

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDALLE SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

*Docket No. 96-2309; Submitted on the Record;
Issued July 9, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 26-year old mail clerk, filed a Form CA-2 claim for occupational disease on November 20, 1989, alleging that she began to suffer swelling in her hands, fingers, and arm on September 1, 1989.¹ The Office accepted appellant's claim for tendinitis of the left arm in a letter dated March 8, 1990, following the Office's receipt of several supporting medical reports.

By letter dated July 11, 1990, the Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Howard L. Hecht, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a report dated July 31, 1990, Dr. Hecht stated that on physical examination appellant was a healthy appearing young woman who held her left arm in a somewhat antalgic position. Dr. Hecht noted there was no evidence of swelling of the hand or fingers with no edema, swelling or inflammatory reaction noted on examination of the entire left arm. Dr. Hecht concluded:

"I can find no objective evidence of abnormalities in [appellant]. Her neurologic examination, except for voluntary giving way and nondermatome hypesthesia, is perfectly normal. The nondermatome hypesthesia appear to be either a malingering or hysterical process. I believe there may be some strong

¹ The Board notes that appellant also filed a Form CA-1 claim based on traumatic injury on November 20, 1989, alleging that she had sustained a traumatic injury on November 15, 1989. Although the Office, by 2-way memorandum dated December 15 and December 26, 1989, indicated that the claim was being adjudicated as an occupational claim, for which it was ultimately accepted, the Office and several medical opinions refer to the claim as originating from a November 15, 1989 work injury.

psychological overtones to [appellant's] behavior during the examination and in her relating her present condition with her alleged injury in 1989. Because of no evidence of objective findings, either on electrical studies, x-ray or physical examination, I am taking the position that [appellant] has no reason to be restricted in her job activities and is in fact capable of full and unrestricted work."

By letter dated August 13, 1990, the Office advised appellant that the medical evidence of record established that she was no longer disabled from performing her usual employment. The Office stated that Dr. Hecht had found no evidence of any continuing medical condition resulting from her employment, and it therefore determined that appellant's entitlement to compensation had ceased as of the date of the letter. The Office advised appellant to immediately contact the employing establishment regarding an immediate return to work.

By decision dated September 14, 1990, the Office terminated appellant's compensation. In the memorandum incorporated by reference in the September 14, 1990 decision, the Office stated that appellant had submitted no additional medical evidence to support her entitlement to continued compensation.

In a letter to the Office dated October 10, 1990, appellant's representative requested a hearing, which the Office scheduled for March 25, 1991 by letter dated February 13, 1991. Appellant submitted a March 12, 1991 medical report from Dr. Roza K. Adamczyk, a specialist in neurology who had treated appellant since the aftermath of her September 1, 1989 employment injury, and an April 23, 1991 letter from Dr. Alan B. Lippitt, a Board-certified orthopedic surgeon. Dr. Adamczyk stated that he was at "quite a loss" to explain what was causing appellant's persistent problems. Dr. Adamczyk advised that, if it was tendinitis, it should have improved within the period of time that he had been treating her, and that if it was an inflammatory process, it should have subsided with anti-inflammatory or steroid medication.² In his April 23, 1991 letter, Dr. Lippitt diagnosed severe stenosing tenovaginitis and bicipital tenosynovitis, and stated that appellant could work with restricted use of her left upper extremity.

In a decision dated May 30, 1991, an Office hearing representative affirmed the Office's September 14, 1990 decision terminating benefits. The hearing representative stated that appellant had been referred to Dr. Hecht, who conducted a thorough examination, reviewed all medical records, and provided a reasoned opinion that appellant had no disabling arm condition. The hearing representative noted that Dr. Hecht had found no disabling condition that could be related to the keying she had performed nearly a year prior to his examination, and found that all tests were normal. The hearing representative further stated that Dr. Adamczyk, appellant's treating physician, was "at a loss" to explain the source of appellant's complaints, and did not relate any condition or disability to her employment. The hearing representative concluded that the record was devoid of any rationalized opinion relating the claimed condition or disability to appellant's employment, and that therefore the Office had established that the effects of the accepted condition had ceased.

² Dr. Adamczyk noted in a September 6, 1990 report that appellant had been assigned to light duty -- answering phones and taking messages -- but that she was not able to "handle" this type of work.

