

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA J. CORE and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Chicago, IL

*Docket No. 03-956; Submitted on the Record;
Issued August 4, 2003*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs, by decisions dated March 5, August 9 and December 26, 2002, properly found that appellant's requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

On May 7, 1985 appellant, then a 28-year-old clerk, 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. She stopped work on May 8, 1985 and returned to work on May 26, 1985.

The Office accepted appellant's claim for cervical and lumbar strains and left hip and ankle sprains.

On July 24, 1985 appellant filed a claim alleging that she sustained a recurrence of disability on that date. She stopped work on the date of the alleged recurrence of disability. The Office accepted appellant's recurrence claim.

Appellant returned to work on November 7, 1986 and after working three hours she 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 appellant sustained a recurrence of disability beginning November 7, 1986 causally related to her May 7, 1985 employment injury. In letters dated December 5, 7 and 11, 1987, appellant requested reconsideration.

By decision dated April 11, 1988, the Office denied modification based on a merit review of the claim. In an October 30, 1988 letter, appellant requested reconsideration.

In a decision dated November 17, 1988, the Office denied appellant's request for a merit review of her claim on the grounds that she failed to submit relevant evidence or advance legal contentions not previously considered.¹

On September 29, 1992 appellant filed a claim alleging that she sustained a recurrence of disability on September 5, 1991.

By decision dated September 9, 1993, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on September 5, 1991 causally related to her May 7, 1985 employment injury. She requested an oral hearing before an Office hearing representative by letter dated October 5, 1993.

In a September 19, 1994 decision, the hearing representative affirmed the Office's decision. Appellant requested reconsideration by letter dated September 19, 1995 and postmarked October 1995.

By decision dated October 16, 1995, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. In a September 23, 1998 letter, she requested reconsideration of the Office's September 19, 1994 decision.

In an October 15, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. On January 14, 1999 appellant appealed to the Board.

By decision dated September 14, 2000, the Board affirmed the Office's October 15, 1998 decision.² In an order dated June 5, 2001, the Board denied appellant's petition for reconsideration.³ By letter dated October 20, 2001, appellant requested reconsideration before the Office.

In an October 29, 2001 decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

In a November 25, 2001 letter, appellant requested reconsideration of the Office's February 2, 1987 decision finding the medical evidence of record insufficient to establish that she sustained a recurrence of disability beginning on November 7, 1986 causally related to her May 7, 1985 employment injury.

By decision dated March 5, 2002, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. In a May 20, 2002 letter, appellant requested reconsideration.

¹ In her October 30, 1988 letter, appellant indicated that she previously requested reconsideration by letter dated July 16, 1988. However, in its November 17, 1988 decision, the Office indicated that it did not receive her letter.

² Docket No. 99-958 (issued September 14, 2000).

³ Docket No. 99-0958 (issued June 5, 2001).

The Office again denied appellant's request for reconsideration on the same grounds by decision dated August 9, 2002. She requested reconsideration by letter dated September 25, 2002.

By decision dated December 26, 2002, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.⁴

The Board finds that the Office by decisions dated March 5, August 9 and December 26, 2002 properly found that appellant's requests for reconsideration were untimely filed and did not demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁵ As appellant filed her appeal with the Board on March 3, 2003, the only decisions properly before the Board are the Office's March 5, August 9 and December 26, 2002 decisions denying appellant's requests for reconsideration of its February 2, 1987 decision, wherein it found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning November 7, 1986 that was causally related to her May 7, 1985 employment injury.

Section 8128(a) of the Federal Employees' Compensation Act⁶ does not entitle a claimant to a review of an Office decision as a matter of right.⁷ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, 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.⁸

In this case, 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.⁹

The last merit decision in this case on the issue of whether appellant sustained a recurrence of disability beginning on November 7, 1986 causally related to her May 7, 1985 employment injury was issued by the Office on April 11, 1988. Inasmuch as appellant's

⁴ In a January 8, 2003 letter, appellant requested reconsideration of the Office's December 26, 2002 decision. By letter dated February 28, 2003, the Office advised her that her only right of appeal was to request a review by the Board.

