

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

BRENDA J. CORE, Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 04-1741
Issued: February 9, 2005**

Appearances:
Brenda J. Core, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 29, 2004 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated June 15, 2004, which denied her untimely request for reconsideration and found that she failed to establish clear evidence of error. The record also contains nonmerit decisions of the Office dated November 18, 2003 and March 10 and 29, 2004, denying her previous untimely requests for reconsideration. Because more than one year has elapsed between the last merit decision dated April 12, 1998 and the filing of the appeal on June 29, 2004 the Board's jurisdiction is limited to a review of the nonmerits of appellant's 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 requests for reconsideration on the grounds that they were not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On May 7, 1985 appellant, then a 28-year-old letter sorter machine operator, filed a traumatic injury claim alleging that on that date she hurt her ankle, left hip and the left side of her neck when she slipped down a flight of stairs. The Office accepted her claim for cervical and lumbar strains and left hip and ankle sprains. The Office later accepted that appellant sustained a recurrence of disability on July 24, 1985 causally related to her May 7, 1985 employment injuries.

After working for three hours on November 7, 1986, appellant filed a claim alleging that she sustained a recurrence of disability on that date. By decision dated February 2, 1987, the Office found the evidence of record insufficient to establish that she sustained a recurrence of disability beginning November 7, 1986 causally related to her May 7, 1985 employment injuries. By decision dated April 12, 1988, the Office denied appellant's December 5, 7 and 11, 1987 requests for reconsideration based on a merit review of her claim. In a November 17, 1988 decision, the Office denied her October 30, 1988 request for reconsideration based on a merit review of her claim.

In a November 25, 2001 letter, appellant requested reconsideration of the Office's February 2, 1987 decision. The Office denied her request in a March 5, 2002 decision, because it was not timely filed and failed to present clear evidence of error.

The Office subsequently denied appellant's May 20 and September 25, 2002 requests for reconsideration by decisions dated August 9 and December 26, 2002 respectively, on the same grounds. She requested reconsideration by letters dated January 8 and February 7, 2003. In a February 28, 2003 response letter, the Office advised appellant to refer to its December 26, 2002 decision which stated that her only appeal right was review by the Board.

On February 28, 2003 appellant appealed to the Board. The Board issued a decision on August 4, 2003 affirming the Office's denials of her requests for reconsideration because they were not timely filed and failed to present clear evidence of error.¹ Appellant requested reconsideration before the Office in letters dated August 19 and September 2 and 12, 2003. In her August 19, 2003 letter, appellant argued that the Office improperly terminated medical compensation benefits for her May 7, 1985 employment injury by denying her recurrence of disability claim. She also contended that she was improperly treated by Office referral physicians who were not qualified to treat her medical condition. Appellant submitted a duplicate copy of the Board's August 4, 2003 decision.

In her September 2, 2003 letter, appellant reiterated that she was entitled to medical benefits for her May 7, 1985 employment injuries. In addition, she stated that she was entitled to a schedule award. Appellant submitted duplicate copies of her July 24, 1985 and November 7, 1986 recurrence claims and an August 21, 2003 claim (Form CA-7) for wage-loss compensation for the period November 8, 1986 through January 9, 1989 and a schedule award for the period

¹ Docket No. 03-956 (issued August 4, 2003).

January 10, 1989 to the present.² She also submitted an August 21, 2003 report from Dr. Gaylen J. Bohlin, a chiropractor, indicating that he first saw appellant on September 5, 2001 regarding pain in her left neck, ankle, hip, midthoracic spine, low back, cervical spine and arm. He provided a history of her May 7, 1985 employment injuries. Dr. Bohlin opined that, based on a review of x-rays, a magnetic resonance imaging (MRI) scan and records dating back to appellant's May and July 1985 employment injuries and November 7, 1986 alleged recurrence of disability, her alleged November 7, 1986 recurrence of disability and July 24, 1985 accepted recurrence of disability were related to her May 7, 1985 employment injuries. He stated that she suffered from unresolved cervical spinal nerve root inflammation with associated cephalic syndrome and midthoracic and lumbar myositis with associated neuritis. Dr. Bohlin concluded that appellant has been totally disabled since November 8, 1986.

