

FACTUAL HISTORY

On March 22, 1985 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she sustained a left shoulder condition causally related to her federal employment. The Office accepted the claim, assigned file number 090291600, for an anterior subluxation with laxity of the left shoulder, capsulitis of the left shoulder and a subluxation of the atlas and axis vertebrae. Appellant stopped work on December 20, 1984. She underwent an arthroscopic repair of the anterior subluxation on December 21, 1984. Appellant returned to her regular employment on April 18, 1985.

On May 19, 1998 appellant filed an occupational disease claim alleging that her shoulder condition worsened due to the performance of her employment duties. The Office accepted the claim, assigned file number 090440797, for an aggravation of a left shoulder subluxation, an aggravation of degenerative joint disease of the left shoulder and conversion and depressive disorders. Appellant stopped work on April 18, 1997 and underwent an arthroscopy of the left shoulder with a Mumford procedure on July 17, 1998. She returned to work for one to two hours per day on December 2, 1998 but stopped work on February 25, 1999 and did not return. The Office paid appellant compensation for total disability.

By decision dated May 14, 2002, the Office terminated authorization for medical benefits for the accepted conditions of a subluxation of the atlas and axis vertebrae in file number 090291600. The Office found that the opinion of Dr. Paul DeVries, a Board-certified orthopedic surgeon, represented the weight of the medical evidence and established that appellant had no residuals from her accepted vertebral subluxations. The Office noted that she continued to be entitled to medical benefits for her work-related left shoulder injury and emotional condition as well as disability compensation under file number 090440797.

On January 11, 2003 appellant requested reconsideration of the Office's May 14, 2002 decision. By decision dated January 22, 2003, the Office denied her request for reconsideration after finding that the evidence was insufficient to warrant further merit review. Appellant again requested reconsideration by letter dated February 24, 2003. In a decision dated March 4, 2003, the Office denied merit review based on its finding that her request for reconsideration raised no new legal contention and included no new relevant evidence.

On March 16, 2003 appellant requested reconsideration and submitted additional medical evidence. In a decision dated June 19, 2003, the Office denied modification of its May 14, 2002 decision terminating medical benefits, including chiropractic care, for the conditions of a subluxation of the atlas and axis vertebrae.

On August 10, 2005 appellant requested assistance from the Office in obtaining coverage for chiropractic treatment. The Office explained that she should follow her appeal rights in file number 0902961600 and described the medical evidence necessary to establish a cervical condition requiring treatment.

Appellant, by letter dated August 30, 2005, requested reconsideration of the June 19, 2003 decision. She described her history of chiropractic care and asserted that her attending chiropractor, Dr. Kevin Johnson, failed to send in adequate reports to the Office as promised.

Appellant argued that the denial of care caused a “severe neck subluxation to continue” and noted that she was hospitalized in April 2005 for cervical vertigo. She challenged Dr. DeVries’ finding that her subluxations had resolved.

On August 17, 2005 Dr. R. Michael Kelly, a Board-certified internist, diagnosed chronic internal derangement of the left shoulder and a disc herniation of the cervical spine. He noted that appellant injured her neck and shoulder while working for the employing establishment. Dr. Kelly recommended medical treatment for her neck and stated, “This condition has worsened over the several years since care has not been authorized. Chiropractic care, in particular, would be important to be used in conjunction with the other conservative treatment regiments that are in place.”²

On August 18, 2005 Dr. Charles F. Roost, a chiropractor, discussed appellant’s history of injury and medical treatment received. He interpreted x-rays dated August 4, 2005 as showing a rotational misalignment at C2 through T2, L1 and L5. Dr. Roost diagnosed a subluxation complex, or nerve impingement syndrome, at C1, C6, T2, T9 and L5. He attributed the cervical nerve impingement syndrome to appellant’s employment injury and recommended chiropractic treatments. Dr. Roost asserted that Dr. DeVries was not a chiropractor and thus should not address chiropractic diagnoses. The record contains a similar report from Dr. Roost dated October 5, 2005 and also three pages of a December 12, 2005 report from Dr. Roost’s clinic; however, the report is unsigned and the final page is missing.

Appellant submitted hospital records relevant to her admission from April 5 to 8, 2005 for vertigo and an emergency room report dated June 2, 2005 documenting her treatment for a severe headache. She also submitted a report dated June 20, 2005 from Dr. Mark D. Lebeda, a Board-certified otolaryngologist, who evaluated appellant for resolving vertigo, possibly of a cervical origin. A computerized tomography (CT) scan of her cervical spine obtained on July 24, 2005 revealed a mild central disc protrusion at C6-7.

By decision dated January 6, 2006, the Office denied appellant’s request for reconsideration as it was not timely filed and failed to establish clear evidence of error. On January 12, 2006 the Office amended its January 6, 2006 decision as it had failed to review the hospital reports submitted with appellant’s request for reconsideration. The Office again denied merit review on the grounds that her request for reconsideration was untimely and insufficient to show clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees’ Compensation Act.³ The Office will not review a decision denying or terminating a benefit unless the application for

² The record further contains clinic notes from Dr. Kelly dated June 2003 to April 16, 2004 documenting his treatment of appellant for pain.