⁵ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Larry L. Litton*, 44 ECAB 243 (1992).

November 25, 2001 and May 20 and September 25, 2002 requests for reconsideration were made outside the one-year limitation, the Board finds that they were untimely filed.

Section 10.607(b) of the Office's implementing regulations 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.¹⁰

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

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.¹⁶ 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 a merit review in the face of such evidence.¹⁷

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 on November 7, 1986 causally related to her May 7, 1985 employment injury.

In this case, the evidence submitted by appellant does not establish clear evidence of error. In support of her November 25, 2001 request for reconsideration, she submitted the medical opinions of Office medical advisers dated July 29, 1986, January 20, 1987 and March 17, 1988. These opinions were previously of record and are not a basis for reopening a

¹⁰ 20 C.F.R. § 10.607(b).

¹¹ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

¹² *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹³ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁶ *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

claim. The Board has held that material that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.¹⁸ Thus, these duplicate opinions are of no value in establishing clear evidence of error.

In support of her May 20, 2002 request for reconsideration, appellant submitted a May 13, 1985 disability certificate, an April 30, 1986 report from Dr. James Boscardin, a Board-certified orthopedic surgeon, an October 4, 1987 report from Dr. Clyde L. Henry, her treating physician,¹⁹ July 26, 1993, October 3 and 31, 1994 and June 30, 1998 reports from Dr. Reuben T. Nichols, a Board-certified internist, and a May 17, 1998 report from the Family Care Clinic. The Office previously considered this medical evidence in its prior decisions and, thus, it is of no value in establishing clear evidence of error.²⁰

Appellant also submitted an October 16, 2001 report from Dr. Edward J. Beyer, a chiropractor, finding that her symptoms in her back, neck and extremities were solely related to her May 7, 1985 employment injury. In a September 24, 2001 report, Dr. Gary Ogurkiewicz, a chiropractor, opined that, as a result of her May 7, 1985 employment injury, appellant suffered from severe sharp back pain. He further opined that all of appellant's objective findings supported his opinion that there was a causal relationship between appellant's employment injury and pain. In his October 10, 2001 report, Dr. Ogurkiewicz noted appellant's neck pain and opined that appellant would not benefit from surgery. Instead, he recommended pain management and some mental health support for her depression. In a December 11, 2001 report, Dr. G.J. Bohlin, a chiropractor, noted appellant's complaints of left neck, mid-thoracic spine and severe low back pain. He provided a history of the May 1985 employment injury, his findings on physical examination and a review of medical records. Dr. Bohlin opined that appellant suffered from an unresolved syndrome that was related to the May 5, 1985 employment injury.²¹

Under section 8101(2) of the Act,²² "[t]he term 'physician' 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 of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."²³ If a chiropractor's reports are not based on a diagnosis of subluxation as demonstrated by x-ray to exist, they do not constitute competent medical evidence to support a claim for compensation.²⁴ Drs. Beyer, Ogurkiewicz and Bohlin

¹⁸ *James A. England*, 47 ECAB 115 (1995).

¹⁹ The Board notes that the professional qualifications of Dr. Henry cannot be determined.

²⁰ *James A. England*, *supra* note 18.

²¹ The Board notes that Dr. Bohlin mistakenly indicated that appellant's employment injury occurred on May 5, 1985 rather than May 7, 1985.

²² 5 U.S.C. §§ 8101-8193.

²³ 5 U.S.C. § 8101(2); *see also Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

²⁴ *Loras C. Dignann*, 34 ECAB 1049 (1983).

have not diagnosed subluxation by x-ray thus, they are not considered physicians under the Act and their opinions regarding the cause of appellant's symptoms do not constitute competent medical evidence to support a claim for compensation. Accordingly, their reports do not establish clear evidence of error.

