

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

B.C., Appellant)	
)	
and)	Docket No. 09-2174
)	Issued: July 16, 2010
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Chicago, IL, Employer)	
)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument January 14, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 28, 2009 appellant filed a timely appeal from the May 20, 2009 merit decision of the Office of Workers' Compensation Programs and a nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant's traumatic injury claim was timely filed pursuant to 5 U.S.C. § 8122; and (2) whether the Office properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

At oral argument, appellant contended that she timely filed her traumatic injury claim by providing actual notice to her supervisor within 30 days of the alleged injury. She further contended that she continued to suffer from residuals of her May 7 and July 24, 1985 employment injuries.

FACTUAL HISTORY -- ISSUE 1

On March 4, 2008 appellant, then a 51-year-old letter sorter machine clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 7, 1986 she experienced pain in her left armpit due to shoulder and cervical pain after returning to work from her accepted May 7 and July 24, 1985 employment-related cervical and shoulder injuries.¹ She contended that her employment-related conditions had worsened. Appellant was unable to reach or lift with her left arm. The employing establishment stated that it received notice of the alleged injury on March 10, 2008. In a March 13, 2008 letter, the employing establishment controverted appellant's claim on the grounds that it was not timely filed.

By letter dated March 25, 2008, the Office advised appellant that the evidence submitted was insufficient to establish that she provided timely notice of her alleged 1986 work injury or that she sustained an injury in the performance of duty. It addressed the factual and medical evidence she needed to submit to establish her claim.

On March 28, 2008 appellant stated that the employing establishment incorrectly filed a recurrence of disability claim (Form CA-2a) for her November 7, 1986 injury. She experienced left arm pain on November 7, 1986 as a result of reaching while performing unsuitable work. Appellant also contended that her injury was a consequence of her May 7 and July 24, 1985 accepted injuries. On the accompanying November 7, 1986 Form CA-2a, Beverly Miller, a supervisor, stated that appellant's neck hurt when she returned to duty on that day. Appellant's neck pain worsened when she began work. Ms. Miller sent her to the first aid unit. When appellant returned, she advised Ms. Miller that she also experienced pain under her left arm while raising it.

By decision dated April 24, 2008, the Office denied appellant's traumatic injury claim finding that it was not timely filed under 5 U.S.C. § 8122 as the March 4, 2008 claim was not filed within three years of the November 7, 1986 injury. Moreover, appellant's immediate supervisor did not have actual knowledge of the injury within 30 days.

In an April 26, 2008 letter, appellant requested a telephonic hearing before an Office hearing representative.

In an August 13, 2008 letter, appellant stated that the employing establishment first became aware of her left arm injury in the claim for her July 24, 1985 employment injuries. She stated that the July 24, 1985 claim had not been accepted for a left arm injury based on the medical evidence. Appellant contended that she was not advised about this determination and assumed that the condition was accepted. She reiterated that the employing establishment injury compensation unit erred by giving her a Form CA-2a rather than a Form CA-1. Appellant stated that she first sought medical treatment from Dr. Clyde L. Henry, an attending physician, for her left arm injury. In form reports dated December 9, 1986 and January 9, 1987, Dr. Henry listed

¹ On May 8, 1985 appellant filed a claim in Office File No. xxxxxx086 alleging that on May 7, 1985 she injured her neck, back and left hip and ankle as a result of falling down a flight of stairs. On May 30, 1985 the Office accepted her claim for cervical and lumbar strains and left hip and ankle sprains. On December 1, 2003 appellant filed a claim in Office File No. xxxxxx103 alleging that on July 24, 1985 she injured her left side, arms and neck. By letter dated March 17, 2005, the Office accepted her claim for cervical and thoracic strains and left trapezius myositis. It combined these claims into a master claim assigned Office File No. xxxxxx086.

the date of injury as May 7, 1985. He diagnosed chronic cervical and lumbar spine sprains. Dr. Henry indicated with an affirmative mark that the diagnosed conditions were caused by May 7, 1985 employment injuries. In a December 9, 1986 report, he reviewed a history of the May 7, 1985 employment injuries. Dr. Henry stated that on November 7, 1986 appellant reinjured her neck and left arm at work and experienced severe pain in her neck and underarm. He reiterated his prior diagnoses of chronic cervical and lumbar spine sprains.