In her September 12, 2003 letter, appellant contended that contrary to the Office's finding, Dr. Bohlin is not only a chiropractor, but also an osteopath. She alleged that her November 7, 1986 recurrence of disability claim should have been considered a new injury claim. She submitted an August 29, 2003 report from Dr. Robin D. Snead, an internist, who provided a history of her May 7, 1985 employment injuries and noted that she attempted to work on November 7, 1986 but, suffered from arm pain. Dr. Snead stated that due to an undiagnosed disorder of Marfan syndrome which involved the connective tissues, appellant suffered from severe muscular skeletal symptoms including, sprains and strains which produced stiffness, weakness, spasms and severe pain with movement. She further stated that appellant would not recover from her condition. Dr. Snead concluded that based on a review of medical records, x-rays and an MRI scan dating back to appellant's original traumatic injury, appellant has been totally disabled since November 7, 1986. She further concluded that appellant not only had Marfan Syndrome, but also athropathy, C-spine, thoracic and lumbar spine radiculopathy with degenerative disc disease.

Appellant also submitted an October 1, 2003 letter regarding the employing establishment's failure to grant her continuation of pay and the treatment of her claim as a new injury and not a recurrence of disability. A Form CA-3 indicated that she sustained an injury on May 7, 1985 and that she returned to work on May 26, 1985. Appellant submitted CA-7 forms for the period August 20 through September 29, 1985, medical treatment notes covering the period May 7, 1981 through April 1, 1983 and cases issued by the Board addressing causal relation.

By decision dated November 18, 2003, the Office denied appellant's requests for reconsideration because they were not timely filed and failed to present clear evidence of error. She requested reconsideration by letters dated November 25 and December 11, 2003 and February 10, 2004. In her November 25, 2003 letter, appellant contended that her July 24, 1995 accepted recurrence of disability should have been treated as a new injury and that she was entitled to medical benefits for her May 7, 1985 employment injuries. She submitted Dr. Bohlin's November 24, 2003 report in which he provided a history that appellant fell down a flight of stairs while working for the employing establishment. After a thorough review of

² The Board notes that the record does not contain a decision issued by the Office regarding appellant's schedule award claim.

x-rays, an MRI scan and records dating back to the May 7, 1985 employment injuries and July 24, 1985 and November 7, 1986 employment-related recurrences of disability which caused weakness and spasm with associated spinal subluxation, Dr. Bohlin opined that the July 24, 1985 employment-related recurrence of disability and alleged November 7, 1986 recurrence of disability were ongoing and related to the May 7, 1985 employment injury. He noted that appellant was suffering from unresolved cervical spinal nerve root inflammation with associated cephalic syndrome and midthoracic and lumbar myositis with associated neuritis and she has been totally disabled since November 7, 1986 to the present.

Dr. Snead submitted a December 1, 2003 report in which she reiterated appellant's diagnosis of Marfan syndrome and her opinion that appellant has been totally disabled since November 7, 1986.

In an addendum letter dated December 11, 2003, appellant reiterated that her November 7, 1986 condition was ongoing and causally related to her accepted employment-related May 7, 1986 injuries and July 24, 1985 recurrence of disability. She submitted medical treatment notes covering the period June 6, 1985 through November 8, 1986 regarding her back pain. Appellant also submitted an October 4, 1987 narrative report from Dr. Clyde L. Henry,³ who provided a history of her May 7, 1985 employment injuries and his findings on physical examination. He diagnosed chronic cervical, thoracic and lumbosacral spine sprains. Dr. Henry prescribed a course of intensive treatment to rehabilitate appellant and opined that her disability was not permanent. In an undated statement, appellant reiterated her contention that she was entitled to continuation of pay which was never paid by the employing establishment and that she sustained a recurrence of disability.

The Office received Dr. Henry's January 23, 1987 supplemental attending physician's report which provided that appellant suffered from chronic cervical and lumbosacral sprains and a duplicate copy of her November 7, 1986 claim for recurrence of disability. By letters dated November 25 and December 2, 2003, appellant submitted a duplicate copy of Dr. Bohlin's November 24, 2003 report and a November 7, 1986 letter requesting authorization to see Dr. Henry.

In another addendum letter dated February 10, 2004, appellant reiterated that she sustained a recurrence of disability causally related to her accepted employment injury and previous employment-related recurrence of disability. She submitted medical treatment notes from June 6 to August 6, 1985 and duplicate copies of Dr. Henry's January 23, 1987 report, her November 7, 1986 request to see Dr. Henry and her July 24, 1985 and November 7, 1986 recurrence of disability claims.