Appellant also submitted test results covering the period November 9, 1993 through October 18, 2001 and treatment notes and reports covering the period October 4, 1987 through June 8, 2001. These treatment notes and reports, however, are irrelevant as they do not establish clear evidence of error that appellant's current disability was not caused by her May 7, 1985 employment injury.

Similarly, the medical reports and treatment notes submitted by appellant, which cover the period March 4, 1974 through October 3, 1986 are irrelevant and do not establish clear evidence of error because they relate to a period prior to the alleged recurrence of disability beginning November 7, 1986.

Appellant also submitted on reconsideration Dr. Nichols' July 25, 1994 report indicated that appellant was last seen in April 1993 and that she was complaining of neck and back pain which dated back to her May 1985 employment injury. He provided his findings on objective examination and diagnosis of chronic cervical and lumbar derangement at that time. He reviewed appellant's medical records and stated, "I think it is quite likely that [appellant's] present cervical and lumbar derangement is related to her original injury and in fact is related to her work injury." Dr. Boscardin's July 2, 2001 report noted appellant's complaints of left shoulder and arm and low back pain and loss of strength. He also noted his findings on physical examination and a review of medical records. Dr. Boscardin recommended further an objective examination and stated that he could not make any judgments or render any treatment until the tests were complete. He also stated that, although he had no idea as to what had been going since appellant had not been seen since 1986, it appeared from her records that by history she experienced a continuation of old problems. The opinions of Drs. Nichols and Boscardin regarding causal relationship are speculative as they fail to definitely relate appellant's continuing conditions to her May 7, 1985 employment injury and, thus, they are of limited probative value.²⁵ Therefore, appellant has failed to establish clear evidence of error.

Finally, in her September 25, 2002 request for reconsideration, appellant has made the following arguments: (1) she did not receive a proposed notice of termination of her compensation benefits; (2) the Office improperly referred her to several second opinion physicians; (3) the Office erroneously appointed Dr. Michael R. Treister, a Board-certified orthopedic surgeon, as her treating physician even though she had a treating physician; (4) her recurrence claim was never submitted to the Office for continuation of pay after termination of her compensation on November 7, 1986; (5) the Office and the employing establishment acted as medical advisers when reviewing reports from her treating physician, Dr. Henry; (6) the Office disregarded the acceptance of her claim in its February 2, 1987 decision; (7) the employing establishment advised the Office about a 1980 motor vehicle accident; (8) she never received a copy of the Office's April 17, 1988 decision; (9) the Office did not consider medical evidence

²⁵ See *Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

from her treating physician until after its February 2, 1987 decision and all reports that were submitted were not used in the evaluation of her claim; (10) the Office, employing establishment and Office medical adviser remained in contact with one another and on August 28, 1986 they had already planned to send her back to work on November 7, 1986 regardless of her condition; (11) the Office started accepting reports from her treating physician after February 2, 1987 and never answered her request in writing for Dr. Henry to be her attending physician; (12) Dr. Treister and the Office communicated with one another regarding her medical condition; (13) the Office paid Dr. Treister's bill after her compensation was terminated on November 7, 1986; and (14) her medical benefits were terminated when she returned to work on November 7, 1986. Appellant did not submit any medical evidence with her request.

Regarding appellant's contention that the Office failed to issue a proposed notice of termination, the Office did not terminate benefits. It denied appellant's claim for recurrence of disability. Thus, it was appellant's burden to establish a causal relationship between her alleged disability beginning November 7, 1986 and her May 7, 1985 employment injury. She failed to meet her burden of proof on this issue and the Office properly denied her claim. Appellant's argument with regard to termination establishes no error in the Office's decision.

Appellant's contentions regarding the procedures followed by the Office in referring her to second opinion physicians, reviewing medical evidence, communicating with the employing establishment and authorizing payment of medical treatment fail to establish clear evidence of error.

As no substantial question has been raised as to whether the Office properly determined that appellant did not sustain a recurrence of disability commencing November 7, 1986, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) in its December 26, August 9 and March 5, 2002 decisions on the grounds that her application for review failed to present clear evidence of error.

The December 26, August 9 and March 5, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member