

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

E.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 08-579
Issued: July 22, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 23, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated April 23, 2007, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated March 25, 2004 and the filing of this 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal before the Board. On January 10, 2004 appellant, a 49-year-old mail clerk, filed a claim for benefits, alleging that she developed bilateral tendinitis and carpal tunnel conditions in her wrists causally related to factors of her employment.

By decision dated March 25, 2004, the Office denied appellant's claim, finding that she failed to establish fact of injury. By decision dated November 4, 2005, it denied appellant's request for an oral hearing on the grounds of untimeliness. In a June 1, 2006 decision,¹ the Board affirmed the November 4, 2005 Office decision. The complete facts of this case are set forth in the Board's June 1, 2006 decision and are herein incorporated by reference.

In a letter received by the Office on April 18, 2007, appellant requested reconsideration. Appellant submitted: (a) an October 5, 2006 Form CA-17 which placed her on light duty and outlined work restrictions of no typing more than four hours and no lifting over four pounds; and (b) a June 20, 2006 request to accommodate her work restrictions, in which a manager stated:

"The basic requirement of the position ... is 40 percent keying. [Appellant] has been accommodated for several months. Employee must address and access her condition in line with her position of record. Light duty is temporary not permanent."

In an August 25, 2006 report, Dr. Paul F. Richin, Board-certified in orthopedic surgery, stated that appellant had chronic de Quervain's tendinitis in the right wrist. He placed her off work for one week. In a September 6, 2006 report, Dr. Richin returned appellant to light duty with restrictions on typing not exceeding four hours per day.

In an August 25, 2006 report, Dr. Damine A. Doute, Board-certified in orthopedic surgery, stated:

"[Appellant] has a history of [d]e Quervain's tend[i]nitis in her right wrist which goes back to 2003. She works intermittently because of the pain that she is having. [Appellant] has had injections in the past but none in the last few years. At the present time she has tenderness over the first dorsal compartment of the right wrist. She has slightly decreased range of motion because of her pain. X-rays are negative."

In a report dated September 6, 2006, Dr. Doute stated:

"[Appellant's] [d]e Quervain's tend[i]nitis is markedly improved. It would be nice to do some physical therapy but she is no longer able to get insurance because of her work. She also wanted to get some kind of back up coverage for being out since the end of June but I explained to her that I only saw her in August and therefore I can[no]t cover for her for the June or July period of time, only from when I saw her. [Appellant] can return to light work, limited duty, no typing over [four] hours and no lifting over [three] or [four] pounds. She can return to work."

By decision dated April 23, 2007, the Office denied appellant's request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of

¹ Docket No. 05-356 (issued August 2, 2005).

error. It stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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: (1) end, or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if her application for review shows “clear evidence of error” on the part of the Office.⁸

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ See cases cited *supra* note 2.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ 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 the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁴ The Board makes an independent determination of whether an appellant 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.¹⁵

ANALYSIS

The Office properly determined in this case that appellant failed to file a timely application for review. It issued its last merit decision in this case on March 25, 2004. Appellant requested reconsideration on April 18, 2007; thus, her reconsideration request is untimely as it was outside the one-year time limit.

The Board finds that appellant's April 18, 2007 request for reconsideration failed to show clear evidence of error. The only new medical evidence submitted in support of the untimely request for reconsideration were the August 25 and September 6, 2006 reports from Drs. Richin and Doute. The reports from these physicians merely indicated that appellant had a history of de Quervain's tendinitis in her right wrist dating back to 2003, which occasionally required her removal from work and necessitated the imposition of work restrictions due to this condition. These reports do not establish clear evidence of error as they did not provide a reasoned medical opinion on the underlying issue; *i.e.*, whether appellant sustained a right wrist condition causally related to employment factors. The October 5, 2006 Form CA-17 contains no probative medical opinion. The June 20, 2006 reasonable accommodation form from the employing establishment is not signed by a physician and does not constitute medical evidence pursuant to section 8101(2).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra* note 3.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of her. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that it abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.¹⁶

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear evidence of error on the part of the Office in her reconsideration request dated April 18, 2007. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on April 23, 2007.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ The Board notes that appellant submitted additional evidence to the record following the October 26, 2004 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c). Appellant's attorney alleges that this evidence was received by the Office prior to its January 8, 2007 decision. However, this evidence is not contained in the instant record and appellant's attorney has provided no documentary support for this assertion.