At an August 12, 2008 hearing, appellant stated that on November 7, 1986 she advised a supervisor about her cervical and left arm pain and was sent to the first aid unit. She did not have a copy of the November 7, 1986 medical record because the first aid unit could not locate it. Appellant noted that her left arm injury occurred while reaching to put mail in cases. She previously experienced left arm pain but the Office did not include this information under her prior claim for her July 24, 1985 employment injury. Further, the Office referral physician who returned appellant to work on November 7, 1986 did not acknowledge that she had left arm pain and that she should not have been performing work that required her to reach with or raise her arm. Appellant contended that the claimed November 7, 1986 injury aggravated her preexisting Marfan's syndrome and habitual muscle tension. She stated that she had filed a Form CA-1 for the November 7, 1986 injury two or three years prior to the hearing.

In an October 2, 2008 decision, an Office hearing representative affirmed the April 24, 2008 decision, finding that appellant's December 25, 2003 and March 4, 2008 claim forms for the November 7, 1986 injury were not timely filed within three years of the alleged injury.² The hearing representative found that Ms. Miller's notation on the November 7, 1986 CA-2a claim form did not establish that appellant sustained a new traumatic injury due to her work duties that day or that the supervisor had actual knowledge of the injury within 30 days. While the November 7, 1986 CA-2a form indicated that appellant was evaluated at the employing establishment's medical clinic that day, the record did not contain any medical evidence confirming a new traumatic injury. The hearing representative recommended that the instant claim (Office File No. xxxxxx827) be combined with the master claim in Office File No. xxxxxx086.

Appellant appealed the October 2, 2008 decision to the Board. On April 15, 2009 the Board issued an order remanding case to the Office for consolidation of the instant claim with appellant's prior claims.³ It found that the evidence reviewed by the hearing representative in the Office File No. xxxxxx086 was not contained of record. On remand, the Office combined the files into Office File No. xxxxxx086 as the master claim number.

By decision dated May 20, 2009, the Office found that appellant's March 4, 2008 traumatic injury claim was not timely filed under 5 U.S.C. § 8122.⁴ It found that the claim was

² The hearing representative reviewed the December 25, 2003 Form CA-1 in the master Office File No. xxxxxx086. It indicated that the employing establishment received notice of the November 7, 1986 injury on December 30, 2003.

³ Docket No. 09-42 (issued April 15, 2009).

⁴ The Board notes that, although the Office combined the instant claim assigned Office File No. xxxxxx827 into the master claim assigned Office File No. xxxxxx086, it referenced Office File No. xxxxxx827 as the claim number on its May 20, 2009 decision.

not filed within three years of the November 7, 1986 injury. The Office further found that an immediate supervisor did not have actual knowledge of the alleged injury within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act⁵ provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.⁶ In cases involving a traumatic injury, the time limitation begins to run on the date of the incident even though the employee may not be aware of the seriousness or ultimate consequences of the injury or the nature of the injury is not diagnosed until sometime later.⁷

Even if a claim is not filed within the required three-year period, it is still regarded as timely under section 8122(a)(1) if the claimant's immediate superior had actual knowledge of the alleged employment-related injury within 30 days.⁸ The knowledge must be such as to put the immediate superior reasonably on notice of appellant's injury.⁹ Additionally, the claim would be deemed timely if written notice of injury or death was provided within 30 days pursuant to 5 U.S.C. § 8119.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant's March 4, 2008 claim was not timely filed within the provisions of the Act. Appellant's alleged injury involved a traumatic incident. The three-year statute of time limitations began to run on November 7, 1986, the date on which appellant allegedly sustained traumatic cervical and left arm injuries while reaching and lifting mail. The record reflects that the first notice of claim was filed on November 7, 1986, in the form of a CA-2a, claim for recurrence of disability. The Board finds, however, that the Form CA-2a does not establish a timely claim under section 8122(a). It does not specifically identify any work factors that caused appellant's neck and left arm pain on that date. Appellant subsequently filed claims on December 25, 2003 and March 4, 2008. The Board finds that these claims were submitted over three years after the alleged November 7, 1986 injury. Therefore, they were untimely filed under section 8122.

Appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if her immediate superior had actual knowledge of the injury within 30 days or under section 8122(a)(2), if written notice of injury was given within 30 days. She has not satisfied either of these provisions. Regarding the December 25, 2003 claim form, the record reflects that the employing establishment did not receive notice of the alleged November 7, 1986 injury until

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8122.

⁷ *See Paul S. Devlin*, 39 ECAB 715 (1988); *Kenneth W. Beard*, 32 ECAB 210 (1980).

⁸ 5 U.S.C. § 8122(a)(1); *Larry E. Young*, 52 ECAB 168 (2001). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.3 (March 1993).

⁹ 5 U.S.C. § 8122(a)(1). *See Hugh Massengill*, 43 ECAB 475 (1992).

¹⁰ *Id.* at §§ 8122(a)(1), 8122(a)(2).

December 30, 2003. Regarding the March 4, 2008 form, the employing establishment did not receive notice of the claimed injury until March 10, 2008. On the November 7, 1986 recurrence claim, appellant's immediate supervisor, Ms. Miller, noted that she sent appellant to the employer's first aid unit on that date for evaluation of neck pain, which worsened after she began work. Appellant subsequently returned and complained of pain under her left arm when she raised it. This is insufficient to establish that Ms. Miller had actual knowledge of a work-related injury on that day. The Board notes that appellant must show not only that her immediate superior knew that she was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹¹ Appellant has not shown that Ms. Miller knew or reasonably should have known of an injury that day. The evidence establishes that Ms. Miller was made aware only of appellant's complaints of pain to her neck and the area under her left arm. As noted, an employee must show not only that his immediate superior knew that he was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹² The record does not contain any medical report from the first aid unit addressing appellant's treatment on November 7, 1986. Moreover, appellant has not established that she submitted written notice of a traumatic injury to the employing establishment within 30 days of the claimed injury. She has not presented sufficient evidence of written notice to the employing establishment within 30 days of her claimed November 7, 1986 traumatic injury.

Consequently, the Board finds that appellant's claim is barred by the applicable time limitation provisions of the Act.

FACTUAL HISTORY -- ISSUE 2

This case has previously been before the Board. In decisions dated September 14, 2000,¹³ August 4, 2003¹⁴ and February 9, 2005,¹⁵ the Board found that the Office properly denied appellant's requests for reconsideration of its finding that she did not sustain a recurrence of disability on November 7, 1986 causally related to her May 7, 1985 employment injuries. It determined that the requests were not timely filed and failed to establish clear evidence of error. In a May 9, 2008 decision, the Board affirmed the Office's termination of appellant's medical benefits on January 18 and November 15, 2007.¹⁶ It found that the medical opinion of Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, that appellant no longer had any residuals causally related to her May 7 and July 24, 1985 employment injuries, was entitled to special weight as an impartial medical specialist. In a September 24, 2008 order, the Board denied her petition for reconsideration of its May 9, 2008 decision.¹⁷

¹¹ *David R. Morey*, 55 ECAB 642 (2004).

¹² *Charlene B. Fenton*, 36 ECAB 151 (1984).

¹³ Docket No. 99-958 (issued September 14, 2000).

¹⁴ Docket No. 03-956 (issued August 4, 2003).

¹⁵ Docket No. 04-1741 (issued February 9, 2005).

¹⁶ Docket No. 08-571 (issued May 9, 2008).

¹⁷ Docket No. 08-571 (issued September 24, 2008).

By letter dated January 22, 2009, appellant requested reconsideration of the January 18, 2007 termination decision before the Office. She contended that Dr. Komanduri's report was incomplete as he focused on her Marfan's syndrome and failed to review her entire medical record, particularly medical records from her attending physicians regarding her cervical conditions. An April 7, 2004 x-ray from Dr. John A. Aikenhead, a radiologist, showed a reversal of the cervical lordosis with an anterior transition of the head. The intervertebral foramen appeared patent. There was no evidence of fracture or dislocation.

