

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

S.B., Appellant)	
)	
and)	Docket No. 10-825
)	Issued: October 20, 2010
U.S. POSTAL SERVICE, GARY PLANT,)	
Gary, IN, Employer)	
)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 2, 2010 appellant, through his representative, filed a timely appeal from the August 26, 2009 nonmerit decision of the Office of Workers' Compensation Programs' denying her request for reconsideration. The last merit decision of the Office was an August 3, 2009 decision denying appellant's occupational disease claim. Because more than 180 days elapsed between the most recent merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

¹ Under the Board's Rules of Procedure, in computing the date of filing of an appeal, the 180 days begins to run on the day following the date of the Office decision. 20 C.F.R. § 501.3(f)(2). The time began to run from the August 3, 2009 Office decision on August 4, 2009 from which 180 days fell on Sunday, January 31, 2010. Appellant had until the close of the next business day, February 1, 2010, to timely submit an appeal; however, the postmark of the appeal was February 2, 2020. See 20 C.F.R. § 501.3(F)(1).

FACTUAL HISTORY

On April 8, 2009 appellant, then a 49-year-old automation clerk, filed an occupational disease claim alleging her right shoulder bursitis and tendinitis, left shoulder pain and upper back pain and spasm were employment related.² She first became aware of these conditions on January 20, 2007, but did not realize they were employment related until January 23, 2009.

In an April 21, 2009 attending physician's report (Form CA-20), Dr. Mark O. Carter, a treating Board-certified family practitioner, diagnosed bilateral shoulder tendinitis. He checked "yes" to the question of whether the condition was employment related.

By letter dated May 7, 2009, the Office informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised as to the medical and factual evidence needed to support her claim, which was to be submitted within 30 days.

In a June 2, 2009 note, Dr. Carter stated that appellant had chronic bilateral shoulder pain as a result of work activities, which resulted in bilateral shoulder surgery. He related that appellant recovered and returned to work in another position as an automation clerk in May 2008. Dr. Carter stated that appellant's current conditions included acromioclavicular joint arthritis with prominent spurs, subacromial impingement with cystic changes to humeral head and tendinitis of rotator cuff. He attributed her chronic pain to the repetitive use of upper arms required by her automation clerk position.

By decision dated August 3, 2009, the Office denied appellant's claim. (RD 8/3/2009) It found the medical evidence of record insufficient to establish a causal relationship between her employment duties as an automation clerk and the bilateral shoulder and back conditions she claimed.

On August 17, 2009 appellant requested reconsideration. (RD 8/20/2009) No evidence was submitted with her request.

By decision dated August 26, 2009, the Office denied appellant's request for further merit review.³

² The Office noted that appellant had prior accepted claims. Appellant's September 27, 2000 traumatic injury claim was accepted for a laceration/contusion of the right thumb. A May 13, 2003 occupational disease claim was accepted for a left shoulder tendinitis/sprain; chronic impingement and partial tear rotator cuff tendon; impingement and partial tear rotator cuff tendon. The Office accepted a January 20, 2007 occupational disease claim for a right shoulder impingement syndrome with labral and cartilage tear with surgery performed in June 2007 and aggravation of the left shoulder tendinitis/sprain, chronic impingement and partial tear rotator cuff with surgery performed in July 2007.

³ The Board notes that, following the August 26, 2009 decision, the Office received additional evidence. However, the Board may not consider new evidence for the first time on appeal. See 20 C.F.R. §§ 501.2(c); *M.B.*, 60 ECAB ___ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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) submit relevant and pertinent new evidence not previously considered by the Office.⁵ 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.⁶ 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.⁷

ANALYSIS

Appellant's August 17, 2009 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any evidence with her request for reconsideration. Consequently, she not entitled to a review of the merits of her claim based on the above-noted requirements under section 10.606(b)(2).

The Board finds that the Office properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(2), and thus the Office properly denied her August 17, 2009 request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that 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 20 C.F.R. § 10.606(b)(2). *See J.M.*, 60 ECAB ____ (Docket No. 09-218, issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ 20 C.F.R. § 10.607(a). *See S.J.*, 60 ECAB ____ (Docket No. 08-2048, issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ 20 C.F.R. § 10.608(b). *See Y.S.*, 60 ECAB ____ (Docket No. 08-440, issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2009 is affirmed.

Issued: October 20, 2010
Washington, DC

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

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

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