In a letter to the Office dated July 18, 1991, appellant's representative requested reconsideration of the hearing representative's May 30, 1991 decision. Accompanying the letter was a July 1, 1991 letter from Dr Lippitt, who stated that appellant had severe stenosing tenovaginitis, which resulted from a November 14, 1989 employment injury in which she had injured her left upper extremity. Dr. Lippitt advised that stenosing tenovaginitis is an inflammation of a tendon to the left thumb which often resulted from repetitive trauma such as punching a keyboard and usually does not improve with benign neglect, and which often required surgical decompression. Dr. Lippitt stated that he was enclosing medical literature pertaining to the subject.

By decision dated August 6, 1991, the Office denied reconsideration of appellant's claim on the grounds that the evidence of record was insufficient to warrant modification of its May 30, 1991 decision. In a memorandum to the Director, the claims examiner stated that Dr. Lippitt's July 1, 1991 report failed to meet appellant's burden of providing a rationalized opinion based on objective findings establishing a causal relationship between appellant's claimed condition and factors of employment.

In a letter to the Office dated November 5, 1991, appellant's representative requested reconsideration of the Office's August 6, 1991 decision. Appellant submitted letters and progress notes from Dr. Lippitt dated August 16, 1991 to January 6, 1992, in addition to results of an electromyographic examination (EMG) appellant underwent on October 3, 1991. The EMG indicated a possible chronic radial nerve neuropraxia, and Dr. Lippitt scheduled appellant for surgery. In a November 5, 1991 letter, Dr. Lippitt diagnosed a radial nerve entrapment, and stated that appellant's problem was related to her November 14, 1989 employment injury.

By decision dated January 8, 1992, the Office denied reconsideration of appellant's claim on the grounds that the evidence of record was insufficient to warrant modification of its August 6, 1991 decision. In a memorandum to the Director, the claims examiner stated that Dr. Lippitt failed to present any evidence to support continuing disability resulting from factors of appellant's employment, and noted that Dr. Lippitt had stated in his September 4, 1991 progress note that her condition was not severe enough to preclude her ability to work.

In a letter to the Office dated April 2, 1992, appellant's representative requested reconsideration of the Office's January 8, 1992 decision. Accompanying the report was a March 9, 1992 deposition from Dr. Lippitt, plus progress notes from Dr. Lippitt dated January 28 through March 13, 1992. In his deposition, Dr. Lippitt stated that appellant's stenosing tenovaginitis of the thumb was a medical condition caused by appellant's job duties as a keypunch operator, that based on her history this had been a continuous problem since November 1989, and that the type of problems she had were very consistent with the type of work she was doing. Dr. Lippitt stated that he had frequently treated key punch operators and had made similar diagnoses many times, but that appellant had the most severe case he had ever seen. Dr. Lippitt stated that he performed surgery on appellant in January 1992, and that although appellant was "basically" recovering, she remained disabled, as she had been since he first examined her in April 1991.

By decision dated April 27, 1992, the Office denied reconsideration of appellant's claim on the grounds that the evidence of record was insufficient to warrant modification of its

January 8, 1992 decision. In a memorandum to the Director, the claims examiner stated that Dr. Lippitt's deposition was similar to reports he previously submitted, and that he failed to provide a medical rationale for his opinion that appellant's condition was related to employment factors.

In a letter to the Office dated May 22, 1992, appellant's representative requested reconsideration of the Office's April 27, 1992 decision. Appellant submitted a May 15, 1992 letter from Dr. Lippitt in which he opined that appellant's left upper extremity condition resulted from work-related problems and that the constant use of key-punch was well known to cause the type of condition for which she had been treated. Dr. Lippitt further stated that the condition did not develop spontaneously, that it was a classic overuse condition seen in people who do keypunch operating. Appellant also submitted treatment notes from Dr. Lippitt dated April 3, April 10, April 27 and May 18, 1992.

By decision dated June 16, 1992, the Office denied reconsideration of appellant's claim on the grounds that the evidence of record was insufficient to warrant modification of its April 27, 1992 decision. The Office stated that its termination of benefits had been based on Dr. Lippitt's September 4, 1991 progress note releasing appellant to return to work without restrictions.

