

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

---

**M.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, OR, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 08-1363  
Issued: December 22, 2008**

*Appearances:*

*Paul H. Felser, Esq., for the appellant*

*No appearance, for the Director*

Oral Argument: November 18, 2008

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 4, 2008 nonmerit decision, denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than one year has elapsed between the Office's last merit decision dated December 12, 2006 and the filing of this appeal on April 8, 2008 the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

---

<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a July 24, 2007 decision of the Board finding that appellant had established that the event occurred as alleged, but affirming the Office's denial of the claim on the grounds that causal relation had not been established. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

## 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

This case is before the Board for the second time. In a decision dated July 24, 2007, the Board affirmed the Office's December 12, 2006 denial of appellant's occupational disease claim, on the grounds that the evidence failed to establish that the accepted events had caused a diagnosed condition. The findings of fact and conclusions of law are incorporated herein by reference.<sup>2</sup>

On September 10, 2006 appellant, a 35-year-old mail handler, filed an occupational disease claim alleging that he sustained a torn left rotator cuff, back pain and tendinitis as a result of pushing a mail container in the performance of duty. In support of his claim, he submitted medical evidence, including reports from his treating physician, Dr. John C. Austin, an orthopedic surgeon. On September 6, 2006 Dr. Austin stated that appellant sustained a left shoulder injury in December 2004 while pushing a mail cart. He diagnosed left shoulder partial thickness rotator cuff tear with rotator cuff tendinitis and left shoulder moderate acromioclavicular (AC) degenerative joint disease. On October 26, 2006 Dr. Austin diagnosed supraspinatus tendinopathy and bursitis with partial tearing. He indicated that appellant noted an acute worsening of left shoulder pain following the mail cart incident in December 2004.

In a decision dated December 12, 2006, the Office denied appellant's claim on the grounds that he failed to establish the fact of injury.<sup>3</sup> Appellant appealed the December 12, 2006 decision to the Board. In a decision dated July 24, 2007, the Board found that appellant had established that the event occurred as alleged, but denied the claim on the grounds that he had failed to establish that the accepted event caused an injury.

On December 11, 2007 appellant, through his representative, requested reconsideration. In support of the request, he submitted new medical evidence, which the representative contended was sufficient to establish a causal relationship between the accepted employment event and appellant's shoulder injury.

In an October 10, 2007 report, Dr. Austin diagnosed left rotator cuff tendinitis and AC degenerative joint disease. He related appellant's report that his shoulder pain began in December 2004 when pushing a mail cart and that he sustained a second injury in December 2005 in a motor vehicle accident. Dr. Austin opined that appellant's shoulder pain originated during the December 2004 incident, stating that "forceful pushing of the container, with it suddenly stopping," could have caused his rotator cuff tendinitis. He stated that it was

---

<sup>2</sup> Docket No. 07-649 (issued July 24, 2007).

<sup>3</sup> The Board notes that the Office properly treated appellant's claim as a traumatic injury claim, since the alleged event occurred in a single workday. See 20 C.F.R. § 10.5 (ee).

difficult to ascertain which of the two incidents significantly worsened his symptoms, but he suspected that the 2004 incident was “the major contributing cause.

On October 24, 2007 Dr. Austin stated that appellant sustained an aggravation of left shoulder chronic rotator cuff tendinitis and AC degenerative joint disease during the December 2004 incident. He opined within a reasonable degree of medical certainty, that “the majority of [appellant’s] shoulder pain” was a result of the mail cart incident.

In a report dated November 21, 2007, Dr. Austin stated that appellant’s job duties, which involved pushing heavy mail containers, repetitive pushing in forward flexion and overhead lifting, “certainly are likely to have created and further aggravated his rotator cuff tend[i]nitis.” He opined, within a reasonable degree of medical certainty, that the rotator cuff tendinitis originated during appellant’s injury.

In a November 4, 2007 report, Dr. Timothy J. Gray, a Board-certified osteopath, specializing in family practice, stated that he saw appellant between June 20 and September 11, 2006 for shoulder pain. He diagnosed supraspinous tendinitis, biceps tendinitis and administered steroid injections. Dr. Gray opined that pushing and pulling heavy containers of mail initially caused appellant’s condition.

By decision dated January 4, 2008, the Office denied appellant’s request for reconsideration.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,<sup>4</sup> the Office’s regulations provide 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>5</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>6</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>7</sup>

In implementing the one-year time limitation, the Office’s procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any

---

<sup>4</sup> 5 U.S.C. §§ 8101-8193. 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>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

subsequent merit decision on the issues.<sup>8</sup> This includes any hearing or review of the written record decision, any denial of modification following a reconsideration request, any merit decision by the Employees' Compensation Appeals Board (ECAB) and any merit decision following action by ECAB.<sup>9</sup>

### ANALYSIS

In support of a request for reconsideration, appellant submitted four medical reports which addressed the relevant issue in this case, namely, whether the accepted employment incident caused an injury. On November 4, 2007 Dr. Gray opined that pushing and pulling heavy containers of mail initially caused appellant's condition. In an October 10, 2007 report, Dr. Austin diagnosed left rotator cuff tendinitis and AC degenerative joint disease. He related appellant's report that his shoulder pain began in December 2004 when pushing a mail cart, stating that "forceful pushing of the container, with it suddenly stopping," could have caused his rotator cuff tendinitis and that he suspected that the 2004 incident was "the major contributing cause." On October 24, 2007 Dr. Austin stated that appellant sustained an aggravation of left shoulder chronic rotator cuff tendinitis and AC degenerative joint disease during the December 2004 incident and opined within a reasonable degree of medical certainty, that "the majority of [appellant's] shoulder pain" was a result of the mail cart incident. On November 21, 2007 he stated that appellant's job duties, which involved pushing heavy mail containers, repetitive pushing in forward flexion and overhead lifting, "certainly are likely to have created and further aggravated his rotator cuff tendinitis." Dr. Austin opined, within a reasonable degree of medical certainty, that the rotator cuff tendinitis originated during appellant's injury.

The medical reports submitted in support of appellant's request for reconsideration constitute relevant and pertinent new evidence related to the underlying issue in this case. They provided a degree of explanation and reasoning regarding the cause of appellant's condition that was not present in earlier reports. The Office noted that the medical evidence was insufficient to establish a causal relationship between the accepted event and the left shoulder injury. However, the standard for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. Rather, he must submit evidence that is relevant, pertinent and not previously considered by the Office. The Board finds the evidence submitted sufficient to require further review of the case on its merits.<sup>10</sup>

Accordingly, the Board finds that the Office improperly denied appellant's reconsideration request without conducting a merit review. Upon return of the case record, the Office shall conduct a merit review of the claim and, following any further development deemed necessary, issue an appropriate merit decision.

---

<sup>8</sup> *Larry L. Litton*, 44 ECAB 243 (1992). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Preliminary Processing*, Chapter 2.1602.3(b)(1) (October 2005).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

<sup>10</sup> *Id.* See *Donald T. Pippin*, 54 ECAB 631 (2003).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 4, 2008 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision.

Issued: December 22, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board