

**United States Department of Labor
Employees' Compensation Appeals Board**

V.M., Appellant)	
)	
and)	Docket No. 06-1370
)	Issued: September 13, 2006
)	
U.S. POSTAL SERVICE, FAYETTEVILLE REMOTE ENCODING CENTER, Fayetteville, NC, Employer)	
)	
)	

Appearances:
Antonio J. Cruz, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 30, 2006 appellant, through her representative, filed a timely appeal from a February 28, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration as untimely and found that she failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 14, 2004 and the filing of the appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 17, 2002 appellant, then a 43-year-old data entry clerk, filed a claim for an occupational disease alleging that on April 10, 1998 she first became aware of her hand, wrist and forearm conditions. On May 10, 1999 she first realized that these conditions were caused by

factors of her federal employment. Appellant stated that she did not have a right wrist condition prior to working at the employing establishment. She attributed her condition to keyboard work. Appellant denied other employment or activities that could have caused her conditions. She resigned from the employing establishment on May 12, 1999.

In undated narrative statements, appellant reiterated her description of her wrist, hand and forearm conditions and her work duties. She stated that she contacted her immediate supervisor about these conditions and advised her that she was going to seek medical treatment due to unbearable right wrist pain. Appellant explained the delay in filing her occupational disease claim, noting that she was not aware of an occupational disease claim form and that she showed her wrists to a coworker and her immediate supervisor. She contended that the employing establishment refused to give her a claim form.

In treatment notes dated June 10 through July 28, 1999, Dr. Louis P. Clark, a Board-certified orthopedic surgeon, indicated that appellant's job duties for five years involved keying information. He found that appellant had bilateral dorsal wrist ganglions with symptoms over the right side with dorsiflexion of the wrist. Dr. Clark released her to return to work.

Joi Kirk, appellant's supervisor, controverted her claim on the grounds that it was not timely filed. She stated that appellant sought medical treatment after her resignation. In a June 20, 2002 letter, Ms. Kirk did not recall appellant showing her wrist to her. She vaguely remembered her submitting documentation which permitted her to return to work, but it did not contain a prognosis or diagnosis. Ms. Kirk stated that, during the same time appellant was out of work, her mother was ill. She had no recollection of refusing to give her a claim form.

By letter dated July 15, 2002, the Office requested that the employing establishment provide information regarding appellant's work duties and a copy of her position description within 30 days. The Office indicated that her occupational disease claim was filed within the three-year time limitation as she was last exposed to the implicated employment factors on May 12, 1999. By letter of the same date, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested additional factual and medical evidence be submitted within 30 days. Neither the employing establishment nor appellant responded within the allotted time period.

In a decision dated October 1, 2002, the Office found that appellant did not sustain an injury while in the performance of duty. The medical evidence failed to establish a causal relationship between the alleged hand, wrist and forearm conditions and her employment duties.

In a September 11, 2002 medical report, Dr. Clark indicated that appellant was last seen in 1999 with complaints related to bilateral dorsal wrist ganglion and not carpal tunnel syndrome.

In an October 24, 2002 letter, appellant requested an oral hearing before an Office hearing representative. Following an October 30, 2003 hearing, she submitted an April 20, 1999 treatment note of Richard D. Hall, a physician's assistant, regarding her allergies. In a May 13, 1999 treatment note, Mr. Hall diagnosed rhinitis allergy and bilateral ganglion cysts. A May 20, 1999 treatment note, which contained an illegible signature, found that appellant sustained

bilateral ganglion cysts and dermatitis. A June 16, 1999 treatment note found that her hands and fingers were normal and that she had fluid retention secondary to toe numbness.

In a June 12, 2002 letter, appellant again addressed her wrist condition and the employing establishment's refusal to give her an occupational disease claim form.

By decision dated January 14, 2004, an Office hearing representative found that appellant's occupational disease claim was not timely filed within the applicable time limitation provisions of the Federal Employees' Compensation Act. The record did not establish that the claim was filed within the three-year time limitation period which began to run on May 12, 1999, the date that she ceased to be exposed to the implicated employment factors and became aware of the causal relationship between the claimed injuries and her employment. The record did not establish that appellant's supervisor had actual knowledge of the claimed 1999 injury within 30 days.

