United States Department of Labor
Employees' Compensation Appeals Board

JO ANN WHITLOCK, Appellant	)	
and	)	**Docket No. 05-64**
	)	**Issued: June 7, 2005**
U.S. POSTAL SERVICE, ATLANTA BULK MAIL CENTER, Atlanta, GA, Employer	)	

Appearances:
Jacqueline K. Taylor, Esq., for the appellant
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 October 4, 2004 appellant timely filed an appeal from a July 29, 2004 nonmerit decision by the Office of Workers' Compensation Programs which denied appellant's request for reconsideration on the grounds that it was untimely and lacked clear evidence of error in the denial of his increased schedule award claim. The jurisdiction of the Board is limited to decisions of the Office issued within one year of the filing of an appeal with the Board. In this case, the Board only has jurisdiction over the July 29, 2004 decision denying appellant's request for reconsideration. The Board, therefore, does not have jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On December 4, 1993 appellant, then a 49-year-old mail clerk, tripped over a loose cover plate at work, falling and injuring both arms. In a May 25, 1994 medical note, Dr. Dexter T. Todmann stated that appellant was found to have right carpal tunnel syndrome and had been unable to work since March 2, 1994. In an August 16, 1994 decision, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to demonstrate disability for the period that appellant claimed. Appellant requested reconsideration and submitted additional medical evidence. In an April 4, 1995 decision, the Office rescinded its August 16, 1994 decision and accepted appellant's claim for carpal tunnel syndrome in the right arm. Appellant subsequently returned to work.

In a May 6, 1996 decision, the Office issued to appellant a schedule award for a 10 percent permanent impairment of the right arm.

On June 25, 1996 appellant filed a claim for recurrence of disability effective that date. She stated that she was medically restricted to lifting no more than five pounds but her supervisor insisted that appellant place sacks of mail and boxes on a container. In a March 19, 1997 decision, the Office found that appellant had not met her burden of proof in establishing that her recurrence of disability was causally related to the December 4, 1993 employment injury.

On April 17, 1997 appellant filed a claim for compensation. In an accompanying statement, she indicated that her supervisor instructed her to lift a 75-pound mail sack even though she informed him that her doctor had instructed her not to lift anything over 5 pounds. After performing the lifting, appellant drove to an emergency room after work. She stated that she sprained her wrist which subsequently caused problems with a tendon in the right rotator cuff. Appellant indicated that she became depressed because of the pain from her employment injuries. In a July 28, 1997 decision, the Office denied appellant's claim for disability for the period April 1 to 26, 1997 because the medical evidence of record failed to show a direct relationship between a psychiatric condition and the December 4, 1993 employment injury and because there was no evidence that the accepted conditions alone were responsible for appellant's disability during the entire period claimed. In an October 7, 1997 decision, the Office denied appellant's claim for disability on the grounds that she had not established that her condition was causally related to the employment injury.

In a letter dated January 26, 1998, appellant requested reconsideration. However, the letter was received by the Office on April 23, 1999. In a June 3, 1999 decision, the Office denied appellant's request for reconsideration as untimely and lacking any clear evidence of error in the Office's prior decisions.

On September 12, 2000 appellant filed a claim for a schedule award. The Office requested information from Dr. William M. Craven on the extent of appellant's permanent impairment. In a June 21, 2002 response, Dr. Craven indicated that appellant had not reached maximum medical improvement. In an August 26, 2002 letter, the Office informed appellant that Dr. Craven had stated that she had not reached maximum improvement for her carpal tunnel

syndrome of the right arm. The Office indicated that, since appellant had not reached maximum improvement, it could not rate her permanent impairment at that time.

On November 15, 2002 appellant filed another claim for a schedule award. In a December 2, 2002 letter, the Office requested an assessment of appellant's permanent impairment from Dr. Craven. In a November 20, 2002 note, Dr. Craven stated that appellant had carpal tunnel syndrome which gave her a 10 percent permanent impairment of the arm and 6 percent of the whole person; C6 radiculopathy which equaled a 15 percent permanent impairment of the upper body or 9 percent of the whole person; and a shoulder impingement tendinitis syndrome which had reached maximum improvement and equaled a permanent impairment of 7 percent permanent impairment of the whole person and 11 percent of the arm. He concluded that appellant had a 36 percent permanent impairment of the arm and 22 percent of the whole body.

