

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

FAYE J. JAMES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 05-1329
Issued: December 9, 2005**

Appearances:
Faye J. James, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 7, 2005 appellant filed a timely appeal of a March 15, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying review of her request for reconsideration. The Office previously denied her claim on the merits in a decision dated March 15, 2004. Because more than one year has elapsed between the March 15, 2004 merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the Office's March 15, 2005 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether 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).

FACTUAL HISTORY

On January 2, 2004 appellant, then a 61-year-old parcel post keyer clerk, filed an occupational disease claim alleging that she developed bursitis and tendinitis of her left shoulder due to repetitive keying and dispatching mail and pushing and pulling cages by hand.

In a letter dated January 26, 2004, the Office advised appellant that the evidence was insufficient to determine whether she was entitled to benefits under the Federal Employees' Compensation Act as there was no medical evidence which provided a history of injury, diagnosis or work-related factors of her employment which could be connected to the conditions and/or events alleged. The Office requested that appellant provide additional factual information along with medical evidence from her treating physician which described her symptoms, the results of examinations and tests, diagnosis and treatment provided along with the physician's opinion, with medical reasoning, on the cause of her condition.

In response, appellant submitted a statement of January 29, 2004 along with a letter from the American Postal Workers Union. No medical evidence was submitted.

By decision dated March 15, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant had established that the claimed events occurred, but that there was no medical evidence that provided a history of injury, diagnosis or work-related factors of her employment, which could be connected to the events alleged.

Appellant disagreed with this decision and requested reconsideration on March 4, 2005. She submitted a statement in which she described her job duties in various positions she held and noted that clerks doing the dispatch job were not allowed to use forklifts. She further noted her limitations with her shoulder and treatments she underwent.

The evidence on file, submitted after the Office's March 15, 2004 decision, indicates that appellant sought medical treatment for her shoulder condition from Dr. William Langworthy, a Board-certified orthopedic surgeon, and Dr. Anthony Checroun, also a Board-certified orthopedic surgeon, and went through a physical therapy modality before and after her left shoulder arthroscopic subacromial decompression and arthroscopic distal clavicle resection on February 26, 2004. Copies of medical treatment notes and reports from the physicians were provided along with a May 1, 2003 magnetic resonance imaging (MRI) scan of the left shoulder and copies of the physical therapy notes and reports, some signed by the physicians, prior to and subsequent to the February 26, 2004 surgery.

In a March 4, 2003 treatment note, Dr. Langworthy noted that appellant had subacromial bursitis and probable bicipital tendinitis. In a December 11, 2003 report, he noted that appellant worked for the employing establishment and had been having problems with her left shoulder. Dr. Langworthy advised that the x-rays and MRI scan studies taken in the past have indicated problems with the acromial joint with evidence of inflammation, but no significant rotator cuff problem. He stated that he suspected that appellant's work aggravated the shoulder. Dr. Langworthy also stated that he could not date the arthritis in the AC joint, but that he

suspected that the work was connected in this incident and had aggravated her problem. Other treatment notes from Dr. Langworthy were provided.

In a January 22, 2004 medical report, Dr. Checroun noted that appellant had complaints of left shoulder pain for the past 10 to 12 years and that she apparently saw a physician for inflammation in the left shoulder 10 to 12 years ago while at work. He noted that appellant had several injections since that time and that her shoulder hurt after doing a lot of overhead work. Dr. Checroun reviewed the objective evidence and provided an impression of left shoulder AC joint pain, arthritis and impingement and advised that appellant was a surgical candidate. Other treatment notes from Dr. Checroun were provided.

Copies of physical therapy notes and reports, some signed by Dr. Langworthy and Dr. Checroun, were also provided regarding appellant's left shoulder condition. Copies of physical therapy notes pertaining to low back pain from February, June, July and August 2004 were also provided.

By decision dated March 15, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of the March 15, 2004 decision. The Office found that appellant did not submit new, relevant medical evidence for review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹ 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.² 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.³ 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.⁴

ANALYSIS

In the March 15, 2005 decision, the Office found that appellant did not submit new and relevant medical evidence. The Office erred in this finding. The Office, in its previous March 15, 2004 merit decision, denied the claim on the grounds that appellant did not submit medical evidence relating her shoulder condition to her employment. On reconsideration,

¹ 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.607(a).

⁴ 20 C.F.R. § 10.608(b).

appellant submitted new medical evidence supporting that her employment activities aggravated her claimed shoulder condition.

Specifically, Dr. Langworthy's December 11, 2003 report noted that appellant's work duties aggravated appellant's shoulder condition. This is relevant evidence that was not previously of record. While this evidence might not be sufficient to meet appellant's burden of proof to establish her claim, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁵ As noted above, appellant submitted relevant and pertinent evidence not previously considered by the Office.

Therefore, the Board will set aside the Office's March 15, 2005 decision and remand the case so that the Office may properly consider the evidence and for issuance of an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

⁵ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2005 decision of the Office of Workers' Compensation Programs is hereby set aside and the case returned to the Office for further development consistent with this decision.

Issued: December 9, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board