



## **FACTUAL HISTORY**

On July 25, 2001 appellant, then a 32-year-old mail handler, filed a claim for traumatic injury, Form CA-1, alleging that she sustained an injury to her right arm and elbow when she was picking up and placing sacks into a container. The Office accepted her claim for right arm and shoulder strain.

On June 21, 2005 appellant filed a request for a schedule award.<sup>2</sup> She attached an attending physician's report, Form CA-20, from Dr. Jean Simard, a Board-certified orthopedic surgeon. In the April 27, 2005 report, Dr. Simard diagnosed right shoulder impingement and reported that appellant had undergone arthroscopy and acromioplasty on her right shoulder on October 5, 2004. He indicated that the effects of appellant's injury were not expected to be permanent, but stated that she was only allowed to lift 30 pounds on a continuous basis and 40 pounds intermittently.

On June 28, 2005 the Office requested a more detailed assessment of appellant's permanent impairment from Dr. Simard. In a report dated July 6, 2005, Dr. Simard stated that appellant had done very well following her surgery and had reached maximum medical improvement by April 26, 2005. He found that she had full strength and range of motion and no atrophy in her right shoulder, though she did have pain with too much overhead lifting. Dr. Simard stated that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had no permanent impairment in her right shoulder, though she was under continuing work restrictions for overhead lifting.

On August 17, 2005 appellant's record was referred to the Office medical adviser Dr. Harry L. Collins, a Board-certified orthopedic surgeon, who found that appellant had no permanent partial impairment of her right arm. Dr. Collins noted that Dr. Simard had found maximum medical improvement as of April 26, 2005 and had pointed to no objective evidence of impairment.

By decision dated August 19, 2005, the Office denied appellant's request for a schedule award on the grounds that the medical evidence provided by her treating physician established that she did not have a permanent impairment of her right arm.

On August 2, 2006 appellant requested reconsideration of the Office's decision on the basis of a July 31, 2006 medical examination. She stated that Dr. Simard had requested "necessary documents to resubmit the updated information" and asked that the Office give him time to submit this information. Appellant attached a duty status report, Form CA-17, prepared by Dr. Simard on July 31, 2006, which renewed appellant's working restrictions of 30 pounds of lifting on a continuous basis and 40 pounds on an intermittent basis.

By nonmerit decision dated August 15, 2006, the Office declined to conduct a merit review of its August 19, 2005 decision. It found that a reconsideration of the case was not warranted based on the evidence that appellant had submitted. The Office found that the duty

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<sup>2</sup> Appellant previously filed a claim for a schedule award for her right arm on April 30, 2002. The claim was denied on October 3, 2002 and reconsideration of the decision was denied on June 23, 2003.

status report from Dr. Simard was irrelevant because it did not indicate whether appellant had a permanent partial impairment. It also found that the request to give Dr. Simard more time to submit additional information was not sufficient to reopen the case for review. The Office noted that appellant had not argued that the previous decision contained an error of fact or law.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.<sup>3</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### **ANALYSIS**

The Office denied appellant's claim for a schedule award for her right arm on August 19, 2005 on the grounds that the medical evidence established that she had no permanent impairment of her right arm. The Board finds that appellant's request for reconsideration met none of the regulatory requirements for a review of the merits of this decision.

Appellant's August 2, 2006 request for reconsideration did not allege that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. She is thus not entitled to further review on the merits of her case under the first two sections of 10.606(b)(2).<sup>6</sup> Though appellant stated that new medical evidence formed the basis for reconsideration, the report she submitted with her request was irrelevant: Dr. Simard's July 31, 2006 report did not indicate a change in her condition or discuss whether she had a permanent partial impairment of her right arm. In her request for reconsideration, appellant asked that the Office provide Dr. Simard time to submit additional information. The Board finds that the Office is not required to hold a record open for evidence and cannot make a determination about whether to reopen a case for review based on the evidence that is not before it. As there was no relevant and pertinent new evidence for the Office to consider, appellant was not entitled to review under the third section of 10.606(b)(2).<sup>7</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

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

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *Id.* at § 10.606(b)(2)(i) and (ii).

<sup>7</sup> *Id.* at § 10.606(b)(2)(iii).

Because appellant did not meet any of the statutory requirements for a review of the merits of her claim, the Office properly denied her August 2, 2006 request for reconsideration.

**CONCLUSION**

The Board finds that the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 15, 2006 is affirmed.

Issued: April 23, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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