United States Department of Labor
Employees' Compensation Appeals Board

LINDA K. COST, Appellant	)	
and	)	**Docket No. 05-986**
	)	**Issued: July 25, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clara, CA, Employer	)	

Appearances:
Linda K. Cost, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 23, 2005 appellant filed a timely appeal from a March 7, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 18, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the March 7, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 29, 2003 appellant, then a 47-year-old mail handler, filed an occupational disease claim alleging that she sustained injuries to her shoulder and back due to lifting and throwing parcels during the course of her federal employment. She indicated that in 1990 she had experienced bursitis in the same shoulder and back area as a result of employment-related activities. Appellant stated that she first became aware of her injury on May 13, 2003.

In support of her claim, appellant submitted several documents, including a May 27, 2003 medical report from a nurse practitioner reflecting a finding of a strained shoulder area. By decision dated August 25, 2003, the Office denied appellant's claim on the grounds that she had failed to establish that her claimed shoulder injury was causally related to an established work-related event.

On September 30, 2003 the Office received a request for reconsideration. In support of her request, appellant submitted medical reports from Dr. Rafael Gonzalez, a Board-certified family practitioner, dated July 8 and 15 and September 16, 2003. On July 8, 2003 Dr. Gonzalez reviewed appellant's history, stating that she developed pain in her left shoulder and arm while she was throwing parcels at work on May 13, 2003. He provided a diagnosis of left tennis elbow and left upper thoracic sprain, but gave no opinion as to causal relationship. On July 15, 2003 Dr. Gonzalez released appellant to light duty, recommending that she be restricted from lifting over 10 pounds. On September 16, 2003 Dr. Gonzalez released appellant to full duty with no restrictions. He stated that, "from what the patient explained to us, that she was throwing parcels that day, it is certainly feasible that this injury could have been caused by that."

Appellant also submitted reports dated June 9 and 17, 2003 from Dr. John Harbaugh, a Board-certified family practitioner. Dr. Harbaugh indicated that appellant had a history of bursitis of the left shoulder which developed while working at the employing establishment. Relating that appellant had developed a gradual onset of pain on May 13, 2003 in her left shoulder, radiating to the elbow, Dr. Harbaugh provided diagnoses of left shoulder strain, trapezius; left upper back strain, rhomboid muscles; and questionable left cervical radiculitis.

By decision dated November 18, 2003, the Office denied appellant's claim on the grounds that she had not provided sufficient medical opinion establishing a causal relationship between her diagnosed condition and a work-related incident.

On October 15, 2004 appellant filed a claim for a recurrence of disability, in which she alleged that, on July 24, 2004, she experienced the same symptoms in the same left shoulder that was the subject of her May 29, 2003 traumatic injury claim.

On September 22, 2004 appellant accepted a limited-duty assignment. In her position as a modified mail handler, she was required to rewrap letters, but was restricted from reaching above shoulder level, opening sacks, or engaging for more than two hours in pulling, pushing, simple grasping or fine manipulation.

In an informational letter dated November 24, 2004, the Office advised appellant that her recurrence claim had been filed in error, in that her underlying claim had been denied. The Office further informed her that though no further action could be taken on her recurrence claim, she could file a new claim for compensation if she believed that additional work factors had caused her injury since her May 2003 claim.[1]

In reports dated October 13 and 26, 2004, Dr. Gonzalez related appellant's continuing complaints of pain in the neck, shoulder and elbow when she picked up parcels at work, occasional numbness in her right hand and stress. He diagnosed carpal tunnel syndrome in the right hand, "some" left tennis elbow and muscular pain in the left upper trapezius. Dr. Gonzalez released appellant to light duty and recommended that she not be required to lift more than 20 pounds. In a November 1, 2004 report, he provided a diagnosis of carpal tunnel syndrome. Neither report addressed the issue of causal relationship. On November 2, 2004 Dr. Gonzalez reported that appellant's upper back and left arm were "much better" but that she was worried that, upon returning to full duty, the pain would recur and she would have to "reclaim it." Indicating that appellant's carpal tunnel symptoms were minor and did not require surgery at that time, he released her to modified duty, restricting her to lifting no more than 15 pounds.

