United States Department of Labor
Employees' Compensation Appeals Board

SANDRA J. SMITH, Appellant	)	
and	)	**Docket No. 04-565**
	)	**Issued: May 26, 2004**
SOCIAL SECURITY ADMINISTRATION, MID-ATLANTIC PROGRAM SERVICE CENTER, Kansas City, MO, Employer	)	

Appearances:
Benita K. Jordan, 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
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 23, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 9, 2003, which denied appellant's request for reconsideration 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 last merit decision dated August 9, 2002 and the filing of this appeal on December 23, 2003 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On May 21, 2002 appellant, then a 55-year-old files clerk, filed a traumatic injury claim, alleging that on May 21, 2002 she had left wrist, arm pain and swelling at the wrist and lower

arm, when she turned folders in reversed position while putting material inside. Appellant stopped working on May 21, 2002.[1] Appellant stated that she was told that the tear was caused on May 21, 2002 but that the swelling was from excessive usage. She stated that no one was at the desk when the tear or pop sound was made.

In a three compartment left wrist arthrogram report dated June 18, 2002, appellant's treating physician, Dr. Lanny W. Harris, a Board-certified orthopedic surgeon with a specialty in hand surgery, stated that he suspected a scapholunate ligament tear particularly given the presence of a limited scaphoid movement and rotatory subluxation of the scaphoid.

In a report dated July 12, 2002, Dr. Harris noted that appellant stated that she felt a sudden pop flipping files in her folders in May 2002 and the pop occurred in the wrist. He stated that as nearly as he could tell, the wrist injury was a result of her repetitive activities at work. In an attending physician's report dated July 29, 2002, Dr. Harris diagnosed joint derangement and osteoarthritis in the forearm. He checked the "yes" box that appellant's condition was work related and stated that it resulted from repetitive use at work making folders.

By decision dated August 9, 2002, the Office denied appellant's claim, finding that the medical evidence was insufficient to establish that her condition was caused by the implicated employment factors. The Office found in part that Dr. Harris' diagnoses were not sufficiently specific.

By letter dated May 29, 2003, appellant's union representative, Pat Smith, requested reconsideration of the Office's decision. By letter dated June 30, 2003, the Office informed Mr. Smith that before it could respond to the reconsideration request, it required a letter from appellant, signed and in writing, authorizing him to represent her in matters arising from claim No. 11-2009247. Appellant submitted two letters authorizing Mr. Smith to represent her, one dated October 9, 2001, in which she authorized Mr. Smith to be her representative concerning a debt collection notice issued to her pursuant to 5 U.S.C. § 5514 and the other dated January 4, 2000, in which she did not specify the purpose for the authorization. By letter dated July 31, 2003, the Office informed Mr. Smith that the letters dated January 4, 2000 and October 9, 2001, were not sufficient to establish authorization of his representation for appellant's claim because appellant did not specify that she was authorizing the representation for claim No. 11-2009247. By letter dated October 15, 2003, appellant stated that she authorized Benita K. Jordan to represent her regarding her workers' compensation claim No. 11-2009247.

In support of her May 29, 2003 requested for reconsideration appellant submitted medical evidence consisting of numerous reports from Dr. Harris, some of which were contained in the record. In a report dated June 22, 2001, Dr. Harris considered appellant's history, noting that sometime in 1998, while working with large folders appellant was grasping and had picked up, she felt a sudden pop in her right wrist and accidentally struck her right wrist at the edge of a file tub. He stated that appellant underwent rehabilitation and splints were made, but she continued to have chronic aching pain in the right wrist until January 2001, when she was picking up folders and suddenly had pain again in the wrist with proximal radiation. Dr. Harris performed

[1] The Office accepted appellant's claim for a right wrist sprain, Case No. 11-2001318, for an injury occurring at work on January 10, 2001.

x-rays and an examination and diagnosed scapholunate ligament disruption with a static instability pattern about the wrist and degenerative radial ulnar distal joint disease. He opined that both of these injuries were related to her work based on history and findings. In a report dated July 25, 2002, Dr. Harris stated that appellant was unable to perform repetitive grasping motion, lifting, pushing and pulling with either wrist due, in part to her conditions of carpal instability and degenerative joint disease. He opined that she was unable to work.

