

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

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**J.H., Appellant**

**and**

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

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**Docket No. 07-40  
Issued: July 3, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 2, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 20, 2006 merit decision denying her recurrence of disability claim and the Office's August 25, 2006 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries; (2) whether appellant met her burden of proof to establish that she sustained a new occupational injury prior to October 8, 2001, other than those which had been previously accepted; and (3) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This is the third appeal in this case. In the first appeal, the Board issued a decision on December 14, 2004 affirming the Office's determination that appellant did not establish that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries and that she did not establish that she sustained a new occupational injury prior to October 8, 2001, other than those which had been previously accepted.<sup>1</sup> On January 25, 1991 appellant, then a 32-year-old letter sorting machine clerk, filed an occupational disease claim, alleging that she sustained upper extremity injuries beginning in November 1990 due to repetitive typing and the handling of mail. The Office accepted that she sustained left wrist tendinitis, left medial epicondylitis, left trapezius and shoulder strains, left shoulder impingement, myofascial pain syndrome and bilateral carpal tunnel syndrome. Appellant filed an occupational disease claim in September 1991 which was accepted for right wrist and forearm tendinitis.<sup>2</sup> In August 1999, she returned to full-time work as a modified general clerk<sup>3</sup> and she stopped work on October 8, 2001 claiming that she sustained a recurrence of total disability due to her accepted employment injuries.<sup>4</sup> On July 22, 2003 appellant filed an occupational disease claim alleging that, at some point prior to October 8, 2001, she sustained a new upper extremity injury due to her job duties which caused her to stop work on October 8, 2001.

In the second appeal, the Board issued a decision on June 8, 2006 setting aside the Office's denial of appellant's claims for a recurrence of total disability on or after October 8, 2001 and for a new occupational injury sustained prior to October 8, 2001.<sup>5</sup> The Board found that the Office did not review evidence received prior to the issuance of its November 1, 2005 decision denying appellant's claim, including reports of Dr. Margaret R. Atterbury, an attending Board-certified internist, dated July 29 and September 9, 2003, February 17, June 8, August 17, November 9 and December 29, 2004 and February 23, May 6 and September 7, 2005. The Board remanded the case to the Office for consideration of this evidence and the issuance of an appropriate decision.

In a July 20, 2003 report, Dr. Atterbury stated that appellant reported that she was having difficulty sleeping due to shoulder pain and numbness and tingling in her hands. She indicated that on examination appellant exhibited tenderness over both medial epicondyles and pain on

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<sup>1</sup> Docket No. 04-576 (issued December 14, 2004).

<sup>2</sup> In November 1998, appellant underwent left shoulder decompression and left carpal tunnel release surgery which was authorized by the Office. By decision dated October 20, 1998, the Office granted appellant a schedule award for an eight percent permanent impairment of her right arm. By decision dated April 9, 2001, the Office granted her a schedule award for an additional 4 percent permanent impairment of her right arm and a 45 percent permanent impairment of her left arm.

<sup>3</sup> The job involved such tasks as answering telephones, engaging in light filing and making photocopies. It did not require lifting more than five pounds, typing more than one half hour in the morning and one half hour in the evening or engaging in overhead work, reaching, repetitive hand motions, pushing and pulling.

<sup>4</sup> The files for appellant's multiple claims have been combined in the present case file. Appellant retired from the employing establishment effective June 24, 2002.

<sup>5</sup> Docket No. 06-327 (issued June 8, 2006).

right shoulder abduction which was limited to 110 degrees. Dr. Atterbury diagnosed bilateral shoulder tendinitis, bilateral epicondylitis and bilateral carpal tunnel syndrome and indicated that these conditions were work related. In a September 9, 2003 report, she stated that on examination appellant exhibited 110 degrees of right shoulder motion and that internal and external rotation of the right shoulder was “exquisitely painful.” Dr. Atterbury diagnosed work-related bilateral shoulder tendinitis, bilateral medial and lateral epicondylitis and bilateral wrist tendinitis. In a February 17, 2004 report, she stated that on examination appellant exhibited 110 degrees of right shoulder motion and that there was pain on internal and external rotation of the right shoulder. Dr. Atterbury diagnosed work-related bilateral shoulder tendinitis, bilateral epicondylitis, bilateral wrist tendinitis and bilateral carpal tunnel syndrome.

In a June 8, 2004 report, Dr. Atterbury indicated that appellant had full range of shoulder motion but that there was pain on internal and external rotation of the right shoulder. She noted that appellant reported that her symptoms were about the same as they were in February 2004 and provided a similar diagnosis of appellant’s upper extremity conditions. In an August 17, 2004 report, Dr. Atterbury stated that appellant reported increased right shoulder and right hand pain. She exhibited 110 degrees of right shoulder motion and that there was pain on internal and external rotation of the right shoulder. In a November 9, 2004 report, Dr. Atterbury stated that appellant reported improved symptoms and that on examination she exhibited tenderness in her palms, more on the right.

