

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

V.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Stony Brook, NY, Employer**

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**Docket No. 11-1554
Issued: February 17, 2012**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 21, 2011 appellant, through counsel, filed a timely appeal from a January 28, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. There is no merit decision of record issued within 180 days of June 21, 2011, the date he filed his appeal with the Board. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.

On appeal, counsel asserts that the medical evidence of record, in particular the August 11, 2010 report of Dr. Philip L. Schrank, an attending Board-certified orthopedic surgeon, established that appellant had continuing residuals of accepted August 14, 2006 right shoulder injuries after OWCP terminated his wage-loss and medical compensation benefits effective October 30, 2008.

¹ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board. By decision and order issued November 12, 2009,² the Board affirmed an October 30, 2008 decision of OWCP terminating appellant's wage-loss and medical compensation finding that the weight of the medical evidence established that accepted August 14, 2006 right shoulder injuries had ceased without residuals. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

By letter dated November 3, 2010 and received by OWCP on November 4, 2010, appellant, through counsel, requested reconsideration. Counsel asserted that there remained an unbroken legal chain of causation between the accepted injuries and appellant's continuing right shoulder symptoms. He submitted additional medical evidence.

In reports from November 7, 2008 to November 30, 2010, Dr. Philip L. Schrank, an attending Board-certified orthopedic surgeon, noted right shoulder weakness and restricted motion. He related that appellant was unable to perform activities of daily living with his right arm due to pain, weakness, paresthesias and limited motion.

In an August 11, 2010 report, Dr. Schrank stated that on examinations from November 7, 2008 through June 1, 2010, he observed restricted right shoulder motion and 4/5 weakness of the supraspinatus and external rotators on the right. Appellant also complained of chronic right shoulder pain with paresthesias into the right hand. Dr. Schrank opined that appellant's right shoulder condition continued to be related to the accepted August 14, 2006 injuries because appellant described "full function of his right shoulder prior to that work-related injury."

By decision dated January 28, 2011, OWCP denied reconsideration of the October 30, 2008 decision terminating appellant's compensation on the grounds that the evidence submitted was cumulative and repetitious.³ It found that Dr. Schrank's reports merely summarized his previous findings. OWCP further found that counsel's legal argument regarding causation was insufficient to warrant a review of the case on the merits.

² Docket No. 09-738 (issued November 12, 2009).

³ OWCP's January 28, 2011 decision mentions a November 30, 2008 OWCP decision. However, there is no decision of record dated November 30, 2008. OWCP appears to be referring to the October 30, 2008 termination decision. The Board notes that this is a harmless typographical error. Additionally, the January 28, 2011 decision misstates that the Board issued its November 12, 2009 decision and order on November 12, 2010. The Board notes that this is also a nondispositive typographical error.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁷ The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.⁸ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP 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.⁹

ANALYSIS

OWCP issued an October 30, 2008 decision terminating appellant's wage-loss and medical compensation benefits as the medical evidence established that accepted right shoulder injuries had ceased without residuals. The Board affirmed this decision on November 12, 2009. Appellant, through counsel, requested reconsideration on November 4, 2010. He asserted that the chain of legal causation between the accepted August 14, 2006 right shoulder injuries remained unbroken, and that additional medical evidence clearly established continuing residuals of the accepted injuries. In a January 28, 2011, OWCP denied reconsideration as the evidence submitted was cumulative and repetitious.

The submitted reports from Dr. Schrank, an attending Board-certified orthopedic surgeon, dated from November 7, 2008 to November 30, 2010 related appellant's account of chronic right shoulder pain, and observed weakness and restricted motion on examination. On August 11, 2010 Dr. Schrank opined that appellant's ongoing right shoulder condition was related to the accepted injuries as his right shoulder was fully functional before August 14, 2006. The Board finds that, while the reports are new, they are repetitive of Dr. Schrank's reports previously of record prior to the October 30, 2008 decision. Cumulative and repetitive evidence

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b). See also *D.E.*, 59 ECAB 438 (2008).

⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *Annette Louise*, 54 ECAB 783 (2003).

is insufficient to warrant reopening a claim for further merit review.¹⁰ Similarly, the Board finds that counsel's argument of an unbroken legal chain of causation is repetitive of his arguments previously of record, and therefore insufficient to warrant a review of the claim on its merits.¹¹

The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that the medical evidence, in particular Dr. Schrank's August 11, 2010 report, established that he had continuing residuals of accepted August 14, 2006 right shoulder injuries. The Board only has jurisdiction over whether OWCP properly denied further merit review of the claim. Appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

¹⁰ See *L.H.*, 59 ECAB 253 (2007); *A.R.*, Docket No. 11-1358 (issued January 3, 2012).

¹¹ *A.R.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 28, 2011 is affirmed.

Issued: February 17, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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