In a report dated August 22, 2002, Dr. Harris stated that he saw appellant on February 12, 2002 with a several month history of increasing pain and swelling and that his examination and x-rays showed degenerative joint disease at the radio-ulnar joint. He stated that it was his opinion at the time that the degenerative joint disease was caused and aggravated by the repetitive motion of appellant's work activity. Dr. Harris stated that on a subsequent visit on June 11, 2002 appellant sustained additional injury while at work doing repetitive use when she flipped files and felt a sudden pop in her wrist. He stated that her examination and x-rays continued to support a degenerative joint disease caused and aggravated by her regular work activities. Dr. Harris also stated that her overtime work "probably added to the aggravation." His progress notes dated from November 12, 2001 through March 13, 2003, document his treatment of appellant's right wrist. On March 27, 2003 Dr. Harris removed pins from appellant's right wrist and gave the postoperative diagnosis of healed intercarpal fusion in the triscaphoid area of the right wrist with retained painful pins.

In a report dated October 24, 2003, Dr. Harris stated that appellant was having increased pain over the last six weeks in the ulnar border of her left wrist, her thumb felt weak and she felt like she did not have any grip. He noted that she had returned to work and was using her hands and wrists for repetitive activities. Dr. Harris performed an examination and reviewed x-rays, which showed the fracture fragment to have healed well with some minimal offset. He noted that she had marked ulnar variance. Dr. Harris suspected that appellant had a triangular fibro-cartilage complex (TFCC) tear on the ulnar border and recommended a three compartment arthrogram. On November 20, 2002 he performed surgery on appellant consisting of a right distal ulnar hemiarthroplasty with arthrodesis.

By decision dated December 9, 2003, the Office found that appellant's letter requesting reconsideration was dated October 15, 2003, the date she submitted the required authorization and was untimely because it was filed more than a year after the Office's merit decision on August 9, 2002. The Office also found that appellant failed to present clear evidence of error.

LEGAL PRECEDENT

The imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[2] This section does not mandate that the Office review a final decision simply upon request by a claimant.

[2] *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley, Jr.*, , 41 ECAB 104 (1989).

The Office, through its regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office merit decision, for which review is sought.[4]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was on its face erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[8]

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[9] Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[10]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the 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.[11]

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.[12] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607(a).

[5] *Id*.

[6] *Pete F. Dorso*, 52 ECAB 424, 427 (2001); *Dean D. Beets*, 43 ECAB 1153 (1992).

[7] *Pete F. Dorso*, *supra* note 6; *Leona N. Travis*, 43 ECAB 227 (1991).

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

[9] *Leona N. Travis*, *supra* note 7.

[10] *Annie Billingsley*, 50 ECAB 210 (1998).

[11] *George C. Vernon*, 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

[12] *Jimmy L. Day*, 48 ECAB 654 (1997).

Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[13]

Section 20 C.F.R. § 10.701 provides in pertinent part that a claim "may authorize any individual to represent him or her in regard to a claim under [the] FECA [Federal Employee's Compensation Act]."[14] Under definitions, 20 C.F.R. § 10.5(z) states: "[r]epresentative means an individual properly authorized by a claimant in writing to act for the claimant in connection with a claim or proceeding under the FECA or this part."[15] Section 20 C.F.R. § 10.700(c) provides that "[a] properly appointed representative who is recognized by the OWCP may make a request or give direction to [the] OWCP regarding the claims process, including a hearing." Section 20 C.F.R. § 10.606 provides in pertinent part that "[a]n employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the] OWCP in the final decision."

The Board has held that there is no requirement that the Office actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant. The representative only needs to show that he (or she) was authorized at the time such action was undertaken.[16]

ANALYSIS

In this case, on May 29, 2003 Mr. Smith requested reconsideration of the Office's decision on behalf of appellant. Subsequently, in response to the Office's instructions that in order for her request to be considered, appellant must authorize Mr. Smith's representation, signed and in writing, in connection with her claim No. 11-2009247, appellant submitted two letters dated January 4, 2000 and October 9, 2001. In the letters she authorized Mr. Smith's representation but did not mention that the representation was in connection with her claim. In response to the Office's instructions that she must specifically state in her authorization that the representation was in connection with her claim, on October 15, 2003 appellant submitted an authorization for the vice-president of the union, Ms. Jordan, to represent her in connection with claim No. 11-2009247.