In a December 29, 2004 report, Dr. Atterbury stated that appellant reported that her pain was unchanged and that she exhibited pain on internal rotation of the right shoulder and pain in both epicondyles. In a February 23, 2005 report, she noted that on examination appellant exhibited pain in the first digit of her right hand, pain on extreme internal and external rotation of the right shoulder and pain in both epicondyles. In a May 6, 2005 report, Dr. Atterbury stated that appellant reported a flare-up of general aches and noted that on examination she exhibited pain on internal rotation and extreme of the right shoulder and tenderness in both epicondyles and wrists. In a September 7, 2005 report, Dr. Atterbury indicated that appellant had 180 degrees of abduction of the right shoulder and tenderness of both epicondyles. She continued to diagnose work-related bilateral shoulder tendinitis, bilateral epicondylitis, bilateral wrist tendinitis and bilateral carpal tunnel syndrome.<sup>6</sup>

On remand the Office reevaluated appellant’s claim in accordance with the instructions of the Board’s June 8, 2006 decision. In a June 20, 2006 decision, the Office denied appellant’s claim on the grounds that she did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries and did not meet her burden of proof to establish that she sustained a new occupational injury prior to October 8, 2001.

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<sup>6</sup> After the Office’s November 1, 2005 decision, appellant submitted March 20 and May 22, 2006 reports of Dr. Michael J. Bertram, an attending Board-certified physical medicine and rehabilitation physician, who diagnosed various upper extremity conditions, including left rotator cuff tendinopathy, bilateral wrist tendinitis, bilateral epicondylitis and bilateral carpal tunnel syndrome and recommended various treatment options such as acupuncture.

In a July 20, 2006 letter, appellant requested reconsideration of her claim. She alleged that her work stoppage on October 8, 2001 was the result of a worsening of her employment-related condition over a long period and asserted that the employing establishment did not provide her with ergometric equipment to alleviate her symptoms. Appellant resubmitted copies of reports of Dr. Atterbury, dated between February 1999 and May 2002.

In a June 4, 2001 report, Dr. Mark J. Goddard, an attending Board-certified physical medicine and rehabilitation physician, noted that appellant reported experiencing significantly worse pain in her right shoulder over the prior five or six months as well as increased pain, numbness and tingling in her fingers. He suggested that appellant participate in physical therapy and “rehabilitation psychology” programs and recommended several medications. In a July 17, 2006, Dr. Bertram noted that appellant reported increased symptoms and stated that on examination she exhibited multiple areas of trigger points and tenderness in her upper extremities and cervicothoracic spine. He diagnosed various upper extremity conditions, prescribed additional medication and recommended that she return in a month.

In an August 25, 2006 decision, the Office denied appellant’s request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained bilateral wrist tendinitis, right forearm tendinitis, left medial epicondylitis, left trapezius and shoulder strains, left shoulder impingement, myofascial pain syndrome and bilateral carpal tunnel syndrome in 1990 and 1991, during a period when she was required to type for 8 to 10 hours per day. In August 1999, appellant began working a light-duty clerical job for the employing establishment which did not require lifting more than five pounds, typing more than one half hour in the morning and one half hour in the evening or engaging in overhead work, reaching, repetitive hand motions, pushing and pulling. Appellant later claimed that she sustained a recurrence of total disability on October 8, 2001 due to her accepted employment injuries.

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<sup>7</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). The medical evidence must contain medical rationale explaining how the recurrence of total disability was related to the accepted employment injury. See *Judd* at 250.

In a June 20, 2006 decision, the Office denied appellant's claim on the grounds that she did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries.<sup>8</sup> In 10 reports dated between July 29, 2003 and September 7, 2005, Dr. Atterbury detailed her periodic evaluations of appellant's upper extremity conditions. Appellant variously reported to Dr. Atterbury that her upper extremity symptoms had worsened or stayed the same. Dr. Atterbury noted that on examination appellant periodically exhibited limited right shoulder motion and pain in her shoulders, elbows, wrists and hands. She diagnosed work-related bilateral shoulder tendinitis, bilateral epicondylitis, bilateral wrist tendinitis and bilateral carpal tunnel syndrome.

These reports, however, are of limited probative value regarding appellant's recurrence of disability claim in that they do not contain an opinion that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries.<sup>9</sup> Dr. Atterbury did not provide any opinion whatsoever in these reports regarding appellant's ability to work. She did not provide any description of the modified general clerk position appellant was performing when she stopped work on October 8, 2001 or otherwise indicate that her employment-related condition changed such that she was unable to perform the extremely limited duties of this position at any point after October 8, 2001.<sup>10</sup> Therefore, appellant has not shown a change in the nature and extent of her injury-related condition such that she sustained a recurrence of total disability on or after October 8, 2001. Moreover, appellant has not alleged and the evidence does not otherwise show that there was a change in the nature and extent of her light-duty job requirements.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>11</sup> has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the

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<sup>8</sup> In a June 8, 2006 decision, the Board instructed the Office to evaluate 10 reports of Dr. Atterbury, an attending Board-certified internist, because it had failed to do so in its November 1, 2005 decision. It is not necessary for the Board to reevaluate the sufficiency of the evidence appellant previously submitted in connection with her recurrence of disability claim as the Board has already determined in its December 14, 2004 decision that this evidence did not establish her recurrence of disability claim.

