

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAZEL J. HOLLIMAN and U.S. POSTAL SERVICE,
ANTIOCH REMOTE ENCODING CENTER, Antioch, TN

*Docket No. 01-1768; Submitted on the Record;
Issued March 18, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

On February 10, 1998 appellant, then a 33-year-old data conversion operator, filed a claim for bilateral carpal tunnel syndrome, which she attributed to keyboarding in the performance of duty on and after October 1, 1997.¹ She was terminated from the employing establishment on June 1, 1998.

In January 20 and 29, 1998 reports, Dr. Joe Walker, an attending Board-certified internist, noted a two-month history of numbness and clumsiness in the right hand, which appellant attributed to seasonal overtime at the employing establishment. On examination he found "somewhat positive" Tinel's and Phalen's signs on the right, with "slight motor weakness on median nerve testing." Dr. Walker diagnosed "[p]robably right carpal tunnel syndrome."

Dr. Walker ordered February 3, 1998 nerve conduction velocity (NCV) and electromyographic (EMG) tests, which were "essentially normal," without evidence of median entrapment neuropathy in either arm.

In March 17 and April 20, 1998 reports, Dr. Walker diagnosed probable carpal tunnel syndrome "in spite of the normal nerve conduction studies." He stated that he did "not have a firm opinion" as to whether the condition was work related.

¹ In a March 4, 1998 letter, the employing establishment controverted appellant's claim based on a lack of medical evidence. In a March 10, 1998 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish her claim. Appellant was specifically directed to submit a "comprehensive medical report from [her] treating physician" describing objective findings and test results and explaining how and why her federal job duties would cause these findings.

By decision dated July 29, 1998, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant submitted insufficient evidence that "repetitive motion activities" at the employing establishment caused any medical condition. The Office found that Dr. Walker's reports were too speculative regarding causal relationship to meet appellant's burden of proof.

Appellant disagreed with this decision and in an August 5, 1998 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held May 20, 1999. At the hearing, appellant asserted that she first experienced hand and wrist symptoms in October 1996, with pain and numbness increased by keying overtime at work due to increased seasonal mail volume. In August 1998, she began private sector employment as a file and order clerk at a cabinet manufacturing company, with duties including photocopying and keyboarding. Appellant also submitted additional evidence.

In a June 21, 1999 report, Dr. Douglas R. Weikert, an attending Board-certified orthopedic surgeon, noted that appellant was improving three-and-a-half months after undergoing right carpal tunnel surgery. Regarding causal relationship, Dr. Weikert noted that while appellant had no "obvious factors relating to her carpal tunnel," she "did do repetitive work at the [employing establishment] for approximately three years before her symptoms started." Dr. Weikert opined that carpal tunnel syndrome was "usually multifactorial in onset and it is difficult to say exactly why she developed carpal tunnel. This is probably an idiopathic carpal tunnel syndrome but it is possible that the repetitive nature of her job did contribute to her symptoms."

By decision dated August 6, 1999 and finalized August 12, 1999, the Office affirmed the July 29, 1998 decision. The Office noted that there was conflicting evidence of record regarding whether appellant began work at the employing establishment in either February 1996 or June 1997. The Office found that Dr. Weikert's June 22, 1999 report was speculative and insufficient to establish causal relationship and did not explain why he diagnosed carpal tunnel; syndrome when the EMG and NCV studies were negative.

Appellant disagreed with this decision and in a September 16, 1999 letter requested reconsideration and submitted new evidence.

In an August 31, 1999 report, Dr. Manju Kandula, a Board-certified neurologist, noted that he has been treating appellant since June 29, 1998 for "bilateral carpal tunnel syndrome." He opined that it was "difficult to say with 100 percent certainty that [appellant's] problems [were] work related. ... [S]he was working in data entry but stopped in June 1998," although her symptoms began in October 1997 "and possibly even prior to that." Dr. Kandula concluded that "most likely [appellant's] condition [was] work related."

By decision dated December 4, 1999, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Kandula's August 31, 1999 report was speculative, as she could not state with certainty that appellant's problems were work related.

