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

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| **R.L., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1674** |
| | ) | **Issued: December 11, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On May 27, 2008 appellant filed a timely appeal from the June 8, 2007 and March 26, 2008 nonmerit decisions of the Office of Workers' Compensation Programs, which denied reconsideration of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these denials. The Board has no jurisdiction to review the merits of appellant's case, as she filed her appeal more than one year after the Office's September 28, 2005 and December 11, 2006 decisions denying her claim.

### ***ISSUES***

The issues are: (1) whether the Office properly denied appellant's March 8, 2007 request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly denied her December 18, 2007 request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

## ***FACTUAL HISTORY***

On July 1, 2005 appellant, then a 37-year-old clerk (modified), filed a claim alleging that the neuritis in her right upper extremity was a result of her federal employment.[1] In a decision dated September 28, 2005, the Office denied her claim on the grounds that medical evidence failed to establish that her duties caused or aggravated her medical condition.

On December 11, 2006 the Office denied modification of its September 28, 2005 decision. It found that the evidence was insufficient to demonstrate a medical condition causally related to appellant's work activities. The Office noted that none of appellant's physicians provided a reasoned medical opinion demonstrating any connection between her work activities and her diagnosed conditions. Appeal rights attached to the December 11, 2006 decision notified appellant that any request for reconsideration must be made within one calendar year of the date of the decision.

On January 11, 2007 the Office further explained the basis for its denial of compensation:

> "The deficiency found after a review of the record is that *your treating physician must provide a medical opinion, supported by medical reasoning, as to whether and how specific work activities that you performed contributed to any medical condition that was diagnosed*. The report must show that the physician has knowledge of the particular work activities you are claiming as harmful to you. This is particularly critical since cervical degenerative changes and shoulder joint abnormalities have been diagnosed. In such case, where the conditions may be underlying or preexisting, *the physician should describe the exact nature and extent of the effect of work activities on a diagnosed condition*." (Emphasis in the original.)

On March 8, 2007 appellant requested reconsideration of the Office's December 11, 2006 decision. She stated that, with a better understanding of her condition, she now believed the date of injury to be May 24, 2001.[2] Appellant submitted a July 31, 2006 report from her chiropractor, Dr. Jason C. Nielson, who reported the following radiograph findings: mild reverse cervical curve, anterior cervical weight bearing, anterior and posterior disruption of George's line C4-6 and osteophyte formation C5-6 with Grade I-II degeneration. Dr. Nielson diagnosed brachial plexus disorder TOS [thoracic outlet syndrome], cervicalgia, thoracalgia, spasms of the muscles, and cervical/thoracic/lumbar myositis/myofasciitis. He addressed the relationship of her medical condition to work activities as follows:

> "[Appellant's] combined diagnosis' all come down to that her condition is and has been medically substantiated to show that her past and current symptoms are of the same nature and that it is causally related to her work activities. [Her] work

[1] The Office accepted a prior claim for aggravation of ulnar nerve entrapment and aggravation of tenosynovitis, right arm. OWCP File No. xxxxxx669. Appellant returned to a clerk (modified) position and filed the present claim.

[2] The date of injury in her prior claim under OWCP File No. xxxxxx669 was on or about May 21, 2001.

> activities are of over use repetitive flexor tone usage. This motion on a habitual basis causes 'unarguable' Fibrocystic and Myositis changes to invoke the nerve roots and nerves itself to cause such condition TOS and Synovitis and Tenosynovitis, Median neuritis and tend[i]nitis. This same motion in [appellant's] work activities if not changed as we can see from above on not modifying her job duties has caused her condition to worsen. Not even allowing [her] to achieve 3 breaks in her workday is not enough to stop the progression of her condition." (Emphasis omitted.)

In a decision dated June 8, 2007, the Office denied appellant's request for reconsideration. It found that Dr. Nielson was not a physician as defined under the Federal Employees' Compensation Act and that his report was immaterial to the issue of causal relationship.

