United States Department of Labor
Employees' Compensation Appeals Board

GLADYS STELLA, Appellant	)	
and	)	**Docket No. 05-293**
	)	**Issued: June 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bayamon, PR, Employer	)	

Appearances:
Gladys Stella, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 15, 2004 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated October 21, 2004 which denied her request for reconsideration on the grounds that it was not timely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated January 28, 2002 to the filing of this appeal on November 15, 2004, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim but has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On December 7, 2001 appellant, then a 53-year-old clerk, filed a traumatic injury claim alleging that on December 6, 2001 she developed neck and back pain while lifting flat trays,

casing mail and working mark-up at the employing establishment. Appellant's supervisor controverted her claim stating that she had no recollection of any specific activity that may have caused this injury, as it developed over a workday and worsened over night. The supervisor noted that appellant's injury could have been caused or worsened by any other nonemployment-related activity as well.

Appellant was treated on December 13, 2001 by Dr. Rafael Tanon, a Board-certified family practitioner, who diagnosed severe cervical and paravertebral myositis and carpal tunnel syndrome. He noted that the carpal tunnel syndrome was another "disabling condition," and indicated that appellant could return to work on December 17, 2001 with certain activity restrictions.

On December 27, 2001 the Office requested further information from Dr. Tanon. In response, the physician provided some handwritten treatment notes which are only partially legible. He noted that appellant still had pain, and experienced numbness in her hands. He diagnosed myositis.

By decision dated January 28, 2002, the Office rejected appellant's claim finding that the evidence of record was insufficient to establish a causal relationship between the employment incident and diagnosed medical conditions. The Office also found that appellant had no definite injury-related diagnosis, and no discussion of causal relation.

On February 6, 2002 appellant submitted more handwritten medical notes from Dr. Tanon, including reports from December 2001 previously considered by the Office. Dr. Tanon reported on February 6, 2002 that he first treated appellant on December 7, 2001 for pain experienced on December 6, 2001 in the right shoulder, neck and back. He also noted numbness of the forearm, hands and fingers. The doctor's diagnoses included bilateral carpal tunnel syndrome.

A December 10, 2002 Form CA-7 report was completed by a psychiatrist with an illegible signature. He diagnosed major depression.

Appellant claimed that she completed two CA-2 forms claiming occupational disease in early 2004 but had heard nothing on them. On July 28, 2004 she requested reconsideration of the January 28, 2002 decision.

By decision dated October 21, 2004, the Office denied review of the January 28, 2002 decision finding the request untimely and that it lacked clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] This section vests the Office with

[1] 5 U.S.C. § 8128(a).

[2] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

discretionary authority to determine whether it will review an award for or against compensation.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

The Office regulations require that an application for reconsideration must be submitted in writing.[6] The regulations provide:

> "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the [Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."[7]

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.[8]

To establish clear evidence of error, a claimant 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 manifest on its face that the Office committed an error. 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 merely enough 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 evidence of error, the evidence submitted must not only be of sufficient probative value to create

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[3] *Id*. at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[4] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[5] 20 C.F.R. 607(b); *Thankamma Mathews, supra* note 2; *Jesus D. Sanchez, supra* note 3.

[6] 20 C.F.R. § 10.606; 20 C.F.R. § 10.605.

[7] 20 C.F.R. § 10.607(b).

[8] *See Thankamma Mathews, supra* note 2.

[9] *Id.*

[10] *Jesus D. Sanchez, supra note 3.*

[11] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

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

a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value so as 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.[13]

ANALYSIS

On July 28, 2004 appellant requested reconsideration by the Office of the January 28, 2002 merit decision. As this request was not filed within one year of the date of issuance of the January 28, 2002 decision, it was untimely.

The Office cannot reject a claimant's request for reconsideration, even if it is untimely made, without a limited review of the evidence submitted with the request to determine whether it presents clear evidence of error.

In this case, appellant submitted evidence dating from 2001 which had been previously considered by the Office in the January 28, 2002 decision, and therefore it was insufficient to establish error on the part of the Office. She also submitted a Form CA-17 duty status report containing an illegible signature; however, the Board has held that an unsigned report cannot be considered probative medical evidence as it lacks proper identification.[14]

Dr. Tanon reported on February 6, 2002 that appellant continued to experience right shoulder, neck and back pain and included carpal tunnel syndrome among his diagnoses. However, his report does not demonstrate that the Office committed clear evidence of error when it denied appellant's claim on failure to establish fact of injury. Appellant has failed to submit any evidence which establishes clear evidence of error as the medical evidence does not *prima facie* shift the weight of evidence in favor of her claim. The Board finds that appellant has not established clear evidence of error in the Office's refusal to reopen her case for further review on its merits.

CONCLUSION

The Board finds that the Office properly denied further merit review of this claim. Appellant filed an untimely request for reconsideration and on the face of her written application for reconsideration, she failed to provide clear evidence of error in the evidence submitted after the January 28, 2002 decision and leading up to the October 21, 2004 decision.

[13] *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

[14] *Merton J. Sills*, 39 ECAB 572 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2004 is hereby affirmed.

Issued: June 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member