

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 07-2329
Issued: March 13, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 23, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 8, 2007 finding that she had not established an injury causally related to her federal employment. She also appealed a May 3, 2007 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed a right shoulder condition due to factors of her federal employment; and (2) whether the Office properly refused to reopen her case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 9, 2007 appellant, then a 52-year-old mail processor clerk, filed an occupational disease claim alleging that she sustained a right shoulder injury. She first sustained

a right shoulder injury in 1995 and continued to experience pain. Appellant first became aware of her current condition on May 18, 2006 and related the condition to her employment on that date. In a letter dated January 25, 2007, the Office informed appellant that additional factual and medical evidence was required to establish her claim. The Office allowed 30 days for a response.

In a letter dated February 14, 2007, appellant stated that her original claim for right shoulder injury had been destroyed by the Office. She stated that continued repetitive motion of her right shoulder caused her current condition. Appellant noted that she verified trays of mail weighing less than 10 pounds eight hours a day, five days a week. She stated that prior to the 1995 employment injury she lifted up to 25 pounds repetitively. Appellant submitted medical evidence regarding her 1995 employment injury as well as notes from the employing establishment health unit dated February 1995 through December 8, 2005. She submitted an authorization for medical attention dated October 12, 2006 completed by a nurse and an anesthesia record regarding right knee surgery on February 9, 2007.

By decision dated March 8, 2007, the Office denied appellant's claim finding that she had not submitted the necessary medical opinion evidence diagnosing a condition arising from her current lifting requirements.

Appellant requested reconsideration on April 19, 2007 and resubmitted a portion of the health unit records as well as the anesthesia record dated February 9, 2007 and submitted a preanesthesia evaluation dated February 9, 2007.

By decision dated May 3, 2007, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that she failed to submit relevant and pertinent new evidence in support of her request for reconsideration.¹

LEGAL PRECEDENT -- ISSUE 1

An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.² 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 the 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the

¹ Following the Office's May 3, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

² 20 C.F.R. § 10.5(q).

relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

ANALYSIS -- ISSUE 1

Appellant filed an occupational disease claim alleging that she developed a right shoulder condition due to repetitive lifting during the course of her federal employment. She indicated that she first became aware of the condition on May 18, 2006. The Office accepted that appellant had identified those employment factors which she felt caused or contributed to her right shoulder condition. However, the Office found that she did not submit sufficient medical evidence to establish the relationship of her right shoulder condition to her federal employment duties.

In support of her claim, appellant failed to submit any medical evidence addressing her right shoulder condition on or after May 18, 2006. She submitted an authorization for medical attention dated October 12, 2006 completed by a nurse. However, a nurse is not a “physician” defined under the Federal Employees’ Compensation Act.⁴ It is well established that, to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician.⁵ Appellant has failed to submit any medical evidence to establish that her right shoulder condition was caused or aggravated by her employment. The Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant resubmitted a portion of the health unit records predating her current claim as well as an anesthesia record dated February 9, 2007.

³ *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

⁴ *Paul Foster*, 56 ECAB 208, 212 (2004).

⁵ *Vickey C. Randall*, 51 ECAB 357, 360 (2000); *Arnold A. Alley*, 44 ECAB 912, 921 (1993). *Merton J. Sills*, 39 ECAB 572, 575(1988).

⁶ 5 U.S.C. §§ 8101-8193, 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

As the Office reviewed these documents in reaching its March 8, 2007 decision, they do not constitute new evidence and are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant did submit new evidence in the form of a preanesthesia evaluation dated February 9, 2007. However, this document is not relevant or pertinent to her claim for a right shoulder condition. The document did not address appellant's right shoulder and did not provide a diagnosis of any right shoulder condition. As the preanesthesia evaluation did not address the central issue in appellant's claim, whether there was medical evidence establishing the presence of existence of a disease or condition for which compensation is claimed, this document is not relevant or pertinent and not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant failed to submit any medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed and that therefore she failed to meet her burden of proof in establishing that she developed a right shoulder condition as a result of her accepted employment duties. The Board further finds that appellant failed to submit relevant, pertinent new evidence in support of her request for reconsideration requiring the Office to reopen her claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the May 3 and March 8, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 13, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board