In a letter to the Office dated July 23, 1992, appellant's representative requested reconsideration of the Office's June 16, 1992 decision. The letter stated that Dr. Lippitt's September 4, 1991 progress note did not release appellant to return to work without restrictions, but stated that she could work with limited use of the left upper extremity. The letter further noted that Dr. Lippitt had subsequently diagnosed a nerve entrapment in her forearm, a condition which required surgery, and had stated repeatedly that this was an employment-related condition which was caused by her duties as a keypunch operator and had disabled her since he began treating her in April 1991. Appellant also submitted an August 10, 1992 report from Dr. Lippitt in which he essentially updated appellant's condition, stating that it totally disabled her from her preinjury employment and that she remained disabled. Dr. Lippitt stated that at the time of his initial evaluation he had not determined what was wrong with appellant, and that based on his examination he felt that she was capable of working. However, Dr. Lippitt stated that subsequently, with "work up" he determined that she had a significant problem with her upper extremity which explained her subjective complaints.

In a letter dated August 19, 1992, an Office claims examiner stated that he had reviewed appellant's file pursuant to the June 23, 1992 request for reconsideration, and that he agreed that Dr. Lippitt's September 4, 1991 progress note to which the Office referred in previous decisions outlined work limitations based on subjective limitations. The claims examiner stated that because Dr. Lippitt subsequently identified objective physical findings, and because the Office in previous decisions had incorrectly identified the issue as remaining disability to earn wages rather than any residuals from the accepted condition, the Office would assist appellant in further developing the claim by referring appellant for an independent medical evaluation to determine whether she suffered from any continued residuals of the employment-related injury and, if so, to determine the extent of disability due to those residuals.

In a letter dated September 28, 1992, the Office referred appellant to Dr. Walter C. Edwards, a Board-certified orthopedic surgeon, for an independent medical examination, which took place on October 13, 1992. In reports dated October 13, 1992, Dr. Edwards stated that he found no evidence of injury or restriction that would prevent appellant from returning to her usual job as a mail sorter, that her subjective complaints and physical examination did not correlate. Dr. Edwards further stated that “certainly” light work would be possible for appellant.

In a follow-up opinion dated October 20, 1992, Dr. Edwards stated that it appeared based on his examination that most of the original problems appellant complained of had been resolved and that the residual associated with two surgeries was “about what is to be expected.” Dr. Edwards stated that he saw no reason why she could not return to her normal work activity in an unrestricted manner, although she required some physical therapy for her painful left upper extremity because she had been inactive for such a long period. Dr. Edwards concluded that it would be best if she were released to her normal regular activity as soon as possible.

In a report dated November 24, 1992, Dr. Edwards reiterated that he saw no reason why appellant could not return to her normal activity, and stated that the surgery she underwent to relieve her upper left extremity condition was apparently successful.

In a letter to the appellant dated December 15, 1992, the claims examiner stated that because Dr. Edwards was unable to provide the specific information requested by the Office, she would be referred to another independent medical examiner.

By letters dated January 19, 1993, the Office referred appellant for an independent medical examination with Dr. Robert D. Rockfeld, a Board-certified orthopedic surgeon, for January 28, 1993.

In a report dated January 28, 1993, Dr. Rockfeld stated:

“My exam[ination] today is totally normal although she complains of pain in the left upper extremity. Although repetitive motion injuries can cause upper extremity pain, [appellant] has not participated in a repetitive motion and I believe, in my opinion, [appellant] is embellishing any symptomatology she is complaining of.... It is my opinion that tendinitis can be caused by repetitive motion injuries, however, I am not convinced that the nerve entrapment that was treated is a cause and effect type of relationship in that the description of the numbness and the symptomatology does not bear out the release that has been performed.... I do not find any aggravation of symptomatology and I do not feel, in my opinion, that there is any permanent problem going on here.”

Dr. Rockfeld concluded that appellant was able to go back to full active work activity.

By decision dated February 18, 1993, the Office denied reconsideration of appellant’s claim on the grounds that the evidence of record was insufficient to warrant modification of its previous decisions. In a memorandum to the Director, the claims examiner stated that the weight of the medical evidence, represented by Dr. Rockwell’s January 28, 1993 report, established that the conditions for which the left upper extremity surgery was performed were not causally

related to employment factors and that there was no objective evidence to establish that there were any residuals of disability resulting from the upper left extremity. The claims examiner stated that the well-reasoned opinion of Dr. Rockfeld, the independent medical examiner was based on physical examination and his review of the medical record. The claims examiner noted that Dr. Rockfeld found no objective evidence of job-related disability and was able to sufficiently explain why appellant did not suffer continued job-related residuals of disability of the upper left extremity.

