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

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| **B.J., Appellant** | ) | |
| **and** | ) | **Docket No. 07-631** |
| | ) | **Issued: July 25, 2007** |
| **DEPARTMENT OF AGRICULTURE, AGRICULTURE MARKETING SERVICE, Memphis, TN, Employer** | ) | |

*Appearances:*
*John R. Johnson, III, Esq.,* for the appellant
Office of Solicitor, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 3, 2007 appellant filed a timely appeal of the December 11, 2006 decision of the Office of Workers' Compensation Programs, which denied reconsideration on the basis that her request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision of August 23, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

### ***ISSUE***

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

### ***FACTUAL HISTORY***

On May 27, 2005 appellant, then a 41-year-old production assistant, filed an occupational disease claim alleging that her tendinitis was caused by the repetitive duties required to tray

cotton. She stopped work on May 16, 2005 and returned to limited-duty work on May 24, 2005. Appellant submitted a May 16, 2005 Form CA-16 report of Dr. Lawrence Gross, a Board-certified family practitioner specializing in emergency medicine, who diagnosed tendinitis. Dr. Gross opined with a checkmark "yes" that the condition was caused or aggravated by work activity and added "repetitive movement at work."

In progress notes dated May 18 to June 8, 2005, Dr. Riley Jones, an orthopedic surgeon, indicated that appellant had severe carpal tunnel on the left side and moderate carpal tunnel on the right side. He noted that she was on light duty and that a left carpal tunnel release was scheduled for June 15, 2005. A copy of a June 1, 2005 nerve conduction study was provided along with an authorization request form for the left carpal tunnel surgery.[1]

After the Office advised appellant of the evidence needed to establish her claim, she resubmitted Dr. Jones' June 1 and 8, 2005 progress reports.

By decision dated July 28, 2005, the Office denied the claim, finding fact of injury not established. On August 15, 2005 appellant requested reconsideration of the Office's July 28, 2005 decision and resubmitted a copy of Dr. Gross' May 16, 2005 report.

By decision dated August 23, 2005, the Office modified the denial of appellant's claim on the grounds that the medical evidence was insufficient to establish causal relationship.

In an August 22, 2006 letter, John R. Johnson, III, an attorney, indicated that he was filing a reconsideration request on behalf of appellant. He argued that, since appellant placed cotton in trays as part of her job duties, this supported that her tendinitis was work related. Mr. Johnson submitted progress reports dated September 20, October 4 and 21, 2005 from Dr. Jones. In the September 20, 2005 report, Dr. Jones advised that appellant had been working for four years at seasonal work moving samples of cotton. He noted that the objective testing showed severe carpal tunnel in the left wrist and moderate on the right. Dr. Jones opined that, based on the repetitive-type work appellant has done over the last four years with moving samples of cotton, this was the most likely cause of her carpal tunnel as it was repetitious motion. On October 4, 2005 Dr. Jones opined that appellant's left carpal tunnel syndrome was totally work related as appellant had no history of other factors which would contribute to her condition.

In a letter dated August 29, 2006, the Office informed Mr. Johnson that he was not authorized as appellant's representative and therefore no action could be taken on the August 22, 2006 reconsideration request. The Office noted that an attorney authorization was needed and the reconsideration request had to be resubmitted.

On November 6, 2006 the Office received additional information on appellant's claim. In a November 1, 2006 letter, appellant advised that Mr. Johnson was her authorized representative in her claim. In a September 5, 2006 letter, Mr. Johnson requested reconsideration and advanced the same arguments contained in his August 22, 2006 letter. In a September 12, 2006 letter, he noted that the emergency room records showed that she was treated for tendinitis

[1] On June 21, 2005 the Office denied authorization of appellant's left carpal tunnel surgery request.

in the left wrist and that her history indicated that she did repetitive work with her left hand. Portions of the May 16, 2005 emergency room report were provided.

By decision dated December 11, 2006, the Office denied appellant's September 5, 2006 request for reconsideration, finding that it was untimely filed and did not establish clear evidence of error.

On appeal, appellant's attorney argued that he requested reconsideration on August 22, 2006, not September 5, 2006, as indicated in the December 11, 2006 Office decision. He further argued that appellant's repetitive work established the requisite causal connection.

## ***LEGAL PRECEDENT***

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[3] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[4] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[5] In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.[6]

Office regulations provide that a claimant or a representative may file an application for reconsideration of an adverse Office decision and that the application must be in writing.[7] Office regulations further provide that a claimant's appointment of a representative must be in writing and that a properly appointed representative may make a request or give directions to the Office

[2] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607 (1999).