In a March 29, 2000 letter, appellant's attorney asked for "some information regarding the [f]ederal standard for compensability of a claim. Must the treating physician state with one hundred percent ... certainty that the working conditions caused the carpal tunnel syndrome?" The attorney noted that the Office stated that appellant worked at the employing establishment for one year, whereas she had worked there for two years. The attorney also asserted that Dr. Kandula's opinion that appellant's carpal tunnel syndrome was "most likely" work related would make the claim "compensable under Tennessee [w]orkers' [c]ompensation law."²

In a December 21, 2000 letter, appellant's attorney noted that he had not received a response "concerning our request for reconsideration of March 29, 2000." Her attorney asserted that the proper "standard for medical proof is that the injury is 'more likely than not' work related, rather than an absolute certainty standard." He concluded that Dr. Kandula's opinion that appellant's carpal tunnel syndrome was "most likely" work related was sufficient to fulfill appellant's burden of proof.

In a March 14, 2001 telefacsimile, appellant's attorney representative requested "the status" of appellant's case. Her attorney noted having written the Office on "December 21, 2000, asking that you advise us of the status of our reconsideration request that was made by letter on March 29, 2000."

By decision dated March 21, 2001, the Office denied reconsideration on the grounds that appellant's request was untimely filed and did not present clear evidence of error. The Office noted that appellant's attorney's March 29, 2000 letter did not constitute a valid request for reconsideration, as it merely requested information about the case. The Office found that even if the December 21, 2000 letter from appellant's attorney were construed as a "request for reconsideration, since at least the word 'reconsideration' was stated in that letter, the request would have been found "untimely as it was not filed within one year of the December 4, 1999 decision. The Office reviewed the legal arguments presented by appellant's attorney and found that they did not demonstrate clear evidence of error.

The Board finds that the Office in its March 21, 2001 decision properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.³

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.⁴ As appellant filed her appeal with the Board on June 25, 2001, the only decision properly before the Board is the March 21, 2001 decision denying appellant's request for a merit review.

² The Board notes that the March 29, 2000 letter was date punched received by the Office on December 26, 2000, the same date as the December 21, 2000 cover letter. It appears that the Office did not associate the original March 29, 2000 letter with appellant's compensation file.

³ See 20 C.F.R. §10.606(b)(2)(i-iii).

⁴ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to review of an Office decision as a matter of right.⁶ This section, vesting the Office with discretionary authority to determine whether it will review an award, 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, decrease, 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).⁷ 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.⁸ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

In this case, the date of appellant's reconsideration request requires clarification. In the March 29, 2000 letter, appellant's attorney requested information concerning the Act's burden of proof, asserted that the Office understated the length of appellant's federal employment and contended that Dr. Kandula's opinion would make the claim compensable under state law. However, appellant's attorney did not request reconsideration in this letter.

Approximately nine months later, in a December 21, 2000 letter, the attorney referred to the March 29, 2000 letter as a “request for reconsideration.” Appellant's attorney asserted that Dr. Kandula's opinion that appellant's carpal tunnel syndrome was “most likely” work related was sufficient to fulfill her burden of proof. As this letter refers specifically to a reconsideration request and presents a legal argument, the Board finds that it constitutes a request for reconsideration.

However, the Board finds that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on December 4, 1999. As appellant's

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1900); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 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 a 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. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.607(a).

⁹ *See* cases cited *supra* note 6.

December 21, 2000 reconsideration request was outside the one-year time limit, which began the day after December 4, 1999, appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.¹⁰ 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(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ 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.¹⁶ To show clear evidence of error, the evidence submitted must not only 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.¹⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁸

The Board finds that appellant's December 21, 2000 reconsideration request failed to show clear evidence of error. The December 21, 2000 letter, the only evidence submitted, does not establish that the Office's December 4, 1999 decision was clearly in error, or raise a substantial question as to the correctness of that decision. The critical issue in the case at the time the Office issued its December 4, 1999 decision was whether appellant sustained the claimed bilateral carpal tunnel syndrome in the performance of duty. Appellant's December 21,

¹⁰ *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, *supra* note 6.

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 6.

¹⁸ *Gregory Griffin*, *supra* note 10.

2000 letter does not provide new, relevant, pertinent evidence on this issue, but merely reiterates her previous assertion that Dr. Kandula's opinion was sufficient to meet her burden of proof. Thus, the December 21, 2000 letter is of no probative value in establishing clear evidence of error and the Office's March 21, 2001 decision finding that appellant's March 21, 2001 request for reconsideration was untimely and did not establish clear evidence of error was correct.

The decision of the Office of Workers' Compensation Programs dated March 21, 2001 is hereby affirmed.

Dated, Washington, DC
March 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member