United States Department of Labor
Employees' Compensation Appeals Board

Y.S., Appellant	)	
and	)	**Docket No. 12-1954**
	)	**Issued: November 21, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Redondo Beach, CA, Employer	)	

Appearances:
Coby Jones, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 21, 2012 appellant, through her representative, filed a timely appeal from a March 29, 2012 Office of Workers' Compensation Programs' (OWCP) nonmerit decision. Because more than 180 days has elapsed between the last merit decision dated January 3, 2011 and the filing of this appeal on September 21, 2012, the Board lacks jurisdiction to review the merits of her claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 37-year-old mail carrier, filed a Form CA-2 occupational disease claim for benefits on November 17, 2010, alleging that she developed a right-sided, lateral epicondylitis condition causally related to employment factors.

[1] 5 U.S.C. §§ 8101-8193.

By letter dated November 29, 2010, OWCP advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It asked her to submit a comprehensive medical report from her treating physician describing the medical reasons for her condition and an opinion as to whether her claimed condition was causally related to her federal employment. OWCP requested that appellant submit the additional evidence within 30 days.

By decision dated January 3, 2011, OWCP denied appellant's claim, finding that she failed to submit sufficient medical evidence in support of her claim that she sustained a lateral epicondylitis condition in the performance of duty.

In a report dated December 27, 2011, Dr. Edward Mittleman, a specialist in family practice, stated that he had been treating appellant for right-sided lateral epicondylitis. He related complaints of sharp, sporadic knifelike pain in her right elbow. Dr. Mittleman advised that appellant's right arm continued to involuntarily move toward her body and that she had a bump on her right elbow which occasionally turned blue. He asserted that activities which worsened the pain included pulling and lifting trays weighing up to 35 pounds, casing mail and pushing. Appellant related that on September 8, 2010 she was pulling a 10-pound tray of mail from the back of her vehicle while on her hands and knees and began loading her double satchel, she then noted that her right upper extremity was swollen at the right elbow and the upper half of the right forearm. In addition, she experienced a "pull" in the upper portion of the right forearm.

Dr. Mittleman advised that lateral epicondylitis was a condition where the outer part of the elbow becomes tender and painful. He stated that it is an overuse injury but it can be caused by trauma. Dr. Mittleman opined that appellant's right elbow pathology was a combination of the activities that occurred on September 8, 2010, in addition to the continued activities which she performed throughout her 12-year service as a city letter carrier. He stated that the activities required when casing, *i.e.,* moving her right upper extremity forward, backward, and up and down, lifting multiple trays of mail, pushing and pulling a gurney to her vehicle, removing the trays of mail from the vehicle and placing them into her vehicle, and using the right upper extremity when performing her activities of delivery, had placed significant stresses and strains on her right elbow. Dr. Mittleman asserted that the irritation of the elbow tendon (common extensor tendon that originates from the lateral epicondyle of the elbow) from the above repetitive actions, had led to an inflammation in the area of the condyle (epicondylitis). He concluded that it was these repetitive activities, required in the use of the right upper extremity, which led to the pathology of appellant's right elbow condition.

Appellant also submitted several unsigned treatment and physical therapy notes describing her treatment for right elbow pain.

By letter dated December 29, 2011, appellant requested reconsideration.

By decision dated March 29, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that she was required to present evidence which showed that it 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 FECA[2] does not entitle an employee to a review of an OWCP decision as a matter of right.[3] This section, vesting OWCP 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 her 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."

OWCP, 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, it 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 OWCP 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 OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] OWCP procedures state that it 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 appellant's application for review shows "clear evidence of error" on the part of OWCP.[8]

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by OWCP.[9] The evidence must be positive, precise and explicit and must be manifested on its face that it committed an error.[10] Evidence which does not raise a

---

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez,* 41 ECAB 964 (1990); *Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, it has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *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).

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

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

substantial question concerning the correctness of OWCP'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 OWCP 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 OWCP.[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 OWCP's decision.[14] The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.[15]

ANALYSIS

OWCP properly determined that appellant failed to file a timely application for review. It issued its most recent merit decision in this case on January 3, 2010. Appellant requested reconsideration on December 29, 2011; thus, the request is untimely as it was outside the one-year time limit.

The Board finds that appellant's December 29, 2011 request for reconsideration failed to show clear evidence of error. Appellant submitted the December 27, 2011 report of Dr. Mittleman, in which he indicated that he had treated appellant for right elbow, right lateral epicondylitis. Dr. Mittleman opined that this condition was the cumulative result of her 12 years of repetitive activities as a mail carrier, in addition to the September 8, 2010 work incident in which she experienced pain and swelling in her right elbow while pulling a 10-pound tray of mail from the back of her vehicle on her hands and knees. While his report presented evidence of causal relationship, it was not of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. In addition to pain, appellant had noted a bump on her elbow, which occasionally turned blue, as well as an involuntary movement of her right arm. A report that might have been sufficient medical evidence if timely filed is not enough to establish clear evidence of error.[16]

[11] *See Jesus D. Sanchez, supra* note 2.

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

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

[14] *Leon D. Faidley, Jr., supra* note 2.

[15] *Gregory Griffin, supra* note 2.

[16] *D.G.*, 59 ECAB 455 (2008).

The treatment[17] and physical therapy[18] notes appellant submitted do not constitute medical evidence under section 8101(2) and are therefore lacking in probative value. Therefore, appellant has failed to demonstrate clear evidence of error on the part of OWCP.

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

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of OWCP in her reconsideration request dated December 29, 2011. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, OWCP properly denied further review on March 29, 2012.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[17] The Board has long held that unsigned reports cannot be considered as probative medical evidence because they lack proper identification. *See Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004).

[18] A physical therapist is not a "physician" within the meaning of section 8101 (2) and cannot render a medical opinion. *Vickey C. Randall*, 51 ECAB 357 (2000).