By decision dated March 10, 2004, the Office denied appellant's requests for reconsideration because they were not timely filed and failed to present clear evidence of error. She requested reconsideration on March 12, 2004. Appellant submitted a duplicate copy of Dr. Snead's December 1, 2003 report, Dr. Bohlin's November 24, 2003 report and Dr. Henry's January 23, 1987 report. Dr. Henry's November 26, 1986 report revealed a diagnosis of chronic cervical and lumbosacral sprains. Appellant also submitted a traumatic injury claim dated

³ The professional qualifications of Dr. Henry are not contained in the record.

December 25, 2003, alleging that she sustained a cervical thoracic sprain of the left arm on November 7, 1986. The employing establishment controverted the claim on the grounds that she did not file the claim within 30 days of the injury.

The Office received a letter from appellant's congressional representative regarding her request for reconsideration and a duplicate copy of Dr. Snead's December 1, 2003 report. The Office also received a November 7, 1986 disability certificate from Dr. Michael R. Treister, a Board-certified orthopedic surgeon, indicating that appellant was able to return to work with restrictions.

By decision dated March 29, 2004, the Office again denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. On March 31, 2004 the Office received a March 25, 2004 letter from appellant requesting reconsideration. She contended that a preexisting condition was aggravated on May 7 and July 24, 1985 and November 7, 1986. Appellant further contended that appeal rights were not sent to her representative in a timely manner and her medical benefits were terminated on November 7, 1986 even though Dr. Triester had not submitted a final report to the Office and he had not released her from his care. She alleged that an Office referral physician was concealing information pertaining to her condition, that her July 24, 1985 recurrence of disability should have been treated as a claim for a new injury for her left side and arm. Appellant stated that the alleged November 7, 1986 recurrence of disability was acknowledged by the Office. She also stated that a pretermination notice was not issued prior to her benefits being terminated. Finally, appellant contended that Dr. Triester did not report her preexisting degenerative disc disease which aggravated her Marfan syndrome. The Office also received two pages from a March 23, 2004 report of Dr. Treister in which he indicated that appellant had Marfan syndrome and opined that there was nothing acute which required treatment.

Appellant also requested reconsideration by letter dated April 20, 2004 and submitted an April 7, 2004 x-ray report of Dr. John A. Aikenhead⁴ which demonstrated a reversal of the cervical lordosis with an anterior transition of the head, a patent intervertebral foramen and no evidence of a fracture or dislocation. She also submitted page 2 of Dr. Treister's December 11, 1986 report which provided that she could work with restrictions and a duplicate copy of Dr. Henry's November 26, 1986 report which diagnosed chronic cervical and lumbosacral sprains.

By letter dated May 20, 2004, appellant submitted a March 20, 2004 MRI scan report of Dr. Peter Georgis, a Board-certified radiologist, in which he suspected possible infectious discitis at C6-7, cervical spondylosis at the same level, mild to moderate cervical spondylosis at C5-6, reversal of the normal cervical lordosis possibly from muscle spasm and disc space narrowing at C6-7. She requested reconsideration again in a letter dated June 4, 2004.

On June 15, 2004 the Office issued a decision denying appellant's requests for reconsideration because they were not timely filed and failed to present clear evidence of error.

⁴ Similarly, the professional qualifications of Dr. Aikenhead are not contained in the record.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ 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 implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷

Section 10.607(a) of the Office's implementing regulation 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.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.¹⁰ Evidence that 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 decision.¹⁴ 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.¹⁵

⁵ 5 U.S.C. § 8128(a).

⁶ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

⁹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Richard L. Rhodes*, 50 EAB 259, 264 (1999).

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

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

¹⁴ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ANALYSIS

In this case, the Board finds that the Office properly determined that appellant failed to file a timely application for review. 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.¹⁶

The last merit decision in this case was issued by the Office on April 12, 1998, which found that appellant failed to establish that she sustained a recurrence of disability beginning November 7, 1986 causally related to her accepted May 7, 1985 employment injuries. As her August 19, September 2 and 12, November 25 and December 11, 2003 and February 10, March 12 and 25, and April 20, 2004 letters requesting reconsideration were made more than one year after the Office's April 12, 1998 merit decision, the Board finds that they were untimely filed.

