



(3) whether the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).<sup>1</sup>

### **FACTUAL HISTORY**

This case has been on appeal previously.<sup>2</sup> In a decision dated April 26, 2002, the Board found that appellant established entitlement to four hours of wage-loss compensation for various dates from March 1, 1990 to January 27, 1995 for which she received medical treatment for her employment-related injuries. The Board further found that she had not established any further entitlement to compensation for the other dates of disability claimed between January 1, 1990 and February 1, 1995. The Board also found that the Office had properly refused to reopen appellant's case for merit review under 20 C.F.R. § 10.608. Additionally, the Board found that the Office met its burden of proof to terminate her compensation benefits effective January 4, 2000. The findings of fact and conclusions of law in the Board's prior decision are hereby incorporated by reference.

On March 11, 2003 the Office determined that a conflict existed between, Dr. Ananth Shenoy, a Board-certified orthopedic surgeon and appellant's physician, and Dr. Glen B. Pfeffer, a Board-certified orthopedic surgeon and second opinion physician, regarding whether appellant continued to suffer from bilateral carpal tunnel syndrome. Dr. Shenoy opined that appellant likely had bilateral carpal tunnel syndrome, while Dr. Pfeffer advised that she could return to full duty and had no objective findings. The Office referred appellant to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 15, 2003 report, Dr. Auerbach noted appellant's history of injury and reviewed diagnostic reports, including a March 25, 2003 right shoulder x-ray that demonstrated some spurs at the acromioclavicular joint. He noted that the head of the humerus was well maintained in the glenoid and there were no calcifications or loose bodies noted, nor cystic changes in the greater tuberosity. During his examination of the shoulders, Dr. Auerbach noted that the right shoulder had no particular tenderness to palpation, no crepitation and no clicking was heard or palpated. Regarding the left shoulder, he found tenderness anteriorly and indicated that appellant resisted motion both passively and actively on the left shoulder and indicated that she had pain in the base of the neck on the left side more than the left shoulder. Dr. Auerbach diagnosed right chronic carpal tunnel syndrome and a degree of bilateral outer elbow epicondylitis with no evidence of cubital tunnel syndrome. He indicated that appellant's neck, chest, shoulder and upper extremity problems appeared to be related to repetitive stress at her work over the years. Dr. Auerbach recommended treatment with her physician, intermittent use of nonnarcotic analgesic medication and anti-inflammatory medication with daily home stretching, strengthening and range of motion exercises of the neck, shoulders and upper extremities with occasional physical therapy three times a week for two weeks, perhaps three

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<sup>1</sup> On appeal appellant alleged that the Office did not properly consider all of the medical evidence.

<sup>2</sup> Docket No. 00-1097 (issued April 26, 2002); *petition for recon. denied* (October 17, 2002).

times a year to the neck, shoulders and upper extremities and advised that appellant was a candidate for bilateral carpal tunnel surgical release.

In reports dated March 25 and May 6, 2003 report, Dr. Margaret Upson<sup>3</sup> diagnosed bilateral carpal tunnel syndrome and right shoulder pain.

In an April 24, 2003 nerve conduction report, Dr. Jack E. Kundin, a Board-certified neurologist, noted abnormal nerve conduction velocity showing bilateral carpal tunnel syndrome, worse on the left. He compared a prior study dated October 9, 2001 and noted the right was improved while the left was slightly more abnormal. Dr. Kundin indicated that the left cubital tunnel study was barely normal.

By decision dated June 25, 2003, the Office vacated the January 4, 2000 decision and approved wage loss until the date appellant returned to work in mid June 2000. The Office also approved medical treatment and accepted the claim for bilateral carpal tunnel syndrome, right tennis elbow and left shoulder tendinitis based on Dr. Auerbach's report.<sup>4</sup>

In a July 24, 2003 report, Dr. Janine Williams Bera, a Board-certified internist, diagnosed bilateral carpal tunnel syndrome and right shoulder pain. She submitted additional reports noting appellant's status.

In an August 11, 2003 report, Dr. Upson diagnosed bilateral carpal tunnel syndrome. In a duty status report of the same date, she diagnosed bilateral carpal tunnel syndrome, bilateral shoulder strain and right lateral epicondyle. Dr. Upson indicated that the diagnosis was due to appellant's injury and indicated that she could return to work with restrictions.

In an August 29, 2003 report, Dr. Yin yin Myint, Board-certified in internal medicine, indicated that appellant presented with right shoulder pain that began on August 25, 2003 after painting a room in her house. She diagnosed bilateral carpal tunnel syndrome.

