

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

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**K.N., Appellant** )  
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**and** ) **Docket No. 08-2443**  
 ) **Issued: July 8, 2009**  
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**DEPARTMENT OF THE NAVY, NAVAL AIR** )  
**WARFARE CENTER -- AIRCRAFT DIVISION,** )  
**Lakehurst, NJ, Employer** )  

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On September 12, 2008 appellant filed a timely appeal from a June 10, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a May 1, 2007 merit decision denying her traumatic injury claim. As over a year has passed since the date of the most recent merit decision dated May 7, 2007 and the filing of this appeal dated September 12, 2008, the Board lacks jurisdiction over the merits of appellant's claim.<sup>1</sup>

**ISSUE**

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

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On November 29, 2006 appellant, a 42-year-old educational technologist, filed a traumatic injury claim (Form CA-1) for arm pain, emanating from her arm pit area and radiating into her hand. She attributed her injury to an incident on November 17, 2006 when, while arranging a classroom, moving furniture, cribs, shelves and rugs, she experienced pain in her arm that radiated into her hand.

In a November 28, 2006 report, Dr. Susan Mason, a Board-certified internist, reported that examination of appellant's left arm revealed tenderness to palpation on the proximal anterior side. She diagnosed appellant with cervical neuritis. In two earlier evaluations dated November 27 and 28, 2006, Dr. Mason diagnosed appellant with left arm pain and recommended appellant for light duty with restrictions.

In a December 4, 2006 report, Dr. Mason diagnosed appellant with cervical neuritis at C6-7. Examination of appellant's left arm revealed tenderness to palpation of the proximal and axilla region. Dr. Mason also observed tenderness in the upper ventral arm to deep palpation.

Appellant submitted an unsigned December 11, 2006 report concerning her initial visit to a doctor's office. The report was not signed by a physician or printed on paper indicating the name of the physician or the physician's practice group.

In a report dated December 22, 2006, Dr. Stephen J. Martino, a Board-certified neurologist, observed that appellant experienced pain on light palpation in the axilla along with positive Tinel's sign at the left elbow and hyperpathia of digits numbers four and five of the left hand. He noted that whether this arose in the left axilla, elbow or a combination of both could not be resolved at that time. Dr. Martino also noted that, clinically speaking, appellant appeared to have nerve irritation. He stated that he would evaluate appellant for the presence of cervical radiculopathy and plexopathy with a magnetic resonance imaging (MRI) scan of the cervical spine and left axilla.

In a January 3, 2007 report, Dr. Mason reported that appellant was qualified for light duty but recommended restrictions consisting of no lifting, no pushing or pulling and no lifting above the shoulder with her left arm.

In a January 22, 2007 report, Dr. Carlo Rondina, Board-certified radiologist, reported findings from an MRI scan of appellant's cervical spine and left brachial plexus. In reviewing the results of the MRI scan of appellant's cervical spine, he noted the presence of mild degenerative changes from C4-5 to C6-7, but without evidence of disc herniation or spinal or foraminal stenosis. Dr. Rodina also noted the presence of questionable syrinx extending from C3 to T2. Concerning the MRI scan of the left brachial plexus, he reported finding no evidence of adenopathy or mass lesion involving the brachial plexus.

Appellant submitted results from nerve conduction studies dated January 29, 2007 and signed by Dr. Martino. In a progress note dated January 29, 2007, Dr. Martino reported that an MRI scan revealed mild degenerative changes from C4-5 and C6-7 but without evidence of herniation or spinal or foraminal stenosis. The MRI scan of the plexus was negative for any

pathology. Dr. Martino diagnosed appellant with left axillary pain and noted that her symptoms appeared to be musculoskeletal in nature and that he would recommend that appellant return to work without restrictions.

In a January 29, 2007 note, Dr. Martino reported that appellant could return to work with restrictions. In a subsequent evaluation dated January 30, 2007, Dr. Mason reported that appellant was able to return to full duty.

In a January 30, 2007 report, Dr. Mason diagnosed appellant with cervical neuritis C6-7 and overexertion. She released appellant to return to work with no limitations.

By letter dated March 29, 2007, the Office notified appellant that the evidence of record was insufficient to support her claim.

Appellant submitted a supplemental factual statement dated April 4, 2007 wherein she explained: "On November 17, 2006 I had rearranged the classroom, moving cribs, shelves and large area rugs. Later that day I had felt a pain in my armpit area. I didn't think much of it, could have been the under wire from my bra bothering me...."

