United States Department of Labor
Employees' Compensation Appeals Board

THELMA A. DAVIS, Appellant	)	
and	)	**Docket No. 06-301**
	)	**Issued: June 7, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Capitol Heights, MD, Employer	)	

Appearances:
Thelma A. Davis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 23, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 26, 2005 nonmerit decision, denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was a June 13, 2002 decision, denying appellant's claim for an employment-related upper extremity condition. This decision was issued more than one year prior to the date appellant filed the present appeal. Therefore, the Board does not have jurisdiction over this decision.[1] Therefore, the Board does not have jurisdiction over the merits of this case.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains an October 29, 2004 decision of the Board affirming the Office's denial of appellant's claim for an employment-related upper extremity condition and the Office's denial of her August 2002 request for further merit review. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on October 29, 2004 in which it determined that the Office properly denied her claim for an employment-related upper extremity condition and properly denied her August 2002 request for further merit review.[2]

On September 30, 2001 appellant, then a 52-year-old clerk, filed a claim alleging that she sustained tendinitis of both hands and wrists due to repeatedly lifting mail and mail trays at work. She submitted an undated note in which Dr. Daniel H. Waterman, an attending Board-certified internist, provided the notation, "Refer to ortho[pedics] for tendinitis." Appellant also submitted an October 16, 2000 report in which Dr. Waterman indicated that she exhibited tenderness in her hands consistent with tendinitis. By decision dated June 13, 2002, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an upper extremity condition in the performance of duty. By decision dated September 26, 2002, the Office denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

By letter dated July 19, 2005, appellant requested reconsideration of her claim.

Appellant submitted a June 27, 2002 report in which Dr. Waterman stated that she had "repetitive motion-related left and right hand and arm tendinitis" since August 1, 2001 and possibly had carpal tunnel syndrome. He stated, "Her symptoms relate specifically to her work and associated repetitive stress." Appellant also submitted several other brief reports from early to mid 2002 in which Dr. Waterman indicated that she had an "exacerbation of carpal tunnel syndrome" or "repetitive stress injury tendinitis to the hands." In a note dated August 27, 2001, Dr. Waterman stated that appellant had wrist tendinitis and a "repetitive stress injury to the wrists."

In a report dated June 17, 2005, Dr. Jeffrey D. Sabloff, an attending Board-certified orthopedic surgeon, stated that appellant had "repetitive motion and bilateral carpal tunnel syndrome" since August 1, 2001. He indicated that the carpal tunnel syndrome had been diagnosed by electromyogram and nerve conduction testing. Dr. Sabloff stated, "Again this is a work-related repetitive motion problem." The record also contains several work restriction forms dated in 2003 and 2004 and disability certificates dated in 2005 from Dr. Sabloff.[3]

[2] Docket No. 03-965 (issued October 29, 2004).

[3] Several of the forms and certificates contained the diagnosis of bilateral carpal tunnel syndrome.

By decision dated August 26, 2005, the Office denied reopening appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.[4] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[5]

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[6] Office regulations and procedures provide 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.[7]

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

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[4] 20 C.F.R. § 10.607(a).

[5] 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[6] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[7] 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "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 (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

[8] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[10] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[11] *See Leona N. Travis*, *supra* note 9.

[12] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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 a substantial question as to the correctness of the Office decision.[13]

ANALYSIS

In its August 26, 2005 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Her reconsideration request was filed on July 19, 2005 more than one year after the Office's June 13, 2002 decision. Therefore, appellant must demonstrate clear evidence of error on the part of the Office in issuing this decision.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its August 26, 2005 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.

In support of her untimely reconsideration request, appellant submitted a June 27, 2002 report in which Dr. Waterman, an attending Board-certified internist, diagnosed "repetitive motion-related left and right hand and arm tendinitis" and possible carpal tunnel syndrome. He stated, "Her symptoms relate specifically to her work and associated repetitive stress." The submission of this report does not show clear evidence of error in the Office's prior decision because it lacks a clear opinion on causal relationship relevant to the merit issue of this case, *i.e.*, whether appellant submitted sufficient medical evidence to establish that she sustained an upper extremity condition in the performance of duty.[14] She also submitted several other brief reports from mid 2001 to mid 2002 in which Dr. Waterman indicated that appellant had an exacerbation of carpal tunnel syndrome, repetitive stress injury to the wrists or repetitive stress injury tendinitis to the hands. These reports would not be relevant because they contained no opinion on the cause of appellant's upper extremity condition. It is not enough that Dr. Waterman merely restate his conclusion on causal relationship.

Appellant also submitted a June 17, 2005 report in which Dr. Sabloff, an attending Board-certified orthopedic surgeon, diagnosed "repetitive motion and bilateral carpal tunnel syndrome" and stated, "Again this is a work-related repetitive motion problem." This report is of limited probative value and Dr. Sabloff did not provide any indication of what work duties he apparently believed contributed to appellant's condition.[15] The record also contains several work restriction forms dated in 2003 and 2004 and disability certificates dated in 2005 from Dr. Sabloff, but these documents would not be relevant as they contain no opinion on the cause

[13] *Leon D. Faidley, Jr., supra* note 5.

[14] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship). It is unclear from the report whether Dr. Waterman was providing an opinion on the cause of appellant's medical condition or merely reporting her belief that her symptoms increased when she worked.

[15] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must contain medical rationale and be based on a complete and accurate factual and medical history).

of appellant's medical condition. Unrationalized medical opinion does not shift the weight of evidence in favor of the claimant.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's August 26, 2005 decision and the Office properly determined that she did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 26, 2005 decision is affirmed.

Issued: June 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board