In a September 2, 2003 report, Dr. Upson noted that appellant had chronic right shoulder strain and increased pain after painting a room eight days earlier. Appellant advised that after seeing Dr. Myint she had a toradol shot, improved for a day and then had a recurrence which was not as severe. She noted that appellant felt a pinching sensation in the right side of the neck, but had no shoulder or arm pain. Dr. Myint diagnosed bilateral carpal tunnel syndrome and right shoulder pain.

On September 3, 2003 appellant filed a CA-7 form claiming compensation from August 25 through September 5, 2003.

In a September 5, 2003 report, Dr. Myint noted appellant's complaint of increased right shoulder pain since August 25, 2003 which was after she painted a room in her house. She

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<sup>3</sup> Dr. Upson's specialty cannot be discerned from the record.

<sup>4</sup> The decision inadvertently referred to Dr. Auerbach as "Dr. Schwartz." However, this appears to be a typographical error.

diagnosed bilateral carpal tunnel syndrome and right shoulder pain. In a partially legible disability slip, Dr. Myint noted seeing appellant on September 2, 2003 and placed her off work until September 10, 2003. In a separate disability slip dated September 17, 2003, appellant was placed off work from September 16 to 17, 2003.

By letter dated September 16, 2003, the Office requested additional information from appellant regarding the period August 25 to September 2, 2003. The Office noted that she submitted two occupational status activity forms indicating that she had increased shoulder pain after painting a room in her house.

In letter dated September 18 and 19, 2003, appellant indicated that there were errors in her file. She alleged that none of her claims were for a left shoulder condition and that the Office was accepting a part of her body that she had never claimed. On September 18, 2003 appellant filed a CA-7 form claiming compensation for September 9 to 13 and September 16 to 18, 2003. On September 25, 2003 appellant filed a CA-7 form for September 22 to 25, 2003. She subsequently filed claims for additional periods of compensation.

In an October 2, 2003 letter, the Office explained that appellant had previous right shoulder claims that were accepted and had subsequently resolved. The Office advised that, when she was examined on April 15, 2003 by Dr. Auerbach, the impartial medical examiner, he did not list any objective findings related to a right shoulder condition although there were findings to warrant a left shoulder condition, which was accepted.

In an October 6, 2003 report, Dr. Jeffrey W. Cass, PhD., diagnosed depression and occupational problems. On October 22, 2003 the Office received an October 1, 2003 report from Dr. Susan Scholey, a Board-certified physiatrist. She noted appellant's history of injury and treatment and diagnosed bilateral carpal tunnel syndrome.

By letter dated October 24, 2003, the Office accepted appellant's claim for bilateral carpal tunnel syndrome and release surgery, which was performed on October 16, 2003.<sup>5</sup>

By letter dated October 24, 2003, appellant requested reconsideration and enclosed additional information.<sup>6</sup> She provided copies of previously received reports from Dr. Harry S. Fung, a Board-certified family practitioner. Appellant also repeated previous assertions that her initial complaints always referred to pain in the right upper shoulder and back and that the full nature of her illness had never been considered.

In a November 20, 2003 report, Dr. Bera diagnosed sprain/strain, right shoulder and sprain/strain cervical neck. She also noted that appellant had lateral epicondylitis and a history of carpal tunnel syndrome. Dr. Bera indicated that her treatment was focused mainly on the right shoulder and neck. In a December 9, 2003 report, Dr. Bera noted appellant's job duties since 1985 and indicated that she was having right shoulder pain on and off since 1985. She opined

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<sup>5</sup> Dr. Kevin F. Degnan, a Board-certified plastic surgeon, performed a right carpal tunnel release on October 16, 2003.

<sup>6</sup> The Office treated this as a reconsideration request from the June 25, 2003 decision.

that appellant's diagnosis of right shoulder strain was due to a work-related injury that occurred in 1985.

By decision dated December 31, 2003, the Office denied appellant's claim for disability compensation for the periods August 25 and September 5, 9 to 18 and 22 to 25 and 29 to October 3 and 8 to 10, 2003.

By decision dated January 28, 2004, the Office denied modification of the June 25, 2003 decision. The Office noted considering Dr. Auerbach's report and found that the evidence did not establish a causal relationship between the claimed right shoulder and neck conditions and employment factors.

On February 1, 2004 appellant requested reconsideration. She repeated her previous arguments, including that Dr. Auerbach referred to her shoulders and that the reports of her physicians, Dr. Fung and Dr. LeClair, were not considered.