In a January 12, 2005 letter, appellant, through her union representative, requested reconsideration. In a February 11, 2005 decision, the Office denied her reconsideration request on the grounds that it neither raised substantive legal questions, nor included new and relevant evidence.

Appellant submitted a May 20, 1999 disability certificate of a physician whose signature is illegible which found that she was medically justified to miss work on that date and that she could return to work on May 21, 1999. She also submitted copies of Mr. Hall's May 13, 1999 and Dr. Clark's June and July 1999 treatment notes. A February 1, 2006 letter from Barbara D. Johnson, appellant's coworker, noted that appellant had pain in her wrists and hands. Ms. Johnson stated that appellant asked her whether she had ever experienced such problems. She had not and suggested that appellant report her injuries to their immediate supervisors. Appellant reported her problems in May 1999. Ms. Johnson later learned that she had developed a ganglion cyst in her wrist.

In a February 9, 2006 letter, appellant, through her union representative, requested reconsideration. She submitted copies of the May 20, 1999 treatment note which contained an illegible signature and the Office's February 11, 2005 decision.

By decision dated February 28, 2006, the Office found that appellant's letter requesting reconsideration was dated February 9, 2006 and received on February 17, 2006, more than one year after the Office's January 14, 2004 decision and was untimely. The Office found that appellant did not submit any evidence establishing clear evidence of error in the prior decisions rejecting her claim.¹

¹ On appeal appellant has submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. §10.606.

LEGAL PRECEDENT

Section 8128(a) of the Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁴ Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."⁵

Section 10.607(a) 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.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 that 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 merely 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, 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

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ 20 C.F.R. § 10.607(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2004).

⁶ 20 C.F.R. § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

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

the claimant and raise a substantial 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 Board finds that the Office properly determined that appellant failed to file a timely request for reconsideration. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The most recent merit decision in this case was issued by an Office hearing representative on January 14, 2004. It found that appellant's occupational disease claim was not timely filed within the applicable time limitation provisions of the Act. As her February 6, 2006 letter requesting reconsideration was made more than one year following the hearing representative's January 14, 2004 merit decision, the Board finds that it was untimely filed.

The underlying issue for purposes of establishing clear evidence of error in this case, is whether appellant established that her occupational disease claim was timely filed. Appellant submitted a May 20, 1999 disability certificate and a May 20, 1999 treatment note of physicians whose signatures are illegible. The disability certificate and treatment note are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim. The evidence is not relevant to the issue of whether her claim was timely filed.

The May 13, 1999 treatment note of Mr. Hall, a physician's assistant, is insufficient to shift the weight of the evidence in favor of appellant's claim as a physician's assistant is not considered to be a "physician" under the Act.¹⁵

Dr. Clark's June and July 1999 treatment notes were already of record and reviewed by the Office. This evidence is insufficient to shift the weight of the evidence in favor of appellant's claim. The medical evidence submitted does not establish that her occupational disease claim was timely filed. The Office properly denied appellant's reconsideration request.

The copy of the Office's February 11, 2005 decision is not relevant as to whether the Office erred in determining that appellant's occupational disease claim was not timely filed. The Board finds that the decision does not establish that the Office committed clear evidence of error in its January 14, 2004 decision.

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁵ *Ricky S. Storms*, 52 ECAB 349 (2001).

Ms. Johnson's February 1, 2006 letter noted that appellant experienced pain in her wrists and hands and that she reported her problems to an immediate supervisor in May 1999. Her letter is insufficient to shift the weight of the evidence in favor of appellant's claim. Although Ms. Johnson stated that appellant informed her supervisor about pain in her wrists in May 1999, this does not establish that her supervisor had actual knowledge of the claimed injury. Ms. Kirk stated that she did not recall appellant showing her wrist to her and that the medical documentation she submitted did not contain any prognosis or diagnosis. The Board finds that the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that the Office properly determined that appellant's February 6, 2006 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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