In a letter to the Office dated February 15, 1994, appellant requested reconsideration of the Office's February 18, 1993 decision.

By decision dated April 11, 1994, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

In a letter to the Office dated December 10, 1995, which was postmarked February 12, 1996, appellant requested reconsideration of the Office's October 8, 1993 decision. Appellant submitted a March 28, 1995 letter from Dr. Lippitt, who essentially reiterated his earlier findings, and a September 27, 1995 progress note and work status report from Dr. R.V. Nair, a specialist in orthopedic surgery, who indicated that appellant would be disabled for the next 2 months due to her left arm condition, which remained unchanged.

By decision dated March 15, 1996, the Office again denied appellant's claim on reconsideration, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which, on its face, showed that the Office made an error, and that the medical evidence in the instant case did not meet this standard. The Office found that the medical reports appellant submitted from Drs. Lippitt and Nair were insufficient to establish clear evidence of error on the part of the Office in its February 18, 1993 merit decision, and denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed her appeal with the Board on July 10, 1996, the only decision properly before the Board is the March 15, 1996 Office decision order.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

³ 20 C.F.R. §§ 501.2(c), 501.3(d)(2)

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle an employee to a review of an Office decision as a matter of right.⁵ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may -- (1) end, or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has stated that it 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁸

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on February 18, 1993. Appellant requested reconsideration on February 12, 1996, when it was received by the Office. Thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the appellant's application for review shows “clear evidence of error” on the part of the Office.¹⁰

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.* 41 ECAB 104 (1989).

⁶ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *See* cases cited *supra* note 3.

⁹ *Rex L. Weaver*, 44 ECAB (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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.¹⁵ 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 as substantial question as to the correctness of the Office decision.¹⁶ The Board makes an independent determination of whether appellant 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 fact of such evidence.¹⁷

In the instant case, appellant's December 15, 1995 request for reconsideration, which was postmarked February 12, 1996, fails to show clear evidence of error with regard to the Office's finding in its February 18, 1993 decision that the conditions for which appellant's left upper extremity surgery was performed were not causally related to employment factors and that there was no evidence of any residuals of disability resulting from her accepted, employment-related upper left extremity condition. The Office reviewed the evidence in its March 15, 1996 decision and found it to be insufficient to show clear evidence of error. The Board notes that the issue in this case is medical and that appellant failed to submit any medical evidence which demonstrated clear evidence of error in the Office's February 18, 1993 decision.

Dr. Lippitt's opinion is merely a rehashing of his previously stated opinion that appellant sustained a disabling condition caused by employment factors; *i.e.*, repetitive key-punching, which had been rejected by the Office in its February 18, 1993 decision in favor of Dr. Rockfeld's opinion, which was accorded the greater weight of an independent medical examiner. Dr. Nair's report and note merely noted that appellant was still disabled due to her left extremity condition, and offered no opinion on whether it was caused by employment factors. To show clear evidence of error, the evidence must not only be of sufficient probative value to create a conflict in medical opinion, but it must be of sufficient probative value to *prima*

¹¹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² See *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ See *Jesus D. Sanchez*, *supra* note 5.

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Leon D. Faidley, Jr.* *supra* note 5.

¹⁷ *Gregory Griffin*, 41 ECAB 458 (1990).

facie shift the weight of the evidence in appellant's favor and raise a substantial question as to the correctness of the Office's decision.¹⁸ Neither Dr. Lippett's March 28, 1995 letter nor Dr. Nair's September 27, 1995 note and report raised a substantial question as to the correctness of the Office's February 18, 1993 decision or otherwise established clear evidence of error on the part of the Office with respect to that decision.

Thus, the evidence submitted by appellant on reconsideration is not sufficient to *prima facie* shift the weight of the evidence in favor of appellant with regard to the left upper extremity condition adjudicated in the Office's February 18, 1993 decision. The Office's decision is therefore affirmed.

The March 15, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
July 9, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

¹⁸ See *Howard A. Williams*, 45 ECAB 853 (1994).