

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

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**T.P., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Corpus Christie, TX, Employer** )  
\_\_\_\_\_ )

**Docket No. 08-619**  
**Issued: September 3, 2008**

*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 December 16, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 6, 2007 decision, which denied further merit review. As more than one year has elapsed between the most recent merit decision of the Office dated December 13, 2006 and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On October 2, 2000 appellant, then a 44-year-old elevator operator, filed a traumatic injury claim alleging that on September 29, 2000 he pushed and pulled mail equipment, injuring

his neck, right hand, arm and shoulder.<sup>1</sup> He stopped work. The Office accepted appellant's claim for cervical strain. He returned to sedentary duty on August 2, 2002.

The record reflects that appellant filed a claim for a recurrence of disability. On May 13, 2003 the Office expanded his claim to include a right shoulder strain.

In a March 18, 2003 report, Dr. Robert A. Sciortino, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's history of injury and medical treatment. He reviewed appellant's job description as an elevator operator and opined that appellant could perform "most if not all of the duties listed." Dr. Sciortino noted that there was not indication of how much weight appellant was required to lift and advised that he could "lift at least 25 pounds floor to waist with both hands." He opined that appellant had reached maximum medical improvement and that no further treatment was necessary.

In a July 31, 2003 report, Dr. Naresh Misir, Board-certified in internal medicine and a treating physician, advised that appellant could not perform the duties of his date-of-injury position and was permanently on light duty.

On August 26, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. Donald H. Brancato, a Board-certified orthopedic surgeon for an impartial medical evaluation. It found a conflict in medical opinion between Dr. Misir, who opined that appellant's restrictions were indefinite and more restrictive than the permanent work restrictions provided by Dr. Sciortino, the second opinion physician.

In an October 25, 2003 report, Dr. Brancato noted appellant's history of injury and treatment and conducted a physical examination. He determined that appellant had no limitations of specific movements in any plane and advised that there were no objective findings to limit his work activities. Dr. Brancato determined that appellant was "fully capable of returning to his work activity as an elevator operator." On December 3, 2003 the Office requested that he provide additional information. On December 4, 2003 Dr. Brancato advised that appellant had reached maximum medical improvement and no further medical treatment was required.

On December 8, 2003 the Office proposed to terminate appellant's compensation benefits based on the report of Dr. Brancato, which established that he had reached maximum medical improvement and no further medical treatment was required and he was able to return to the full duties of his position as an elevator operator.

By decision dated January 20, 2004, the Office terminated appellant's medical and wage-loss benefits effective January 16, 2004.

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<sup>1</sup> The record reflects that appellant had several nonwork-related conditions which included right leg clot; a service-connected right ulnar condition and right ulnar surgery. The record also reflects that appellant has several work-related claims for an injury on May 6, 2003 under Claim No. 112018530 and an injury on July 14, 2004 under Claim No. 112024252.

On July 19, 2007 appellant requested reconsideration.<sup>2</sup> He submitted a copy of a December 20, 2006 letter to his congressional representative, contending that his claim included more than a strain. Appellant also indicated that he had not received a schedule award or compensation for his absences.

In a January 9, 2007 response, the Office informed appellant's congressional representative that appellant had been referred for an impartial medical examination with Dr. Brancato, a Board-certified orthopedic surgeon. It noted that appellant was found capable of performing his date-of-injury position and that no further medical care was necessary for the accepted strains. The Office indicated that appellant was given a pretermination notice, and 30 days to respond with supportive documentation, and his termination was finalized on January 20, 2004. It explained that appellant had had five reconsiderations in the past; however, the medical evidence did not support his claim for continuing compensation and benefits.

Appellant submitted a health summary comprised of Department of Veterans Affairs (VA) treatment notes dating from August 6, 2004 to April 3, 2007. On April 7, 2007 Dr. Alan H. Morris, a Board-certified orthopedic surgeon, noted that he was providing an impairment rating regarding appellant's service-connected ulnar nerve condition. He had reviewed appellant's workers' compensation reports and examination and concluded that "it is not at all likely that the veteran's right shoulder or arm complaints are in any way related to his service-connected disability, injury or right ulnar nerve injury in the right hand." In a report dated August 10, 2004, Dr. Michael J. O'Day, a Board-certified family practitioner and osteopath, noted appellant's history of injury and treatment. He conducted an examination pertaining to appellant's claim for an increase in his veteran's award related to his right ulnar neuritis. Dr. O'Day concluded that appellant's complaints of numbness and tingling in the ulnar-supplied area of the left forearm and left fourth and fifth fingers were "at least as likely as not caused by his ulnar neuritis." Notes from a nurse practitioner were also submitted.

In an August 6, 2007 decision, the Office denied appellant's request for reconsideration without a merit review finding that the evidence submitted was irrelevant or immaterial with regard to the issue in the case.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain

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<sup>2</sup> The record reflects that appellant previously requested reconsideration on February 3, 2004, February 7 and August 30, 2005, March 30 and November 7, 2006. By decisions dated February 12, 2004, May 9 and December 7, 2005, May 23 and December 13, 2006, the Office denied modification of the January 20, 2004 decision. These decisions continued to find that the report of Dr. Brancato represented the weight of the medical evidence.

<sup>3</sup> 5 U.S.C. § 8128(a).

review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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 [the Office].”<sup>4</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>5</sup>

### ANALYSIS

Appellant’s July 19, 2007 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted a copy of a December 20, 2006 letter to his congressional representative, in which he indicated that his claim included more than a strain and that he had not received a schedule award or compensation for his absences. However, the underlying issue in this case is medical evidence and opinion. The Office terminated appellant’s claim for medical and wage-loss benefits on January 20, 2004, based on the report of Dr. Brancato, the impartial medical examiner, who determined that appellant had reached maximum medical improvement and advised that no further medical treatment was required. Appellant’s letter to his congressman is not relevant to the issue of whether he continued to be disabled or have residuals of his work-related conditions.

Appellant also submitted VA treatment records that included an April 7, 2007 report from Dr. Alan H. Morris, a Board-certified orthopedic surgeon, who provided an impairment rating regarding appellant’s service-connected ulnar nerve condition. The Board finds that this report is not relevant as the physician addressed the issue of impairment rating for appellant’s service-connected disability and did not address the relevant issue of whether appellant’s accepted injury caused or contributed to disability on or after January 16, 2004. The submission of evidence that does not address the relevant issue in this case does not constitute a basis for reopening a case.<sup>6</sup>

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<sup>4</sup> 20 C.F.R. § 10.606(b).

<sup>5</sup> 20 C.F.R. § 10.608(b).

<sup>6</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

While Dr. Morris noted appellant's workers' compensation claim, he did not provide any opinion regarding the relationship of any disability to his accepted work-related condition. The Board also finds that the August 10, 2004 report from Dr. O'Day is not relevant because it also pertains to appellant's service-connected right ulnar neuritis and did not address his work-related disability.<sup>7</sup>

The treatment notes dated April 19, 2003 from a nurse practitioner are similarly not relevant. Nurses are not physicians under the Act and are not competent to render a medical opinion.<sup>8</sup> As the issue in the claim is medical in nature, these notes do not constitute a basis for reopening his case for a merit review. The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2008  
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

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<sup>7</sup> *Id.*

<sup>8</sup> *G.G.*, 58 ECAB \_\_\_\_ (Docket No. 06-1564, issued February 27, 2007).