A June 3, 2009 report from Dr. Sunil John, a rheumatologist, reviewed a history of appellant's May 7, 1985 employment injuries and 1980 motor vehicle accident. He noted her complaints of chronic neck, shoulder and back pain. Dr. John listed his findings on physical and x-ray examination. He diagnosed chronic pain in the neck with spasm and in the back, myofascial pain and Marfan's like syndrome. Dr. John stated that he was not a disability evaluator. He could not comment on appellant's prognosis. Dr. John was unable to provide an opinion on whether her current pain was causally related to the motor vehicle accident or a subsequent work injury.

An undated treatment note from the employing establishment's health unit addressed appellant's left arm and leg. Its May 8, 1985 treatment note addressed her May 7, 1985 employment injuries.

By decision dated July 29, 2009, the Office denied appellant's request for reconsideration. It found that she failed to submit any relevant and pertinent new evidence or argument or establish that the Office erred in applying or interpreting a point of law. Appellant's claim was not entitled to further merit review.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²⁰ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In a January 22, 2009 letter, appellant disagreed with the Office's January 18, 2007 decision, which terminated her medical benefits on the grounds that she no longer had any

¹⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.606(b)(1)-(2).

²⁰ *Id.* at § 10.607(a).

residuals or disability causally related to her May 7 and July 24, 1985 employment injuries. The relevant issue is whether she sustained any residuals causally related to the accepted employment injuries. The Board notes that this issue is medical in nature.

On reconsideration, appellant reiterated her prior contention before the Office that Dr. Komanduri's opinion was not entitled to special weight accorded an impartial medical specialist in finding that she no longer had any residuals causally related to her accepted employment injuries, as it was not accurately based on her medical background. However, the submission of this evidence does not require reopening of appellant's claim for merit review because it was previously considered by the Office. The Board has held that evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.²¹

Dr. Aikenhead's April 7, 2004 x-ray report found reversal of the cervical lordosis with an anterior transition of the head, an apparent patent intervertebral foramen and no evidence of fracture or dislocation. Although this evidence showed abnormalities in appellant's cervical spine, it did not contain an opinion addressing whether her continuing problems were causally related to the May 7 and July 24, 1985 employment injuries. The Board has held that the submission of evidence, which does not address the particular issue involved in the case, does not constitute a basis for reopening the claim.²² The Board finds that Dr. Aikenhead's report and opinion are insufficient to reopen appellant's claim for further merit review.

Similarly, Dr. John's June 3, 2009 report and opinion are insufficient to reopen appellant's claim for further merit review. He listed his findings on physical and x-ray examination and diagnosed chronic pain in the neck with spasm and in the back, myofascial pain and Marfan's like syndrome. Dr. John stated that he was not professionally qualified to determine whether appellant was disabled and was unable to provide a medical opinion on whether her current pain was causally related to the motor vehicle accident or subsequent work injury. As he did not provide a medical opinion addressing the relevant issue of whether appellant had any continuing residuals causally related to her accepted employment injuries, the Board finds that Dr. John's report is insufficient to reopen appellant's claim for further merit review.²³

The treatment notes from the employing establishment health unit addressed appellant's left arm and leg conditions and May 7, 1985 employment-related injuries. This evidence does not address the relevant issue of whether she continued to suffer from residuals of her employment injuries. The Board finds that the employing establishment health unit treatment notes are insufficient to reopen appellant's claim for further merit review.²⁴

The Board finds that the evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal argument not

²¹ See *L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

²² *D'Wayne Avila*, 57 ECAB 642 (2006).

²³ *Id.*

²⁴ *Id.*

previously considered or constituted relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.²⁵

CONCLUSIONS

The Board finds that appellant's traumatic injury claim is barred by the applicable time limitation provisions of the Act in Office File No. xxxxxx827. The Board further finds that the Office properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a) in Office File No. xxxxxx086.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 3, 2009 decision in Office File No. xxxxxx086 and May 20, 2009 decision in Office File No. xxxxxx827 are affirmed.

Issued: July 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁵ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).