

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

---

**E.L., Appellant** )  
 )  
**and** ) **Docket No. 10-367**  
 ) **Issued: September 1, 2010**  
 )  
**DEPARTMENT OF HEALTH & HUMAN** )  
**SERVICES, SOCIAL SECURITY** )  
**ADMINISTRATION, Salinas, CA, 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  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 23, 2009 appellant filed a timely appeal from an October 22, 2009 nonmerit decision denying her request for reconsideration. As the most recent merit decision is dated March 6, 2009, more than 180 days prior to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly denied appellant's request for further review of the merits of this case under 5 U.S.C. § 8128.

## **FACTUAL HISTORY**

On April 6, 2007 appellant, then a 45-year-old teleservice representative, filed an occupational disease claim alleging that she sustained left shoulder tendinitis and carpal tunnel syndrome of the right wrist due to factors of her federal employment.<sup>1</sup> She did not stop work.

By decision dated July 2, 2007, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that her current medical condition was due to employment factors. It noted that she submitted numerous medical reports that predated her occupational disease claim and were relevant to prior work injuries. The Office had previously accepted that appellant sustained right carpal tunnel syndrome and right wrist sprain and left shoulder tendinitis under other file numbers. It informed her that she needed to submit medical evidence showing that she had a current condition due to factors of her federal employment.

On July 20, 2007 appellant requested an oral hearing. By decision dated January 31, 2008, the hearing representative affirmed the July 2, 2007 decision. He found that the medical evidence was insufficient to establish that appellant had a diagnosed condition causally related to her federal employment. The hearing representative considered a July 2, 2007 report from Dr. Warren Nishimoto, an osteopath, who opined that appellant's neck, shoulder and upper back problems were due to her work performing data entry. He determined, however, that Dr. Nishimoto did not provide a firm diagnosis or support his findings with objective studies.

On August 14, 2008 appellant, through her representative, requested reconsideration. In a decision dated November 17, 2008, the Office denied modification of its January 31, 2008 decision. It noted that the medical evidence did not address the cause of appellant's right cubital tunnel syndrome or any other diagnosed condition.

Appellant again requested reconsideration on November 24, 2008. By decision dated March 6, 2009, the Office denied modification of its November 17, 2008 decision. It found that she had not submitted rationalized evidence in support of her claim.

On September 5, 2009 appellant requested reconsideration. She related that she was providing a medical report as requested diagnosing cubital tunnel syndrome. Appellant attributed her problems with her right wrist and left shoulder and her cubital tunnel syndrome to repetitive work performed at the employing establishment. In support of her request for reconsideration, she submitted an August 28, 2009 Social Security Administration form from Dr. Nishimoto addressing her ability to do work-related physical activities. Dr. Nishimoto provided appellant's history of a left shoulder strain and torn rotator cuff, a cubital tunnel release of the right elbow and five surgeries on the right knee. He further identified her physical restrictions.

By decision dated October 22, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant reopening her case for further review of the merits under section 8128.

---

<sup>1</sup> The employing establishment noted that appellant initially filed a notice of recurrence of disability but that it was denied.

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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 on the merits.<sup>5</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>6</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>8</sup>

## ANALYSIS

The Office denied appellant's claim after finding that the medical evidence was insufficient to establish that she had a current condition of the upper extremities causally related to factors of her federal employment. On September 5, 2009 appellant requested reconsideration. She attributed her right wrist, left shoulder and cubital tunnel syndrome to repetitive work duties. Appellant's lay opinion concerning the cause of her condition, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.<sup>9</sup>

In an August 28, 2009 physical capacity evaluation form, Dr. Nishimoto diagnosed a left shoulder strain and torn rotator cuff, a cubital tunnel release of the right elbow and five surgeries on the right knee. He provided work restrictions. Dr. Nishimoto did not, however, address the cause of the diagnosed conditions. Therefore, his opinion is not relevant to the pertinent issue of

---

<sup>2</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>7</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>8</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>9</sup> *L.G.*, 61 ECAB \_\_\_\_ (Docket No. 09-1517, issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

whether appellant has established that she sustained right carpal tunnel syndrome and left shoulder tendinitis due to factors of her federal employment. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>10</sup>

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute pertinent new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for further review of the merits of this case under section 8128 of the Act.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 22, 2009 is affirmed.

Issued: September 1, 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

---

<sup>10</sup> *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).