<sup>9</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>10</sup> After the Office's November 1, 2005 decision, appellant submitted March 20 and May 22, 2006 reports of Dr. Bertram, an attending Board-certified physical medicine and rehabilitation physician, who discussed appellant's upper extremity condition but he did not provide an opinion that she sustained a recurrence of disability on or after October 8, 2001.

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>12</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>13</sup>

### ANALYSIS -- ISSUE 2

Appellant also alleged that she sustained a new occupational injury, *i.e.*, an injury other than the injuries that were accepted as occurring in 1990 and 1991, that caused her to stop work on October 8, 2001. In a June 20, 2006 decision, the Office determined that appellant did not meet her burden of proof to establish that she sustained a new occupational injury prior to October 8, 2001.

The Board notes that the 10 reports of Dr. Atterbury, dated between July 29, 2003 and September 7, 2005, provide no opinion that appellant sustained a new occupational injury prior to October 8, 2001.<sup>14</sup> Although Dr. Atterbury listed several conditions which had not previously been accepted as employment related, including bilateral shoulder tendinitis and right epicondylitis, she provided no indication that these conditions were sustained prior to October 8, 2001, nor did she identify any employment factors which might have been responsible for causing a new occupational injury prior to October 8, 2001. As already noted, Dr. Atterbury did not provide any opinion in these reports regarding appellant's ability to work.<sup>15</sup> Therefore, the Office properly determined that appellant did not meet her burden of proof to establish that she sustained a new occupational injury prior to October 8, 2001, other than those which had been previously accepted.

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<sup>12</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>13</sup> *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). The medical evidence must contain a rationalized medical opinion explaining how the accepted employment factors caused or contributed to the claimed occupational injury. *See id.*

<sup>14</sup> It is not necessary for the Board to reevaluate the sufficiency of the evidence appellant previously submitted in connection with her new occupational injury claim as the Board has already determined in its December 14, 2004 decision that this evidence did not establish the occurrence of a new occupational injury.

<sup>15</sup> Moreover, the March 20 and May 22, 2006 reports of Dr. Bertram do not provide an opinion that appellant sustained a new occupational injury.

### **LEGAL PRECEDENT -- ISSUE 3**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>16</sup> the Office's regulation provides that the evidence or argument submitted by 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>17</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>18</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>19</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case<sup>20</sup> and that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>21</sup>

### **ANALYSIS -- ISSUE 3**

In connection with her July 20, 2006 reconsideration request, appellant argued that her work stoppage on October 8, 2001 was the result of a worsening of her employment-related condition over a long period and asserted that the employing establishment did not provide her with ergonomic equipment to alleviate her symptoms. However, appellant has already provided a similar argument on numerous prior occasions and the Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>22</sup> She resubmitted copies of reports of Dr. Atterbury, dated between February 1999 and May 2002, but the resubmission of medical reports which have already been considered by the Office would not require reopening of her claim for merit review.

Appellant also submitted a June 4, 2001 report of Dr. Goddard, an attending Board-certified physical medicine and rehabilitation physician and a July 17, 2006 report of Dr. Bertram which had not previously been considered by the Office. Both Dr. Goddard and Dr. Bertram noted that appellant reported increased upper extremity symptoms and recommended treatment options. However, the submission of these reports would not require reopening of appellant's claim for merit review because the reports are not relevant to the main

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<sup>16</sup> 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).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

<sup>18</sup> 20 C.F.R. § 10.607(a).

<sup>19</sup> 20 C.F.R. § 10.608(b).

<sup>20</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>21</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>22</sup> See *supra* note 20 and accompanying text.

issues of the present case.<sup>23</sup> Neither physician provided an opinion that appellant sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries or that she sustained a new occupational injury prior to October 8, 2001, other than those which had been previously accepted.<sup>24</sup>

Appellant has not established that the Office improperly denied her request for further review of the merits of its June 20, 2006 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to 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 constitute relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after October 8, 2001 due to her accepted employment injuries and did not meet her burden of proof to establish that she sustained a new occupational injury prior to October 8, 2001. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>23</sup> See *supra* note 21 and accompanying text.

<sup>24</sup> The Board further notes that Dr. Goddard's report predated appellant's claimed October 8, 2001 recurrence of disability and, therefore, would not be relevant to appellant's medical condition on or after that date.



**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 25 and June 20, 2006 decisions are affirmed.

Issued: July 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