When appellant authorizes an individual to represent her, she must indicate that it is in connection with her claim under the Act.[17] If appellant submits proper authorization subsequent to the date the representative acts on her behalf, the action is valid if the authorization covers the date of that action.[18] Since, however, appellant did not submit any documentation that Mr. Smith

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

[14] 5 U.S.C. § 8101 *et seq*.

[15] *See David M. Ibarra*, 48 ECAB 218, 219 (1996).

[16] *Ira D. Gray*, 45 ECAB 445, 447 (1994).

[17] *See* 20 C.F.R. §§ 10.5(z); 10.701(a); *David M. Ibarra*, *supra* note 15.

[18] *See Ira D. Gray supra* note 16.

was authorized to represent her on May 29, 2003 the date of Mr. Smith's reconsideration request, the request was not valid at that time. When on October 15, 2003 appellant submitted signed authorization for Ms. Jordan to represent her, her request for reconsideration became valid on that date. The date of appellant's request for reconsideration was, therefore, October 15, 2003 and was filed more than a year after the Office's August 9, 2002 merit decision. The Board, therefore, finds that appellant's request for reconsideration was untimely filed.

In support of her request for reconsideration, appellant submitted medical reports from Dr. Harris including those dated June 22, 2001, July 25 and August 22, 2002 and October 24, 2003. In his June 22, 2001 report, Dr. Harris noted that sometime in 1998 while working with large folders appellant felt a sudden pop in her right wrist and accidentally struck her wrist at the edge of a file tub. He stated that in January 2001, she suddenly had pain again in her right wrist with proximal radiation while picking up folders. Dr. Harris diagnosed scapholunate ligament disruption with a static instability pattern about the wrist and degenerative radial ulnar distal joint disease, which were related to appellant's work. Although Dr. Harris provided a specific diagnosis and opined that there was a causal connection between that diagnosis and appellant's work, his history of the injury is inaccurate as it did not coincide with the date appellant alleged her injury occurred, May 21, 2002. His report is, therefore, not sufficient to show clear evidence of error in the Office's decision.[19]

In his August 22, 2002 report, Dr. Harris diagnosed degenerative joint disease caused and aggravated by the repetitive motion of appellant's work activity. Because he did not specify May 21, 2002 as the date of injury but indicated that he saw appellant on June 11, 2002 that report also does not contain an accurate history. Further, Dr. Harris did not relate appellant's wrist condition to the specific injury appellant described, the popping of her wrist on May 21, 2002 rather than the repetitive work. His August 22, 2002 report is, therefore, insufficient to show clear evidence of error. Dr. Harris' other report dated July 25, 2002, in which he described appellant's physical limitations and his report dated October 24, 2003, in which he noted marked ulnar variance and suspected a TFCC tear do not address causation and, therefore, are not relevant. The medical evidence submitted does not show that appellant's right wrist condition is causally related to the May 21, 2002 employment injury and does not show clear error in the Office's August 9, 2002 decision.[20]

[19] The Board has held that a medical report containing an inaccurate history of injury is of diminished probative value. *See Kathleen M. Fava*, 49 ECAB 519, 523 (1998).

[20] Since the basis of appellant's claim is that she sustained a traumatic injury on May 21, 2002 as an alternative, she could file an occupational claim. *See* 20 C.F.R. §§ 10.101 and 10.116.

CONCLUSION

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review on December 9, 2003. Appellant request for reconsideration became effective on October 15, 2003 the date she submitted the proper authorization for representation and since the request was filed more than a year after the Office's August 9, 2002 merit decision, the request was untimely. The Board further finds that appellant has failed to submit evidence establishing clear error on the part of the Office in her reconsideration request. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Officer properly denied further review on December 9, 2003.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 26, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member