United States Department of Labor
Employees' Compensation Appeals Board

FREDDIE HAWKINS, Appellant	)	
and	)	**Docket No. 04-1642**
	)	**Issued: January 21, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Concord, CA, Employer	)	

Appearances:
Freddie Hawkins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 15, 2004 appellant filed a timely appeal from a May 5, 2004 nonmerit decision of the Office of Workers' Compensation Programs that found that her request for reconsideration of a February 4, 2003 Office decision was not timely filed and did not demonstrate clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the merits of appellant's case, as her appeal was filed more than one year after the Office's most recent merit decision.

ISSUE

The issue is whether appellant's request for reconsideration of a February 4, 2003 Office decision was timely filed and, if not, whether it demonstrated clear evidence of error. On appeal she contends that her submission of evidence received by the Office on February 2, 2004 constituted a timely request for reconsideration.

FACTUAL HISTORY

On August 2, 2002 appellant filed a claim for compensation for a recurrence of medical treatment related to a February 16, 1994 employment injury. She listed the date of the recurrence as July 23, 2002, but listed the date she received medical treatment following the recurrence as April 24, 2001, when she underwent a magnetic resonance imaging (MRI) scan of her cervical spine. Appellant stated that, following the original injury, she returned to work with restrictions and had severe back, neck and shoulder pain and headaches. The employing establishment reported that she worked modified assignments since her 1994 injury and was currently working as an administrative clerk.

Appellant submitted an interpretation of the MRI scan of her cervical spine, which was actually done on April 13, 2002, the same date as x-rays showing degenerative disc disease at C3-4 and C4-5 and mild anterolisthesis of C2 on C3 and May 14 and June 11, 2002 reports from Dr. David LaRochelle, an orthopedic surgeon. The later report indicated, under subjective complaints, that appellant's cervical spine condition was more noted with daily activities.

In response to a September 20, 2002 request for further factual and medical evidence, appellant submitted a July 23, 2002 report from Dr. LaRochelle, which noted a 1990 repetitive movement injury, causing neck pain and carpal tunnel syndrome, a 1994 slip that appellant claimed injured her back and neck causing a recurrent strain to both locations and constant use of the letter sorting machine that appellant claimed caused repetitive motion problems with her cervical spine but was eventually stopped due to her carpal tunnel problem. In an October 11, 2002 letter, appellant described her duties of casing mail manually, operating the letter sorting machine, sorting mail and timekeeping and contended that these duties contributed to her neck and shoulder problems, which began in March 2001.

By decision dated October 21, 2002, the Office, which treated appellant's recurrence claim as one for a new injury related to her employment duties, found that she had not established that her condition was caused by employment factors.

By letter dated November 1, 2002, appellant requested reconsideration and submitted an October 22, 2002 report from Dr. LaRochelle stating that she became tired after four hours of work. The Office referred appellant to Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, for a second opinion on her condition and its relation to her employment. In a December 17, 2002 report, Dr. Sherman concluded that appellant had mild osteoarthritis of the cervical spine without any neurological or mechanical deficit, that this condition was not related to her work activities and that her condition required no restrictions and no treatment.

By decision dated February 4, 2003, the Office found that the weight of the medical evidence established that appellant's condition was not causally related to employment factors.

On July 18, 2003 appellant filed a claim for compensation on Office form CA-7 for time spent obtaining medical treatment from December 17, 2002 to July 2, 2003. By letter dated July 28, 2003, the Office advised appellant that this was not payable because her claim had been denied and that she should exercise her appeal rights if she disagreed with the denial. On January 27, 2004 appellant called the Office stating that she wanted to file a request for

reconsideration but had not received her medical records from her health care provider. Appellant requested an extension of time to request reconsideration; the Office advised her that an extension could not be given and that the deadline for requesting reconsideration was February 4, 2004.

