

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southfield, MI, Employer**

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**Docket No. 07-1996
Issued: January 16, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2007 appellant, through counsel, filed a timely appeal of a June 25, 2007 nonmerit decision denying her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated July 13, 2006 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.

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 11, 2006 appellant, then a 33-year-old city carrier, filed a claim for an occupational disease. On December 14, 2005 she first became aware of a bulging disc in her neck and first realized that this condition was caused by lifting, pushing and pulling at work. Appellant submitted treatment notes which covered intermittent dates from February 24 through

March 28, 2006 and medical reports dated February 14 and 24 and March 28, 2006 from Dr. Steven E. Newman, a Board-certified neurologist, which found that she sustained work-related traumatic right C6 radiculopathy, functional impairment of the dominant right upper extremity with demonstrable atrophy on circumferential measurements and weakness and functional impairment as determined by objective testing. Treatment notes covering intermittent dates during the period February 15 through April 14, 2006 from appellant's physical therapist addressed her neck problems. A patient history questionnaire was completed by appellant on February 14, 2006.

By letter dated May 4, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit additional factual and medical evidence within 30 days. Appellant did not respond within the allotted time period.

In a decision dated July 13, 2006, the Office denied appellant's claim. It found the evidence of record insufficient to establish that she sustained an injury while in the performance of duty.

By letter dated June 10, 2007, appellant, through counsel, requested reconsideration. She submitted a January 23, 2006 report of Dr. Douglas D.W. Lee, a Board-certified physiatrist, who reviewed a history that appellant experienced pain in the medial scapula and the right shoulder initially and later experienced pain in the base of her neck with pain radiating into the medial scapula and then the right upper extremity as a result of performing her work duties on December 14, 2005. Dr. Lee also reviewed her medical and family background. He reported his essentially normal findings on physical examination. Dr. Lee opined that appellant presented with a five-week history of right shoulder pain with radiating pain into her right upper extremity "relative to a work-related injury sustained on or around December 14, 2005." He wished to rule out cervical radiculopathy and a herniated cervical disc, especially C7 nerve roots on the right. Dr. Lee stated that appellant had possible carpal tunnel syndrome but related that this was unlikely based on his examination. Dr. Lee recommended a magnetic resonance imaging (MRI) scan of the cervical spine, an electromyogram examination for cervical radiculopathy versus carpal tunnel syndrome and continuation of appellant's physical therapy and restrictions. A February 6, 2006 report of Dr. Stephen D. Daly, a family practitioner, found that appellant had cervical radiculopathy. In a February 10, 2006 report, he stated that he had been treating appellant since December 17, 2005. Dr. Daly reported a history that appellant's right upper extremity had been increasingly painful from continuous pushing, pulling and lifting at work. He stated that an MRI scan of the cervical spine demonstrated a bulging disc with a small right paracentral disc protrusion at C6-7 which produced mild spinal stenosis and mild foraminal encroachment. Dr. Daly stated that this lesion correlated with appellant's area of pain. He opined that "this condition was caused or aggravated by her work." In a December 17, 2005 report, William Rogers, a physician's assistant, noted appellant's complaint of a shoulder injury sustained on December 14, 2005. He reported his normal findings on physical and neurological examination. In a December 23, 2005 report, Elizabeth A. Wineka, a physical therapist, opined that appellant's examination was consistent with possible carpal tunnel syndrome and cervical radiculopathy and lateral epicondylitis.

By decision dated June 25, 2007, the Office denied appellant's request for reconsideration on the grounds that it did not include relevant evidence and, thus, it was insufficient to warrant a merit review of the Office's prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹ the Office's regulation 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 of the merits.

ANALYSIS

In a July 13, 2006 decision, the Office found that appellant did not sustain an injury while in the performance of duty because the medical evidence of record did not establish that the claimed neck injury was causally related to factors of her federal employment. In a letter dated June 10, 2007, appellant disagreed with this decision and requested reconsideration. The relevant issue in this case is whether appellant's neck injury was causally related to factors of her employment. The Board notes that this issue is medical in nature.

Dr. Daly's February 6, 2006 report found that appellant had cervical radiculopathy. This evidence, however, is not relevant to the issue of whether appellant sustained a neck injury causally related to factors of her employment. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁴ Dr. Daly did not opine that appellant's cervical radiculopathy was causally related to her employment factors. Thus, his report is insufficient to warrant reopening appellant's claim for further merit review.

The December 17, 2005 report of Mr. Rogers, a physician's assistant, and December 23, 2005 report of Ms. Wineka, a physical therapist, do not constitute probative medical evidence

¹ 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).

² 20 C.F.R. § 10.606(b)(1)-(2).

³ *Id.* at § 10.607(a).

⁴ See *Patricia G. Aiken*, 57 ECAB ____ (Docket No. 06-75, issued February 17, 2006).

inasmuch as neither a physician's assistant nor a physical therapist are considered a physician under the Act.⁵

Dr. Lee's January 23, 2006 report found that appellant had a five-week history of right shoulder pain with radiating pain into her right upper extremity relative to a work-related injury sustained on or around December 14, 2005. Dr. Daly's February 10, 2006 report provided a history of the alleged employment injury. He opined that appellant's bulging disc with a small right paracentral disc protrusion at C6-7 which produced mild spinal stenosis and mild foraminal encroachment was caused or aggravated by her work. The Board finds that Dr. Lee's and Dr. Daly's reports constitute pertinent new and relevant medical evidence not previously considered by the Office which constitute a basis for reopening appellant's claim for merit review.⁶

Since appellant submitted evidence in support of her request for reconsideration which meets the third standard for obtaining a merit review of her case, the Board finds that the Office should have reopened the case for a review on the merits. Accordingly, the Board will remand the case to the Office for a review on the merits.

CONCLUSION

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

⁵ 5 U.S.C. § 8102(2). This subsection defines the term physician; *see Roy L. Humphrey*, 57 ECAB ____ (Docket No. 05-1928, issued November 23, 2005). (Medical opinion, in general, can only be given by a qualified physician); *see also David P. Sawchuk*, 57 ECAB ____ (Docket No. 05-1635, issued January 13, 2006) (Lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act.)

⁶ The requirement of reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge the burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office. *Sydney W. Anderson*, 53 ECAB 347 (2002).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2007 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further action consistent with this decision.

Issued: January 16, 2008
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