[5] 20 C.F.R. § 10.607(a) (1999).

[6] 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[7] 20 C.F.R. §§ 10.605, 10.606(b)(1). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1502.2a (January 2004).

regarding the claims process.[8] The Board has held that a representative must be authorized by a claimant in writing in order to file a valid reconsideration request on her behalf.[9]

## ***ANALYSIS***

The one-year time limitation begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.[10] In this case, the most recent merit decision is the Office's August 23, 2005 decision. Thus, appellant had one year from August 23, 2005 to submit a timely request for reconsideration. Appellant's request from her attorney dated September 5, 2006 was received by the Office on November 6, 2006, along with appellant's November 1, 2006 authorization of her attorney. Because the request was received more than one year after the August 23, 2005 merit decision, the Office found the request to be untimely.

Appellant's attorney argued that he requested reconsideration on August 22, 2006. The record reflects that an attorney sent the Office a letter requesting reconsideration on August 22, 2006 along with several documents. However, appellant did not acknowledge that the attorney was her properly appointed representative until November 1, 2006. There can be no valid reconsideration request where the record is void of any evidence that the attorney was appellant's properly appointed representative at the time the August 22, 2006 letter was sent. Therefore, he did not file a valid reconsideration request on behalf of appellant on August 22, 2006.[11] As such, the only valid reconsideration request of record is the September 5, 2006 letter, which is untimely. Therefore, the Office properly determined that appellant filed an untimely request for reconsideration and the Board must address whether appellant has demonstrated clear evidence of error by the Office.

In its August 23, 2005 decision, the Office found that the medical evidence of record failed to establish a causal relationship between the diagnosed condition and the employment factors identified by appellant, specifically, the repetitive nature of her work. Appellant's September 5, 2006 letter asserted that, because it was established that appellant placed cotton in trays as part of her job duties, this showed that her tendinitis was work related. In a separate statement, appellant pointed to portions of the emergency room record in support of her assertion. However, causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[12] The Board finds that this letter does not raise a substantial question as to whether the Office's August 23, 2005 decision was in

[8] 20 C.F.R. § 10.700(a), (c). The Board has specifically acknowledged that a properly appointed representative may file a reconsideration request on behalf of a claimant. *See David M. Ibarra*, 48 ECAB 218, 219 (1996).

[9] *See id*. at 219-20. The Board has further 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, but the representative only needs to show he was authorized at the time such action was undertaken. *See Shirley Rhynes*, 55 ECAB 703 (2004); *Ira D. Gray*, 45 ECAB 445, 447 (1994).

[10] *Donna M. Campbell*, 55 ECAB 241 (2004).

[11] *See Shirley Rhynes*, *supra* note 9. *See also Nancy Marcano*, 50 ECAB 110 (1998).

[12] *Elizabeth Stanislav*, 49 ECAB 540 (1998).

error or *prima facie* shift the weight of the evidence in appellant's favor. Therefore, it is insufficient to establish clear evidence of error.

While appellant submitted medical reports from Dr. Jones dated September 20, October 4 and 21, 2005 on reconsideration, these reports also do not establish clear evidence of error by the Office. As noted above, the evidence submitted must be relevant to the issue which was decided by the Office. Here, appellant's claim was denied on the grounds that the medical evidence did not establish a causal relationship between appellant's diagnosed condition and employment factors. The evidence submitted in support of the reconsideration request must address causal relationship and be so persuasive that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office's decision. As noted, it is not sufficient to merely show that the evidence could be construed so as to produce a contrary conclusion. 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 insufficient to show clear evidence of error.[13] Dr. Jones's October 21, 2005 report does not render an opinion on causal relationship, his September 20, 2005 report is couched in speculative terms[14] and his October 4, 2005 report is not well rationalized. Dr. Jones' reports are insufficient to establish clear evidence of error in the Office's August 23, 2005 merit decision. Appellant has submitted no other evidence sufficient to 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.

The Board finds that the arguments and evidence submitted by appellant in support of her September 5, 2006 request for reconsideration do not *prima facie* shift the weight of the evidence in her favor or raise a substantial question as to the correctness of the Office's August 23, 2005 decision and are thus insufficient to demonstrate clear evidence of error.

## ***CONCLUSION***

The Board also finds that the Office properly denied appellant's request for reconsideration, as the request was filed outside the one-year time limitation and did not establish clear evidence of error.

[13] *See, e.g., James R. Mirra*, 56 ECAB ___ (Docket No. 05-998, issued September 6, 2005).

[14] *Kathy A. Kelly*, 55 ECAB 206, 211-12 (2004).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 11, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board