United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
	)	
and	)	**Docket No. 06-1536**
	)	**Issued: December 14, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 14, 2006, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 9, 1997 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal to the Board. In a May 18, 2004 decision, the Board affirmed the December 8, 2003 decision of the Office, finding that it properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely

filed and failed to show clear evidence of error.[1] The facts and the history contained in the prior appeal are incorporated by reference.[2]

On September 7, 2004 appellant requested reconsideration.

In support of appellant's request, the Office received a July 30, 2004 report from Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, who noted her history of injury and treatment. She related that her positions at the employing establishment included working in mail distribution and mail handling, which included repetitive motion activities with her arms. Dr. Chmell noted that appellant developed pain in her upper extremities and neck which progressed to numbness and tingling in her hands to the point that she sought and obtained medical care and treatment on April 30, 1997. He noted that appellant eventually retired on disability as a result of continued pain and problems. Dr. Chmell examined appellant, noting a reduction of cervical lordosis with spasm and tenderness of the cervical paraspinal muscles and reduced cervical spine motion, with crepitus and impingement in both shoulders with a positive crossover test, and diminished motion at the wrists. He found evidence of tendinitis and ganglion cyst formation, with diminished sensation in both hands and diminished strength in the upper extremities as well as atrophy in the hands. Dr. Chmell diagnosed cervical disc derangement, multiple tendinitis, bilateral shoulder derangements and bilateral carpal tunnel syndrome. He opined that, "based upon a reasonable degree of medical and orthopedic surgical certainty, these conditions are related to repetitive motion and trauma of her prior job." Dr. Chmell advised that further care and treatment including surgery were required.

By letters dated October 18, November 8, December 6, 2004 and January 9, 2005 appellant repeated her request for reconsideration.

By decision dated January 31, 2005, the Office found that appellant's requests for reconsideration were not timely filed and did not present clear evidence of error. It noted that the most recent merit decision was dated September 9, 1997.

On February 7, 2005 appellant requested reconsideration. She alleged that she never received the denial letter dated September 9, 1997 or she would have filed an appeal in 1997. Appellant alleged that she was told that no claims were being accepted for carpal tunnel syndrome and that a letter would be forthcoming. In December 1998, she went to the district Office and received the letter dated September 9, 1997 and was again told that no claim for carpal tunnel syndrome was being accepted. Appellant contended that her case was mixed up with her other case File No. 100467701. She also questioned the validity of reports from Dr. Miam and questioned why Dr. Walton's report was not sufficient. Appellant noted that these doctors had retired and her treating physician was now Dr. Chmell. She alleged that "there was no reason for my case to be denied -- the error is on the Office."

[1] Three other appeals filed by appellant were dismissed for procedural reasons; Docket No. 99-1245 (issued June 29, 1999); Docket No. 00-2520 (issued March 30, 2001) and Docket No. 04-1701 (issued September 28, 2004).

[2] Docket No. 04-601 (issued May 18, 2004).

The Office received a September 24, 1997, certification from a physician whose signature is illegible, which diagnosed "[s]evere moderate carpal tunnel syndrome" of the right hand and right biceps tendinitis.

The Office also received a copy of the July 30, 2004 report from Dr. Chmell.

By decision dated May 26, 2005, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

By letter dated June 1, 2005, appellant again contended that she never received the original letter of denial and explained that it took almost four years to get a decision in her other claim under File No. 100467701. She was unaware of the process for filing an appeal and argued that she was not given the proper time frame. Appellant alleged that the Office refused to acknowledge that it had made a mistake. She provided another copy of the September 24, 1997 report from the physician whose signature is illegible, and which contained a diagnosis of "[s]evere moderate carpal tunnel syndrome" of the right hand and right biceps tendinitis. By letters dated July 7 and August 5, 2005, appellant repeated her reconsideration request and she provided another copy of the July 30, 2004 report from Dr. Chmell.

On August 16, 2005 the Office received a copy of an April 23, 1997 statement from appellant regarding the numbness in her right thumb and fingers and which she alleged was a result of the years of repetitive motion work. In a December 10, 1998 memorandum, the Office noted that appellant came to the district Office to inquire into the status of her claim.

By decision dated November 17, 2005, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration on December 17, 2005. She submitted a December 10, 2005 report from Dr. Chmell who noted that appellant's employment activities included repetitive activities such as "casing, lifting, pulling, carrying and reaching." He also noted that appellant continually and repetitively used wrists, hands and fingers for 10 to 11 hours per day for 7 days a week. Dr. Chmell also related that appellant used weights from 10 to 70 pounds and even heavier weights and opined that appellant sustained repetitive trauma to her shoulders and neck. He stated that the repetitive motion trauma that appellant was subjected to at work caused her work injuries "which included a cervical disc derangement, multiple tendinitis, bilateral shoulder derangement and bilateral carpal tunnel syndrome." Dr. Chmell noted that appellant had several positions within the employing establishment and her condition was further aggravated. He also alleged that the Office was incorrect in noting that there was no mention of a positive Tinel's sign. Dr. Chmell explained that his June 5, 2004 evaluation of appellant "clearly indicates a number of objective abnormalities that are clearly diagnostic of a carpal tunnel syndrome. These include a positive median nerve compression test, a positive Tinel's sign and a positive Phalen's test as well as other abnormal findings."[3] Dr. Chmell opined that appellant was "unable to use either of her extremities meaningfully for gainful employment" and that she was "fully incapacitated for duty."

[3] Dr. Chmell alleged that a copy of the June 4, 2004 report was provided; however, the record does not contain such copy. The Board notes however, that several copies of his July 30, 2004 report are contained in the record.

By decision dated June 14, 2006, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[4] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[7] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.[8] 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[10] The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.[11] Evidence that 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] 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.[14]

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[4] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[5] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.607.

[7] 20 C.F.R. § 10.607(a).

[8] 20 C.F.R. § 10.607(b).

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

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

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

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

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

[14] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

The Office issued a merit decision on September 9, 1997, which denied appellant's claim on the basis that the evidence was insufficient to establish that appellant sustained an injury as alleged. Appellant's request for reconsideration was dated December 17, 2005. As her request was filed more than one year after the Office's September 9, 1997 decision, it is not timely filed. Therefore, appellant must demonstrate "clear evidence of error" on the part of the Office in issuing its September 9, 1997 decision.

Appellant submitted a December 10, 2005 report from her treating physician, Dr. Chmell who noted that appellant's employment activities included repetitive activities such as "casing, lifting, pulling, carrying and reaching" and advised that appellant continually and repetitively used her wrists, hands and fingers for many hours per day, and lifted heavy weights. Dr. Chmell stated that the repetitive motion trauma that appellant was subjected to at work caused her work injuries "which included a cervical disc derangement, multiple tendinitis, bilateral shoulder derangement and bilateral carpal tunnel syndrome." He found that appellant had objective findings such as a positive median nerve compression test, a positive Tinel's sign and a positive Phalen's test as well as other abnormal findings." The Office reviewed the medical evidence and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. 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.[15] Therefore, this evidence is insufficient to show that the Office erred in denying appellant's claim on the grounds that she failed to meet her burden of proof to establish an injury due to the claimed employment factors. Appellant presented no other evidence or legal argument showing any error in the Office's September 9, 1997 decision.[16]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

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[15] *Pete F. Dorso*, 52 ECAB 424 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3c (January 2004).

[16] On appeal, appellant alleged that she never received the original decision denying her claim. However, the record does not reflect that to be the case. This argument was also addressed by the Office in its prior decisions.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board