



of duty.<sup>1</sup> The Office accepted appellant's claim for comminuted fracture to the left femur, fracture transverse process L5 on the left side, fracture left hemi pelvis, fracture to the L4 vertebrae and urethral injury. The record also reflects that the Office authorized carpal tunnel surgery on February 25, 2002. Further, the Office accepted a ventral hernia. Appellant received appropriate compensation and benefits.<sup>2</sup>

In an August 11, 2004, report, Dr. Diane E. Giles, a Board-certified orthopedic surgeon and treating physician, indicated that appellant presented with complaints of bilateral shoulder pain. She reported full range of motion of the shoulders and found no crepitus over the flexor tendons and noted that his shoulder joints were stable. Dr. Giles advised that appellant had increased pain with ambulating with a walker and had to "use the walker all the time because of his lower extremity deficits from multiple spine surgeries." She diagnosed moderate acromioclavicular (AC) joint arthritis bilaterally, myofascial pain in the shoulders and impingement syndrome in the shoulders.

In an October 11, 2004 report, Dr. Giles advised that appellant was seen for follow up of bilateral shoulder pain. She diagnosed osteoarthritis in the AC joints and myofascial pain in the left scapula. In a January 7, 2005 report, Dr. Giles opined that the "shoulders are indeed related to the original workers' comp[ensation] injury because he has had to use crutches for several years causing problems with his shoulders."

In a letter dated January 31, 2005, the Office requested that appellant provide a letter from his physician explaining the relationship of his shoulder condition to his accepted conditions.

In a February 7, 2005 report, Dr. Giles advised that appellant ambulated with a "walker. Loftstrand crutches and/or[a] cane." She diagnosed AC joint arthritis bilaterally due to long-term use of assistive devices and opined that appellant's shoulder condition was directly related to the use of long-term assistive devices, which were required as a result of work-related motor vehicle accident.

In an April 11, 2005 report, an Office medical adviser noted that, on August 11, 2004, Dr. Giles reported full range of motion and found no crepitus over the flexor tendons of the shoulders. Dr. Giles noted that appellant's shoulder joints were reported as stable to testing. The Office medical adviser opined that x-rays taken that date show minimal changes despite his age and advised that the use of assistive devices did not require repetitive motion in the six planes of shoulder motion which was the usual cause of shoulder conditions due to repetitive trauma. He explained that the use of assistive devices required "fixed posturing of the shoulders which even over many years would not be expected to cause a diagnosable condition in a shoulder." The

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<sup>1</sup> The record reflects that appellant had a preexisting laminectomy in 1970 and liver disease.

<sup>2</sup> On November 25, 1977 the Office issued a schedule award for a 40 percent impairment of the left leg. Appellant underwent an authorized discectomy on October 16, 1992, which resulted in complications that included loss of vision. On September 6, 1995 the Office granted appellant a schedule award for 100 percent impairment of the right eye and 100 percent impairment of the left eye. On March 19, 1999 it granted appellant a schedule award for 12 percent permanent impairment of the right leg.

Office medical adviser opined that appellant's condition was age related and that the Office should not accept the bilateral shoulder condition as a consequence of his work injury.

By decision dated June 28, 2005, the Office denied appellant's claim for a consequential bilateral shoulder condition.

On September 26, 2005 appellant's representative requested reconsideration. He enclosed a copy of a July 18, 2005 report from Dr. Giles, who diagnosed AC joint arthritis, bicipital tendinitis and impingement syndrome, bilaterally. By decision dated October 24, 2005, the Office denied appellant's request for reconsideration without a review of the merits of the claim.

On December 20, 2005 and February 6, 2006 appellant's representative requested reconsideration. He submitted a December 5, 2005 report from Dr. Giles. In her report, Dr. Giles indicated that appellant had been using Loftstrand crutches for his back pain and chronic ambulatory difficulties since his employment injury on May 27, 1973. She advised that the crutches placed an abnormal strain across the shoulder joint. Dr. Giles explained that the prolonged chronic stress across the shoulders and the AC joint secondary to the chronic assistive device usage. She noted that appellant had maintained his range of motion but opined that "just because he does not have any instability to the shoulder does not mean that there has not been chronic wear." Dr. Giles added that she was unable to cite to "any objective references for you to use to appeal his claim."

By decision dated April 19, 2006, the Office denied modification of the June 28, 2005 decision.

On June 29, 2006 appellant requested reconsideration and submitted additional evidence. The additional evidence included a May 30, 2006 report from Dr. Bryan Scheer, a Board-certified orthopedic surgeon, who diagnosed bilateral impingement syndrome with AC joint pain and arthritis with likely small supraspinatous tendon tears. Dr. Scheer opined that he thought it was "reasonable to assume that his injury followed by his subsequent long-term crutch use has predisposed him to shoulder dysfunctional and rotator cuff pathology." He noted that, while it was "a common degenerative condition, he seems to have a good basis for these symptoms."

By decision dated August 8, 2006, the Office denied modification of its previous decision. It found that Dr. Scheer's report was speculative and lacked adequate rationale to include a bilateral condition.

By letter dated April 11, 2007, appellant's representative requested reconsideration. He submitted additional evidence, which included a copy of Dr. Scheer's May 30, 2006 report. Appellant's representative alleged that the report of Dr. Scheer supported that appellant's use of crutches contributed to the arthritic condition in his shoulders.

By decision dated April 27, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request was cumulative and, thus, it was insufficient to warrant review of its prior decision.

### 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 provide that a claimant may obtain 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 disagreed with the Office's June 28, 2005 decision, which denied his claim for a bilateral shoulder condition as a consequence of his employment-related injury. The underlying issue on reconsideration was whether appellant submitted sufficient medical evidence to show that he sustained a bilateral shoulder condition as a consequence of his accepted employment injury. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether appellant sustained a bilateral shoulder condition as a consequence of his accepted employment injury.

On reconsideration, appellant's representative submitted a copy of Dr. Scheer's May 30, 2006 report. However, this report was not new as it was previously submitted and considered in the August 8, 2006 decision. The Board has held that submission of duplicative or repetitious evidence is insufficient to require the Office to reopen a case for merit review.<sup>6</sup>

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law, or

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b).

<sup>5</sup> 20 C.F.R. § 10.608(b).

<sup>6</sup> *Edward W. Malaniak*, 51 ECAB 279 (2000); *Eugene F. Butler*, 36 ECAB 393 (1984); *Jerome Ginsburg*, 32 ECAB 31 (1980).

advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his request for reconsideration.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2009  
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