear why the Office did not fully evaluate her reconsideration request at that time. However, this is harmless error as the Office later issued its July 2, 2004 decision which fully evaluated her reconsideration request.

[6] 20 C.F.R. § 10.607(a).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

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

[9] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] 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.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[11] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office 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 the Office.[14] 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 the Office decision.[15]

Appellant has not established clear evidence of error on the part of the Office in issuing its November 7, 2002 decision. In support of her untimely reconsideration request, appellant submitted a March 5, 2004 report in which Dr. Lau diagnosed repetitive strain injury of the upper extremities, worse on the left, myofascial pain syndrome and tenosynovitis of the upper extremities, worse on the left. He indicated that her conditions were "industrial related." However, this report's apparent opinion on causal relationship is of little probative value and insufficient to show clear evidence of error because it is not based on a complete and accurate factual and medical history.[16] Dr. Lau acknowledged that he first saw appellant in 2004 and that he had no medical records for review. He provided no discussion of the employment factors implicated by her and essentially based his opinion regarding causal relationship on her claim that she sustained such an injury. Such evidence does not shift the weight of evidence in favor of the claim.

In a May 17, 2004 report, Dr. Hsu indicated that she first treated appellant for left hand tendinitis on June 25, 2001. She stated: "This type of tendinitis can be exacerbated by repetitious lifting." This report is of limited relevance in it contains an opinion on causal relationship which is equivocal and speculative in nature.[17] Appellant also submitted a September 18, 2002 statement in which a coworker noted that she complained of persistent wrist

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

[11] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[13] *See Leona N. Travis*, *supra* note 11.

[14] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[15] *Leon D. Faidley, Jr.*, *supra* note 7.

[16] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

[17] *See Leonard J. O'Keefe,* 14 ECAB 42, 48 (1962); *James P. Reed,* 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal and speculative is of limited probative value regarding the issue of causal relationship).

pain after engaging in repetitive duties at work. However, the relevant issue of the present case is medical in nature and must be resolved by the submission of probative medical evidence. For these reasons, the evidence submitted by appellant in connection with her untimely reconsideration request does not raise a substantial question concerning the correctness of the Office's November 7, 2002 decision and does not show clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her 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 July 2, 2004 is affirmed.

Issued: January 25, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member