In a December 2, 2002 letter, the Office asked appellant further questions on the date of maximum improvement and a description of the restriction of movement, other pertinent objective findings, subjective findings that caused impairment and the recommended permanent impairment of the affected member. In an undated response, Dr. Craven indicated that the date of maximum improvement was November 20, 2002. He referred the Office to a functional capacity examination for a discussion of appellant's range of motion. The functional capacity report, however, only discussed the amount of weight appellant could lift. Dr. Craven noted that appellant had pain in the wrist and shoulder which would cause impairment.

The Office requested that an Office medical adviser review Dr. Craven's report and provide his opinion on the extent of appellant's permanent impairment. In a December 19, 2002 response, the Office medical adviser stated that appellant had a 10 percent permanent impairment for his carpal tunnel syndrome, 15 percent for C6 radiculopathy, and 7 percent for shoulder impingement which the Office had not accepted as employment related.

In a January 7, 2003 letter, the Office asked Dr. Craven to review the Office medical adviser's memorandum. In a January 13, 2002 note, Dr. Craven stated that appellant had a 10 percent permanent impairment of the right arm according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[1] In an April 21, 2003 decision, the Office denied appellant's request for an increased schedule award because Dr. Craven found that appellant had a 10 percent permanent impairment of the right arm, which had been previously awarded to appellant. The Office concluded that appellant was not entitled to an increased schedule award.

In a May 22, 2003 form, appellant requested a hearing before an Office hearing representative. Appellant submitted the functional capacity report and a June 13, 2003 work capacity evaluation in which Dr. Craven referred to the functional capacity report. In a July 3, 2003 decision, Office denied appellant's request for a hearing because the request had not been submitted within 30 days after the date of the April 21, 2003 final decision. The Office reviewed appellant's case on its own motion and concluded that issue in the case could be addressed adequately by a request for reconsideration and submitting evidence not previously submitted

[1] Fifth edition (2001).

which established that she had an increased permanent impairment of the right arm due to the effects of the December 4, 1993 employment injury.

In a June 30, 2004 letter, appellant requested reconsideration. She submitted Dr. Craven's November 20, 2002 note and an April 1, 2004 note from Dr. Craven who stated it was well documented that repetitive activities can cause or exacerbate maladies of the arm, such as carpal tunnel syndrome and shoulder tendinitis.

In a July 29, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not contain clear evidence of error in the Office's April 23, 2003 decision.

LEGAL PRECEDENT

Under section 8128(a) the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.607(a) of the implementing federal regulations which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review.[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, and decisions by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[5]

However, the Office 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 section 8128(a) of the Act, when an application is not timely filed, the Office must

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(a).

[4] 41 ECAB 104 (1989).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[6]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[7] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[8] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[10] 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.[11] To show clear evidence of error, however, 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 fundamental question as to the correctness of the Office decision.[12] 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.[13]

ANALYSIS

The Office issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on April 21, 2003. In this decision, the Office found that appellant did not have more than a 10 percent permanent impairment of the right arm, previously granted. The Office did not receive the application for review until June 30, 2004. The application, therefore, was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

Appellant did not submit new medical evidence and argument that her condition had worsened since the April 21, 2003 decision, thereby entitling her to an additional award. Instead,

[6] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990). *See, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 21602.3(b) which states: "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."

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

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

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

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

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

[12] *Leon Faidley, supra* note 4.

[13] *Gregory Griffin, supra* note 6.

appellant requested reconsideration of the April 21, 2003 decision. This request for reconsideration was therefore subject to the clear evidence of error standard of review.[14]

Appellant has not established clear evidence of error in the Office's decision. She only submitted a report from Dr. Craven that had been previously submitted and an April 1, 2004 report in which Dr. Craven stated that repetitive motion can cause injuries of the arm. Dr. Craven did not directly address the issue of whether appellant was entitled to an increased schedule award due to the December 4, 1993 employment injury. The evidence fails to demonstrate that the Office had improperly concluded that appellant had no more than a 10 percent permanent impairment.

CONCLUSION

The Office properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error in the Office's April 21, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs, dated July 29, 2004, is hereby affirmed.

Issued: June 7, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Linda T. Brown*, 51 ECAB 115 (1999).