



syndrome due to factors of her federal employment. She stopped work on December 22, 1995 and returned to work with restrictions on January 9, 1996. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and an aggravation of brachial plexus lesions or thoracic outlet syndrome.

The Office accepted that appellant sustained a recurrence of disability on October 1, 2002. She worked four hours per day limited duty until May 25, 2004, when she stopped work and did not return. On November 16, 2004 Dr. James Bethea, a Board-certified orthopedic surgeon and Office referral physician, diagnosed bilateral hand and wrist pain and left shoulder pain. He listed negative findings on examination for carpal tunnel syndrome. Dr. Bethea found that appellant had no evidence of thoracic outlet syndrome and required no work restrictions. Dr. Domenic J. DeMichele, a neurologist and appellant's attending physician, found that her employment-related condition had not resolved.

The Office referred appellant to Dr. Scott A. Stegbauer, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Bethea and Dr. DeMichele regarding whether she sustained an employment-related condition or disability. In a report dated March 24, 2005, Dr. Stegbauer found that appellant had no objective evidence of thoracic outlet syndrome. He diagnosed mild carpal tunnel syndrome which was not disabling. Dr. Stegbauer opined that she could work four hours per day in her limited-duty position and also perform her full-time regular employment duties.

By decision dated August 16, 2005, the Office terminated appellant's compensation effective September 4, 2005. The Office found that the weight of the medical evidence, as represented by the opinion of the impartial medical examiner, established that she had no further disability due to her accepted employment injury.<sup>2</sup>

On November 4, 2005 appellant requested reconsideration of her claim and submitted additional medical evidence. In a decision dated February 7, 2006, the Office denied modification of its August 16, 2005 decision terminating her wage-loss compensation.

Appellant, through her representative, again requested reconsideration on January 25, 2007. She contended that Dr. Bethea and Dr. Stegbauer did not reference the statement of accepted facts in their reports. Appellant resubmitted September 19 and October 24, 2005 reports from Dr. R. Joseph Healy, a neurologist, a June 10, 2004 thoracic outlet study and a September 19, 2005 cervical spine study and electromyogram (EMG). She also submitted a May 9, 2005 thoracic outlet study by Dr. DeMichele, who found that the study was abnormal and recommended clinical correlation.

In a report dated April 25, 2006, Dr. DeMichele diagnosed thoracic outlet syndrome. He based the diagnosis on a history, physical examination and the results of a thoracic outlet syndrome study. Dr. DeMichele noted that those who performed repetitive work were at increased risk for thoracic outlet syndrome. In a duty status report dated August 30, 2006, he diagnosed carpal tunnel syndrome and thoracic outlet syndrome and listed work restrictions. On

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<sup>2</sup> The Office did not terminate authorization for medical benefits.

May 30, 2006 Dr. DeMichele opined that appellant's carpal tunnel syndrome and thoracic outlet syndrome were worsening.

In a progress report dated December 18, 2006, Dr. Healy diagnosed bilateral carpal tunnel syndrome and "thoracic outlet syndrome in the form of pectoralis minor syndrome." He stated:

"I have told [appellant] that she should not use her arms above the horizon and this is in my note of October 2005. She says workers' comp[ensation] is denied because 'no doctor has put that in the report' but this has been her number one most chronic problem for the past 12 years. I have told [appellant] that all the workers' comp[ensation] people have to do is to read my notes and it is all in there."

Dr. Healy also diagnosed carpal tunnel syndrome and recommended a change of occupation.

By decision dated February 6, 2007, the Office denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</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>4</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>5</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>6</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>7</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>8</sup> While the reopening of a case may be predicated

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<sup>3</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>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 20 C.F.R. § 10.608(b).

<sup>7</sup> *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

<sup>8</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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>9</sup>

### ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and an aggravation of brachial plexus lesions or thoracic outlet syndrome. Appellant stopped work on May 25, 2004 and did not return. The Office found that a conflict existed between Dr. DeMichele, her attending physician, and Dr. Bethea, who provided a second opinion evaluation, on the issue of whether appellant had any further employment-related condition or disability. The Office referred appellant to Dr. Stegbauer for an impartial medical examination. In a report dated March 24, 2005, Dr. Stegbauer found that she had no objective findings of thoracic outlet syndrome and had mild carpal tunnel syndrome which would not prevent her from performing her usual employment duties. Based on his opinion, the Office terminated appellant's compensation for wage loss effective September 4, 2005.

In her request for reconsideration, appellant contended that Dr. Bethea's report was of little probative value as he did not refer to the statement of accepted facts. She also alleged that neither Dr. Bethea nor Dr. Stegbauer "based their reports on the statement of accepted facts." Appellant, however, has failed to raise a legal argument showing how the physician's failure to specifically reference the statement of accepted facts was prejudicial or altered the outcome of their reports. Thus, her argument does not have a reasonable color of validity such that it would warrant reopening her case for merit review.<sup>10</sup>

Appellant resubmitted reports from Dr. Healy dated September 19 and October 24, 2005 and the results of diagnostic studies dated June 10, 2004 and September 19, 2005. As this evidence duplicated evidence already in the case record, it does not constitute a basis for reopening the case.<sup>11</sup> Appellant additionally submitted a May 9, 2005 thoracic outlet study from Dr. DeMichele who interpreted the study as abnormal and recommended clinical correlation. The diagnostic study, however, is not relevant to the issues of whether appellant can perform her employment duties and the causal relationship between any disability and her employment injury. The Board 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>12</sup>

On April 25, 2006 Dr. DeMichele diagnosed thoracic outlet syndrome and explained that he based appellant's diagnosis on a history, physical examination and the results of a thoracic outlet syndrome study. He indicated that repetitive work increased the risk of thoracic outlet syndrome. Dr. DeMichele's report did not address the relevant issue of whether appellant could

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<sup>9</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>10</sup> *Elaine M. Borghini*, 57 ECAB \_\_\_\_ (Docket No. 05-1102, issued May 3, 2006).

<sup>11</sup> *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>12</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001).

perform her employment duties. As discussed, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup>

In an August 30, 2006 form report, Dr. DeMichele diagnosed carpal tunnel syndrome and thoracic outlet syndrome. He listed work restrictions. On May 30, 2006 Dr. DeMichele opined that appellant's carpal tunnel syndrome and thoracic outlet syndrome were worsening. His reports, however, are substantially similar to his prior reports of record and thus do not constitute relevant new evidence.<sup>14</sup>

On December 18, 2006 Dr. Healy diagnosed bilateral carpal tunnel syndrome and thoracic outlet syndrome. He found that she should not work with her arms "above the horizon." Dr. Healy referred the Office to his treatment notes. His report, however, is substantially similar to his previous report dated October 24, 2005 and, consequently, is cumulative in nature and insufficient to warrant reopening the case for merit review.<sup>15</sup>

On appeal, appellant contends that she submitted objective tests which establish that she has thoracic outlet syndrome. As discussed, however, the relevant issue is whether she has any disability from employment related to her employment injury.

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 submit new and relevant evidence not previously considered. She did not meet any of the necessary regulatory requirements, and therefore she is not entitled to further merit review.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for review of the merits of her claim under 5 U.S.C. § 8128.

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<sup>13</sup> *Id.*

<sup>14</sup> *See Severiano Marquez*, 41ECAB 637 (1990).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 6, 2007 is affirmed.

Issued: October 3, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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