The issue for purposes of establishing clear evidence of error in this case, is whether appellant submitted evidence establishing that there was an error in the Office's determination that she did not sustain a recurrence of disability beginning November 7, 1986 causally related to her May 7, 1985 employment injuries. The Board notes that this issue is medical in nature. Appellant submitted numerous medical records regarding her employment-related cervical and lumbar strains. Dr. Snead, Dr. Henry, Dr. Aikenhead and Dr. Georgis indicated that she suffers from continuing residuals of her accepted employment injuries and that she is totally disabled but, this evidence is not sufficient to shift the weight of the evidence in favor of the claim as it did not specifically address whether appellant's residuals or disability beginning November 7, 1986 were causally related to her accepted May 7, 1985 employment injuries, nor did they provide any medical rationale supportive of the conclusion.

Dr. Bohlin's reports which, while generally relevant to the issue whether appellant sustained a recurrence of disability causally related to her May 7, 1985 employment injuries are not sufficient to *prima facie* shift the weight of the evidence in favor of appellant. The August 21, 2003 report of Dr. Bohlin, a chiropractor, does not diagnose a subluxation by x-ray. Hence, he is not deemed a physician as defined in section 8101(2) of the Act and his report is not deemed to be medical evidence.¹⁷ Further, the record does not establish that Dr. Bohlin is an osteopath as alleged by appellant. In his November 24, 2003 report, Dr. Bohlin stated that appellant's May 7, 1985 employment injuries, employment-related July 24, 1985 recurrence of disability and alleged November 7, 1986 recurrence of disability caused weakness and spasm with associated spinal subluxation and he concluded that the recurrences of disability were causally related to the accepted employment injury. Although he diagnosed subluxation, he did not indicate when the x-rays were taken. Although the Office's regulation provides that a

¹⁶ *Larry L. Litton*, 44 ECAB 243 (1992).

¹⁷ 5 U.S.C. § 8101(2) (the term "physician," as used therein, "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.") *Sheila A. Johnson*, 46 ECAB 323 (1994).

chiropractor may interpret his/her own x-rays,¹⁸ there is no evidence to establish whether they were his or taken at his request. This would be especially important since Dr. Bohlin reported that he did not start treating appellant until September 5, 2001. Since there is no evidence to establish that the x-rays he reviewed were his taken or taken at his request or when, the Board again finds that he is not a physician under the Act and, therefore, his report does not raise a substantial question as to the correctness of the Office's February 2, 1987 decision as it does not constitute competent medical evidence.

Treatment notes covering the periods May 7, 1981 through April 1, 1983 and June 6 through August 6, 1985 predate appellant's alleged recurrence on November 7, 1986 and are not relevant to the period in question. Thus, they are insufficient to establish that the Office's denial of appellant's claim was erroneous.

Dr. Treister's disability certificate, his partial report dated December 11, 1986 and his March 3, 2004 report fail to address the issue whether appellant is disabled or had any residuals due to her May 7, 1985 employment injuries. Thus, they do not establish that the Office erred in its February 2, 1987 decision.

The Board, therefore, finds that the medical records submitted by appellant do not raise a substantial question as to the correctness of the Office's determination that she did not sustain a recurrence of disability beginning November 7, 1986 causally related to her May 7, 1985 employment injuries. Further, the claim forms and correspondence and Board precedent cases submitted by appellant are not directly relevant to the medical issue in this case and, therefore, do not establish clear evidence of error. Similarly, appellant's contentions that she sustained a recurrence of disability on November 7, 1986 causally related to her accepted employment injury, she is entitled to a schedule award, her July 24 1985 and November 7, 1986 recurrence of disability claims should have been treated as a claim for a new injury, she is entitled to continuation of pay, the Office improperly terminated her compensation for her May 7, 1985 employment injuries, her preexisting back condition was aggravated on May 7 and July 24, 1985 and November 7, 1986 and not properly reported by Dr. Treister and her appeal rights were not timely sent to her representative are not relevant to the issue in this case, whether the medical evidence establishes that she sustained a recurrence of disability on November 7, 1986 due to her accepted employment injuries and, therefore, do not establish that the Office's February 2, 1987 decision was incorrect.

CONCLUSION

The Board finds that the Office properly denied appellant's requests for reconsideration on the grounds that they were not timely filed and failed to present clear evidence of error.

¹⁸ See 20 C.F.R. § 10.311(c).

ORDER

IT IS HEREBY ORDERED THAT the June 15, March 10 and 29, 2004 and November 18, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member