In a decision dated March 11, 2004, the Office denied appellant's request for reconsideration on the grounds that her arguments were repetitive and insufficient to warrant merit review of the prior decision.

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

To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.<sup>7</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>8</sup> Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *Ernest St. Pierre*, 51 ECAB 623 (2000).

## ANALYSIS -- ISSUE 1

The Office initially accepted appellant's claim for right trapezius muscle spasm and strain and expanded the claim by decision dated June 25, 2003 to include bilateral carpal tunnel syndrome, right tennis elbow and left shoulder tendinitis based on the report of Dr. Auerbach, the impartial medical examiner.<sup>11</sup> Appellant subsequently requested that her neck and right shoulder conditions be accepted.

Reports from Dr. Myint, who diagnosed bilateral carpal tunnel syndrome, indicated that appellant had increased right shoulder pain that began on August 25, 2003, after appellant painted a room in her house. She did not relate it to her employment condition. Likewise, in a September 2, 2003 report, Dr. Upson noted that appellant had chronic right shoulder strain and increased pain after painting a room eight days earlier, but she did not relate any condition to appellant's employment. The Board finds that these reports indicate that appellant was painting and engaged in a nonemployment-related activity when she sustained a right arm, shoulder or neck condition. These reports contain diagnoses which include her accepted condition of bilateral carpal tunnel syndrome and her previously accepted condition of right shoulder pain, which had resolved, but no explanation to show why appellant's conditions of right shoulder pain would be related to her accepted employment injuries as opposed to the painting incident. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.<sup>12</sup>

Appellant also submitted several disability slips, which placed her off work on September 2, 16 to 17, 22 to 24 and September 29 to October 2, 2003 and reports dated October 1 and 22, 2003, in which Dr. Scholey, diagnosed bilateral carpal tunnel syndrome. However, none of these reports contained any opinion which contained an explanation of whether her right shoulder and neck conditions were causally related to the accepted employment injury.

In her December 9, 2003 report, Dr. Bera opined that appellant's conditions of right shoulder strain were due to her employment injury of 1985. However, she did not explain how she arrived at this conclusion, nor did she seem to be aware of the reports of Dr. Myint and Dr. Upson for the period August 29 to September 5, 2003, which noted increased shoulder pain after appellant painted her home. The Board has held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value.<sup>13</sup>

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<sup>11</sup> Although the Board as noted in the text, found that the Office met its burden of proof to terminate appellant's compensation benefits in the Office's decision dated January 4, 2000, this decision was subsequently vacated by the Office's decision dated June 25, 2003 after the Office received new medical evidence and the Office accepted appellant's claim for bilateral carpal tunnel syndrome, right tennis elbow and left shoulder tendinitis.

<sup>12</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB \_\_\_\_ (Docket No. 01-640, issued March 5, 2002).

<sup>13</sup> *Vaheh Mokhtarians*, 51 ECAB 190 (1999).

Other medical reports submitted by appellant do not address the employment as a cause of the conditions at issue. The Board finds that appellant has not submitted sufficient evidence to establish that her neck and right shoulder conditions were caused or aggravated by factors of her employment.

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

For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>14</sup> As used in the Federal Employees' Compensation Act, the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>15</sup> Disability is thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>16</sup> Whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence.<sup>17</sup>

With respect to claimed disability for medical treatment, section 8103 of the Act provides for medical expenses, along with transportation and other expenses incidental to securing medical care for injuries.<sup>18</sup> Appellant would be entitled to compensation for any time missed from work due to medical treatment for an employment-related condition.<sup>19</sup> However, the Office's obligation to pay for medical expenses and expenses incidental to obtaining medical care, such as loss of wages extends only to expenses incurred for treatment of the effects of any employment-related condition. Appellant has the burden of proof which includes the necessity to submit supporting rationalized medical evidence.<sup>20</sup>

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

In support of her claim for intermittent wage-loss compensation for the period August 25 to October 10, 2003, appellant submitted several reports.

Reports from Dr. Myint and Dr. Upson, dated August 29 and September 2 and 5, 2003 contained diagnoses but no discussion of causal relationship.<sup>21</sup> An October 6, 2003 report from Dr. Cass diagnosed depression. However, this was not an accepted condition. Furthermore,

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<sup>14</sup> *William A. Archer*, 55 ECAB \_\_\_\_ (Docket No. 04-1138, issued August 27, 2004).

<sup>15</sup> *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

<sup>16</sup> *See Fred Foster*, 1 ECAB 21 (1947).