On February 2, 2004 the Office received additional evidence: a physical therapy evaluation done on November 25, 2002, an undated patient progress record with an illegible signature, an interpretation of December 11, 2003 x-rays of appellant's cervical spine, form reports from unidentified authors dated October 28, 2002 and December 8, 2003 and a December 11, 2003 report from Dr. Antoine Samman, a Board-certified neurologist. In his December 11, 2003 report, Dr. Samman noted a history of carpal tunnel symptoms two to three years ago, the development of pain in her appellant's while doing physical therapy for her neck and the development of a different type of pain on both sides of her head about a week ago. Dr. Samman stated that his "complete neurolgic examination including mental status, cranial nerves, motor and sensory systems, coordination, deep tendon reflexes, gait and auscultation of the neck" did not reveal any objective abnormalities. Dr. Samman stated that appellant's current headaches appeared to be due to sinusitis or stress and that her past history of right trigeminal neuralgia, which was now resolved, might be related to the reported C2-3 anterolisthesis described on the April 2002 MRI scan. This evidence was accompanied by a letter dated January 28, 2004 listing appellant's claim number and indicating the enclosed medical reports were for that claim number.

On March 9, 2004 appellant called the Office to ask about the status of her case and was advised that a request for reconsideration had not been received. She said she thought she had sent it and was told that additional medical reports had been received but no statement requesting an appeal and specifying the type. On March 22, 2004 the Office received appellant's appeal request form dated March 10, 2004, on which reconsideration was checked and a March 10, 2004 letter from her stating that she forgot to mail the appeal request form with the new medical documentation she had submitted.

By decision dated May 5, 2004, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought." The Office's regulation provides that an employee "shall exercise this right [to reconsideration] through a request to the district [O]ffice"[1] and that the request for reconsideration must be submitted in writing.[2] The Office's procedure manual provides: "A claimant may apply for reconsideration of a final decision regardless of the date of injury or death. While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested and be accompanied by relevant new evidence or argument not previously considered."[3]

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] 20 C.F.R. § 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 [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] 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.[8] 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.[9] 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

[1] 20 C.F.R. § 10.605.

[2] 20 C.F.R. § 10.606.

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (January 2004).

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

[8] *See Leona N. Travis*, *supra* note 6.

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

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.[10] 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.[11]

ANALYSIS

The Office issued its most recent merit decision in appellant's case on February 4, 2003. Pursuant to 20 C.F.R. § 10.607(a), she had one year from this date to send the Office a request for reconsideration. On January 27, 2004 appellant called the Office stating that she wanted to file a request for reconsideration, but this telephone call cannot be considered a request for reconsideration since the Office's regulation require that such requests must be in writing. On February 2, 2004 the Office received additional evidence, but this evidence was not accompanied by any written statement from appellant that could reasonably be construed as a request for reconsideration.[12] As her March 10, 2004 letter and appeal request form were the earliest documents that constituted a request for reconsideration of the Office's February 4, 2003 decision, her request for reconsideration was not sent within one year of the Office's decision and were not timely.

The evidence appellant submitted in support of her request for reconsideration did not demonstrate clear evidence of error. The progress notes and form reports that lack proper identification cannot be considered as probative evidence in support of her claim.[13] The evaluation of appellant's physical therapist is of no probative value as a physical therapist is not a physician as defined by section 8101(2) of the Act[14] and is not competent to render a medical opinion.[15] The report of Dr. Samman does not attribute any of appellant's conditions to her employment and thus, cannot demonstrate clear evidence of error in the Office's February 4, 2003 decision denying appellant's claim on the basis causal relation was not shown.

CONCLUSION

Appellant's request for reconsideration of the Office's February 4, 2003 decision was not timely filed and did not demonstrate clear evidence of error.

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[10] *Leon D. Faidley*, Jr., 41 ECAB 104 (1989).

[11] *Gregory Griffin*, *supra* note 4.

[12] The Board has liberally construed statements from claimants in favor of such statements constituting requests for reconsideration. *See, e.g. Jeanette Butler*, 47 ECAB 128 (1995); *Vicente P. Taimanglo*¸45 ECAB 504 (1994).

[13] *Merton J. Sills*, 39 ECAB 572 (1988).

[14] 5 U.S.C. § 8101(2) defines "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners.

[15] *Linda Blue*, 50 ECAB 227 (1999).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member