Appellant submitted no additional medical evidence in support of her claim and by decision dated May 1, 2007, the Office denied her claim because the evidence of record did not establish that the alleged incident occurred or that she sustained an injury in connection with this alleged incident. It specifically found:

"The factual basis of your claim is unclear or unknown. The factual evidence received is insufficient to establish that an incident occurred on the date, at the time and/or in the manner you allege. The medical evidence received is insufficient to establish that you sustained an injury in connection with the reported incident."

Appellant disagreed and requested reconsideration on March 22, 2008. In support of her request, she submitted a duplicate copy of a December 22, 2006 report signed by Dr. Martino as well as a duplicate copy of a report dated January 22, 2007 signed by Dr. Rondina. Appellant submitted a duplicate copy of results from a nerve conduction study conducted January 19, 2007 as well as a duplicate copy of a medical treatment note dated January 29, 2007, both of which were signed by Dr. Martino. She also submitted a medical report dated January 24, 2007, signed by Dr. Rondina. In his January 24, 2007 medical report, Dr. Rondina reported findings after a series of x-rays: thin T2 sagittal and axial images. He reported that the additional images, when compared to appellant's MRI scan dated January 22, 2007, suggested the possibility of a syrinx extending from C3 to T2. However, Dr. Rodina also noted that there was no evidence syrinx on the thin T2 sequences.

Appellant also submitted a personal note dated March 22, 2008, in which she requested reconsideration of her claim and provided details concerning the injury-causing incident. She alleged that while moving furniture and carpeting in a classroom on November 7, 2006, she experienced arm pain, emanating from her arm pit that radiated down into her hand. Appellant alleged that there was no specific moment, while moving furniture and carpet during which she felt the pain but, rather, it was noticeable as her day went on. She described the pain as an

aggravating pain, rather than a sharp persistent pain, that she experienced while moving around. Appellant alleged that her symptoms increased to include pain and a tingling sensation in her fingers. She alleged that on November 28, 2008, she reported her condition to her supervisor, who sent her to Occupational Health for evaluation, after she was placed on no duty/light duty and referred to a neurologist.

By decision dated June 10, 2008, the Office denied merit review, finding that appellant's new factual evidence was not relevant because the incident had already been accepted, and that the medical evidence appellant submitted in support of her reconsideration request was insufficient because it essentially repeated evidence already in the case record.<sup>2</sup>

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</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>4</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>5</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>6</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>7</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> While a reopening of a case may be predicated solely on a legal premise not

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<sup>2</sup> On appeal, appellant submitted additional medical evidence consisting of a personal note dated September 5, 2008. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). See *J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As appellant's September 5, 2008 personal note was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

<sup>3</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>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *D.I.*, 59 ECAB \_\_\_\_ (Docket No. 07-1534, issued November 6, 2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>8</sup> *D.K.*, 59 ECAB \_\_\_\_ (Docket No. 07-1441, issued October 22, 2007); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

previously considered such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>9</sup>

### ANALYSIS

The Board notes that in its May 1, 2007 decision, the Office denied appellant's claim because she had not established that an incident occurred at the time, place and in the manner alleged, and because the medical evidence was insufficient to establish that she sustained an injury. In its June 10, 2008 decision, the Office stated that it did not conduct a merit review; however, it did conclude that appellant had established that the incident occurred in the time, place and in the manner alleged. As it did accept that the incident occurred in the June 10, 2008 decision, which it previously denied in the May 1, 2007 decision, the Board concludes that the June 10, 2008 decision constituted a merit review as it changed the basis of the decision.

The Board also finds, however, that appellant has not established that she sustained an injury arising from this incident on November 17, 2006.

Appellant has submitted a number of reports from Dr. Mason in which she diagnosed cervical neuritis. She has not however submitted any medical report which explains with medical rationale how appellant's work activities involving moving furniture on November 17, 2006 would have caused the diagnosed condition. The Board has held that the fact that a condition manifests itself or worsens during a period of employment<sup>10</sup> or that work activities produce symptoms revelatory of an underlying condition<sup>11</sup> does not raise an inference of causal relationship between a claimed condition and employment factors.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>12</sup>

Appellant has still not met her burden of proof in this case because she has not submitted rationalized medical evidence explaining the causal relationship between her diagnosed cervical condition and the accepted incident of moving furniture at work on November 17, 2006.

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<sup>9</sup> *M.E.*, 58 ECAB \_\_\_ (Docket No. 07-1189, issued September 20, 2007); *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>10</sup> *E.A.*, 58 ECAB \_\_\_ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

<sup>11</sup> *D.E.*, 58 ECAB \_\_\_ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155,157 (1960).

<sup>12</sup> *I.J.*, 59 ECAB \_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

**CONCLUSION**

The Board finds that the Office decision dated June 10, 2008 was a merit decision. The Board also finds that appellant has not established that she sustained an injury related to the accepted employment incident of November 17, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2008 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 8, 2009  
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