<sup>17</sup> *See Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>18</sup> 5 U.S.C. § 8103(a).

<sup>19</sup> *Vincent E. Washington*, 40 ECAB 1242 (1989).

<sup>20</sup> *Dorothy J. Bell*, 47 ECAB 624 (1996); *Zane H. Cassell*, 32 ECAB 1537 (1981).

<sup>21</sup> *See Michael E. Smith*, 50 ECAB 313 (1999).

none of the above mentioned reports indicated that appellant was disabled for any period of time. She also submitted several disability slips, which placed her off work on September 2, 16, 17, 22, to 24 and September 29 to October 2, 2003 and an October 1, 2003 report in which Dr. Scholey, diagnosed bilateral carpal tunnel syndrome. However, none of these reports contained any opinion explaining the causal relationship as to why or how appellant's accepted employment injury prevented her from performing her duties on the dates listed.<sup>22</sup>

The record also contains additional reports, however, they do not address the period in question. An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between her condition and her employment.<sup>23</sup> She failed to submit sufficient medical evidence in this case and, therefore, has failed to discharge her burden of proof. The reports in the instant case are insufficient to meet appellant's burden of proof as they do not offer medical rationale explaining the causal relationship as to how or why her accepted employment injury prevented her from performing the duties of her position on the particular dates listed.<sup>24</sup> Instead the reports merely state conclusions without any discussion of the reasons why appellant was disabled on the dates in question. There also is no clear indication that any time lost from work was due to treatment for accepted conditions. As appellant has failed to submit sufficient rationalized medical opinion evidence to establish that she was unable to work on the days she claimed she was unable to work due to her employment injury, she has failed to establish that she was disabled and thus, is not entitled to wage-loss compensation for additional days claimed. Without such evidence, she has not established her claim for intermittent wage-loss compensation during the period August 25 to October 10, 2003.

### **LEGAL PRECEDENT -- ISSUE 3**

To require the Office to reopen a case under section 8128(a) of the Act,<sup>25</sup> section 10.608(a) of the implementing regulation provides that, a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>26</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (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.<sup>27</sup> Section 10.608(b) provides that, when a request for reconsideration is timely but fails

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<sup>22</sup> *Id.*

<sup>23</sup> *Patricia J. Glenn*, 53 ECAB \_\_\_ (Docket No. 01-65, issued October 12, 2001).

<sup>24</sup> Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet appellant's burden of proof. *Lourdes Davila*, 45 ECAB 139 (1993).

<sup>25</sup> 5 U.S.C. § 8128(a).

<sup>26</sup> 20 C.F.R. § 10.608(a).

<sup>27</sup> 20 C.F.R. § 10.608(b)(1) and (2).

to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>28</sup>

When reviewing an Office decision denying a merit review the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>29</sup>

### **ANALYSIS -- ISSUE 3**

With her February 1, 2004 reconsideration request appellant repeated her previous arguments that her right shoulder and neck conditions were causally related to her accepted employment injury.<sup>30</sup> She also alleged that the reports of her treating physician's Drs. Fung and Dr. Le Clair were not considered. However, the Board notes that the reports of appellant's treating physician's were considered previously. The Board, therefore, finds the medical evidence duplicative. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.<sup>31</sup>

With regard to appellant's allegation that the Office did not utilize the report of Dr. Auerbach, the impartial medical examiner, the Board notes that this allegation was not supported by any evidence of record and did not have a reasonable color of validity.<sup>32</sup> The record indicates that the Office had considered Dr. Auerbach's report as appropriate in reaching its decisions in the case. The Office had also previously entertained similar contentions by appellant regarding Dr. Auerbach's report.

Appellant, therefore, did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to a merit review.<sup>33</sup>

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to

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<sup>28</sup> 20 C.F.R. § 10.608(b).

<sup>29</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

<sup>30</sup> The Board notes that appellant previously had accepted right shoulder claim, which had resolved and the evidence necessary for her present right shoulder claim, would need to relate to the present time frame.

<sup>31</sup> *Edward W. Malaniak*, 51 ECAB 279 (2000).

<sup>32</sup> *See Nora Favors*, 43 ECAB 403 (1992).

<sup>33</sup> *See James E. Norris*, 52 ECAB 93 (2000).

reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that her right shoulder and neck conditions are causally related to her accepted employment injuries. The Board also finds that appellant was not entitled to intermittent wage-loss compensation for the period August 25 to October 10, 2003. The Board further finds that the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 11 and January 28, 2004 and December 31 and June 25, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 2, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member