On December 18, 2007 appellant again requested reconsideration of the Office's December 11, 2006 decision. She argued that the current claim was related to her prior claim. Appellant argued that more than one physician had substantiated her claim to be causally related to work. She submitted an October 5, 2007 radiology report showing multilevel discogenic and hypertrophic changes. Appellant also submitted several reports from Dr. Jonathan C. Landsman, a spine surgeon, who diagnosed C6 radiculopathy, who opined that appellant was involved in a motor vehicle accident on October 14, 2007. On December 13, 2007 Dr. Landsman reported the following:

> "The patient clearly has a C6 radiculopathy. I believe it is caused from the C5, 6 spondylosis and the disc osteophyte complex. [Appellant] has decreased sensation in the C6 distribution of her right upper extremity. She does have depressed brachioradialis reflex on the right as well. So, there definitely are objective findings here. The question that arises is to the cause and etiology of [appellant's] symptomatology. I think at this point the patient should be protected in terms of her work environment. I do [not] think [appellant] should be doing any overhead lifting at this point. I think she should have lifting restrictions. It is possible that this may go on to surgery in the future. But hopefully this can be curtailed with work restrictions."

In a decision dated March 26, 2008, the Office denied appellant's request for reconsideration. It found that her request was untimely and failed to present clear evidence of error in the December 11, 2006 denial of her claim.

## ***LEGAL PRECEDENT -- ISSUE 1***

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[3] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4] An application for

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.605 (1999).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.[5]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[6]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, it will deny the application for reconsideration without reopening the case for a review on the merits.[7]

Section 8101(2) of the Act provides that 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."[8] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[9]

## ***ANALYSIS -- ISSUE 1***

Appellant made her March 8, 2007 request for reconsideration within one year after the Office's December 11, 2006 decision. The request is therefore timely. The question is whether this request meets at least one of the three standards for reopening her case for a merit review.

Appellant's March 8, 2007 request for reconsideration does not show that the Office erroneously applied or interpreted a specific point of law. Her argument that she now believed the date of injury was May 24, 2001 is irrelevant to the denial of her claim. The Office denied her claim for compensation because she failed to submit a reasoned medical opinion explaining how specific duties at work contributed to one of her diagnosed medical conditions. Appellant submitted a July 31, 2006 report from her chiropractor, Dr. Nielson. However, Dr. Nielson is not considered a "physician" under the Act because he did not diagnose a subluxation from x-ray.

[5] *Id*. at § 10.607(a).

[6] *Id*. at § 10.606.

[7] *Id*. at § 10.608.

[8] 5 U.S.C. § 8101(2).

[9] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

His opinion on causal relationship is therefore not relevant and pertinent to the denial of her claim.

Because appellant's March 8, 2007 request for reconsideration does not meet at least one of the three standards for obtaining a merit review of her case, the Board finds that the Office properly denied that request. The Board will affirm its June 8, 2007 decision.

## ***LEGAL PRECEDENT -- ISSUE 2***

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. It will consider an untimely application 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.[10]

The term "clear evidence of error" is intended to represent a difficult standard. If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[11]

## ***ANALYSIS -- ISSUE 2***

Appellant made her December 18, 2007 request for reconsideration more than one year after the Office's December 11, 2006 decision, the most recent decision on the merits of her case. The request is therefore untimely. The question is whether this request establishes, on its face, that the December 11, 2006 decision was erroneous.

Appellant's argument that her current claim is related to her prior claim is not germane to the reason the Office denied her current claim, which was her failure to submit a well-rationalized medical opinion explaining how specific work activities as a clerk (modified) contributed to a diagnosed medical condition. Her view that more than one doctor had substantiated causal relationship is merely an expression of her disagreement with the Office's finding to the contrary. Appellant's disagreement with the Office's finding is, by itself, no proof that the Office's December 11, 2006 decision was erroneous.

Appellant submitted a radiology report showing multilevel discogenic and hypertrophic changes. This raises no question of error in the Office's December 11, 2006 decision. She also submitted several reports from Dr. Landsman, a spine surgeon, but only his December 13, 2007 reports addressed the issue of causal relationship. After raising the question as to the cause and etiology of appellant's symptomatology, however, Dr. Landsman did not attribute the diagnosed C6 radiculopathy to any specific work activity in appellant's clerk (modified) position. Instead, he suggested only protective measures. This does not establish, on its face, that the Office's December 11, 2006 decision denying compensation was erroneous.

[10] 20 C.F.R. § 10.607 (1999)

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2-1602.3 (January 2004).

Because appellant's December 18, 2007 request for reconsideration does not demonstrate clear evidence of error on the part of the Office in its most recent merit decision, the Board finds that it properly denied that request. The Board will affirm the Office's March 26, 2008 decision.

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's requests for reconsideration.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 26, 2008 and June 8, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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