³ 5 U.S.C. §§ 8101-8193.

review is filed within one year of the date of that decision.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁶ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must 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.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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. 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.⁹ 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.¹⁰

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins the date following an original Office decision.¹¹ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹²

⁴ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

⁵ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁶ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁷ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Darletha Coleman*, 55 ECAB 143 (2003).

⁹ *Id.*

¹⁰ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Robert F. Stone*, 57 ECAB ____ (Docket No. 04-1451, issued December 22, 2005).

In this case, appellant's August 30, 2005 request for reconsideration was submitted more than one year after the last merit decision of record dated June 19, 2003. Thus, it was untimely. Consequently, she must demonstrate clear evidence of error by the Office in its most recent merit decision.¹³

In its last merit decision dated June 19, 2003, the Office denied modification of its May 14, 2002 termination of medical benefits for the conditions of a subluxation of the atlas and axis vertebrae. Appellant argued that the Office erred in failing to authorize treatment for chiropractic services and contended that Dr. DeVries incorrectly determined that her accepted subluxations had resolved. She maintained that her subluxations worsened because she did not receive proper medical care. The relevant issue, however, is whether the medical evidence establishes that she requires continued medical treatment due to a subluxation of the atlas and axis vertebrae. As this issue is medical in nature, it can only be resolved through the submission of medical evidence.¹⁴ Appellant's lay opinion on her need for further medical treatment is not relevant as the Board has held that lay individuals are not competent to render a medical opinion.¹⁵ Consequently, her contentions are insufficient to establish clear evidence of error by the Office.

In an August 17, 2005 report, Dr. Kelly diagnosed chronic internal derangement of the left shoulder with an anterior subluxation and a disc herniation of the cervical spine and noted that appellant sustained neck and shoulder injuries working for the employing establishment. He opined that she required additional medical treatment, including chiropractic treatment, for her neck. While Dr. Kelly found that appellant required further chiropractic treatment for her neck, his opinion is not sufficient to show clear evidence of error. The term "clear evidence of error" is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁶ The evidence must *prima facie* shift the weight of the evidence in favor of appellant.¹⁷ Dr. Kelly's report does not constitute evidence which manifests on its face that the Office committed an error in terminating medical benefits for the accepted subluxations.

On August 18, 2005 Dr. Roost, a chiropractor, diagnosed a subluxation complex or nerve impingement syndrome, at C1, C6, T2, T9 and L5 by x-ray.¹⁸ He attributed the cervical nerve

¹³ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB ____ (Docket No. 05-1637, issued October 18, 2005).

¹⁴ *George C. Vernon*, 54 ECAB 319 (2003).

¹⁵ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁶ *Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

¹⁷ See *Darletha Coleman*, *supra* note 8.

¹⁸ The Act provides that the 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 as demonstrated by x-ray to exist. See 5 U.S.C. § 8101(2). Dr. Roost diagnosed a misalignment by x-ray, he is considered a physician under the Act. See *Mary A. Ceglia*, 55 ECAB 626 (2004). A subluxation is an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on an x-ray of any film to an individual trained in the reading of x-rays. 20 C.F.R. § 10.5(bb).

impingement syndrome to appellant's employment injury and recommended chiropractic treatments. Dr. Roost challenged Dr. DeVries qualifications to address a chiropractic diagnoses. He submitted a similar report on October 5, 2005. Dr. Roost's opinion, however, fails to show on its face that the Office erroneously relied upon Dr. DeVries' report to terminate medical treatment for appellant's atlas and axis subluxations. As Dr. Roost's opinion does not "*prima facie*" shift the weight of the evidence in favor of appellant, the Office properly found that it was insufficient to warrant reopening her claim for merit review.¹⁹ The record also contains a December 12, 2005 report from Dr. Roost's clinic; however, this report is unsigned and missing pages. The Board has held that medical reports lacking proper identification are of no probative value.²⁰

Appellant submitted hospital records describing her treatment for vertigo from April 5 to 8, 2005, an emergency room report dated June 2, 2005 documenting her treatment for a severe headache and a June 20, 2005 report from Dr. Lebeda, who diagnosed possible cervical vertigo. She also submitted a CT scan of her cervical spine showing a mild central disc protrusion at C6-7. This evidence, however, is not relevant to the issue of whether appellant has residuals from her axis and atlas vertebral subluxations. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.²¹

The evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of the claimant or raise a substantial question as to the correctness of the Office's last merit decision. She has not established clear evidence of error.²²

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

¹⁹ See Robert F. Stone, *supra* note 12.

²⁰ *D.D.*, 57 ECAB ____ (Docket No. 06-1315, issued September 14, 2006); *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988).

²¹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

²² See *Veletta C. Coleman*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 12 and 6, 2006 are affirmed.²³

Issued: February 28, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

²³ Appellant submitted new evidence with her appeal. The Board has no jurisdiction to review evidence for the first time on appeal that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).