Appellant submitted reports from Dr. Natalie G. Kaveh, a Board-certified physiatrist, dated August 31, September 10 and October 26, 2004. In her August 31, 2004 report, Dr. Kaveh stated that the range of motion in appellant's cervical spine, left shoulder, bilateral forearm, and both wrists and hands were within normal limits; that appellant exhibited profuse tenderness along paravertebral muscles on the left side of the cervical spine, left trapezius and rhomboid, as well as tenderness along the joint or capsule of the left shoulder, with known negative impingement maneuver and negative arm drop test; that there was no muscle atrophy; that there was tenderness to palpation at the axial of the lateral epicondyle bilaterally; that reflexes were +2 and symmetrical; and that examination of the wrists and hands revealed that Phalen's maneuver was negative bilaterally. In his September 10, 2004 report, Dr. Kaveh related appellant's history, indicating that her symptoms "started with tingling in both hands and fingers three years ago;" that her symptoms became worse on July 12, 2004, when the pain in her wrists and numbness in her fingers became unbearable; and that her primary physician told her the condition was work related. On October 20, 2004 Dr. Kaveh reported that a nerve conduction velocity study showed evidence of mild median nerve neuropathy at the level of the right wrist, which was clinically compatible with carpal tunnel syndrome.

By letter dated "May 14, 2005," received by the Office on February 21, 2005, appellant requested reconsideration. In support of her request, appellant submitted a statement reiterating the history of her alleged injury and resulting condition.

[1] The Board has no jurisdiction to consider appellant's claim for a recurrence of disability, as the Office did not issue a final decision regarding her request. *See* 20 C.F.R. § 501.2(c).

By decision dated March 7, 2005, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[2] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[3] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[4] The Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[5] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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's decision.[8] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the

[2] 5 U.S.C. §§ 8101-8193, 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607. *See Alan G. Williams*, 52 ECAB 180 (2000).

[4] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[5] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

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

[7] *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005). *See also Leon J. Modrowski*, 55 ECAB ___ (Docket No. 03-1702, issued January 2, 2004); *Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

[8] *Id.*

Office such that the Office abused its discretion in denying merit review in the face of such evidence.[9]

ANALYSIS

The Office found that appellant failed to file a timely application for review. The last merit decision in this case was the Office's November 18, 2003 decision denying appellant's occupational injury claim on the grounds that she had not established a causal relationship between a diagnosed condition and work-related factors. As appellant's letter requesting reconsideration, which was received by the Office on February 21, 2005, was submitted more than one year after the last merit decision of record, it was untimely. Consequently, she must demonstrate "clear evidence of error" by the Office in denying her claim for compensation.[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 the Office decision.[11] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[12] The Board finds that the evidence submitted on reconsideration fails to meet this standard.

In conjunction with her request for reconsideration, appellant submitted a statement reiterating the history of her alleged injury and her belief that her current condition was caused by the alleged employment-related injury. However, an award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[13] Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that she sustained an injury in the performance of duty and that her disability was caused or aggravated by her employment.[14]

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[9] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[10] 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB ___ (Docket No. 03-2223, issued January 9, 2004).

[11] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states:

> "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 and would not require a review of the case...."

[12] *See Pete F. Dorso*, 52 ECAB 424 (2001).

[13] *Paul E. Thams*, 56 ECAB ___ (Docket No. 04-1019, issued April 26, 2005).

[14] *Id.*

Subsequent to the Office's November 18, 2003 decision, appellant submitted several reports from her treating physicians, Dr. Gonzalez and Dr. Kaveh. However, none of those reports provided an opinion as to how appellant's current condition was causally related to the alleged May 13, 2003 employment injury. Therefore, they lack probative value. Moreover, appellant's newly diagnosed carpal tunnel syndrome bears no apparent relationship to her original claim.

On appeal appellant contended that she was not late in filing her request for reconsideration. As discussed above, appellant's request was received on February 21, 2005, more than 15 months after the Office's final decision and, therefore, was untimely. Appellant also claimed that she was "reinjured" last year. In an informational letter dated November 24, 2004, the Office advised appellant that her recurrence claim had been filed in error, in that her initial underlying claim had been denied. The Office further informed her that she could file a new claim for compensation if she believed that additional work factors had caused her injury since her May 2003 claim. Furthermore, as the Office properly advised appellant, a claim for recurrence of disability or medical condition is inappropriate when the injury or condition has not been accepted by the Office.[15]

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review to determine whether appellant's reconsideration request showed clear evidence of error, which would warrant reopening appellant's case for merit review. The Office reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error. The Board finds that the arguments and evidence submitted by appellant in support of her application for review do not raise a substantial question as to the correctness of the Office's decision and thus are insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for review on March 7, 2005. The Board further finds that appellant's reconsideration request was untimely and failed to establish clear evidence of error.

[15] *Id. See also* 20 C.F.R. § 10.5(y). As noted above, the Board has no jurisdiction to consider appellant's claim for a recurrence of disability, as the Office did not issue a final decision regarding her request. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2005 is affirmed.

Issued: July 25, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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