

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 08-2178
Issued: May 4, 2009**

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2008 appellant filed a timely appeal from the January 16, 2008 merit decision of the Office of Workers' Compensation Programs terminating compensation benefits and the July 22, 2008 nonmerit decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's medical and wage-loss compensation benefits effective January 16, 2008; and (2) whether the Office properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 2, 2005 appellant, then a 50-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that on October 28, 2005 she realized that she sustained a shoulder injury due to repetitive motions at work, which worsened after she began working on the delivery bar code sorting. In an April 17, 2006 report, Dr. Kim L. Stearns, a Board-certified orthopedic surgeon, reported that appellant performed repetitive work, pushing, pulling, lifting

and sorting, using her right arm. After noting that a magnetic resonance imaging scan revealed superior labrum from anterior to posterior (SLAP) lesion/labral tear, he concluded that it was employment related. Dr. Stearns explained that given her work history and “the lack of any other physical activity in her life,” the repetition of her employment duties caused the condition. The Office accepted the claim for SLAP lesion and labral tear of the right shoulder.¹

On September 8, 2006 appellant underwent an authorized right shoulder arthroscopy, debridement of SLAP tear and arthroscopic subacromial decompression. She continued working until the date of the surgery.

In a report dated November 13, 2006, Dr. Stearns stated that appellant was two months postoperative and was doing quite well with an improved range of motion and diminished pain. In a work capacity evaluation (Form OWCP-5c) dated November 9, 2006, he advised that appellant could return to an eight-hour workday on December 1, 2006 with limitations on reaching, twisting, pushing, pulling and lifting. Dr. Stearns noted that appellant had not reached maximum medical improvement.

Appellant returned to limited duty on December 8, 2006 within the restrictions provided by Dr. Stearns.² On January 31, 2007 she met all her therapy goals and was discharged from physical therapy.

On March 8, 2007 the Office referred appellant, together with the case file and a statement of accepted facts, to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of any residuals of her work-related condition.

In a medical report dated April 9, 2007, Dr. Ghanma discussed appellant’s previous medical and employment history. Physical examination revealed decreased range of motion in the right shoulder and a clunking and grinding sensation during the range of motion tests. Dr. Ghanma diagnosed degenerative changes of the right shoulder involving multiple areas including the supraspinatus, infraspinatus and subscapularis muscles, the acromioclavicular (AC) joint, glenoid labrum and associated synovitis. He opined that the current diagnoses related solely to degenerative changes and arthritis and not to her work injury. Dr. Ghanma further stated that the SLAP lesion improved due to surgery and that appellant had returned to baseline with regard to that condition. He provided work restrictions, noting that her limitations were due to the preexisting shoulder arthritis and that appellant did not continue to experience any work-related disability.

By letter dated May 3, 2007, the Office requested that Dr. Stearns review Dr. Ghanma’s report and provide a response.

¹ The Office initially denied the claim for fact of injury by decision dated March 31, 2006. In a decision dated June 2, 2006, a hearing representative reversed the denial on a preliminary review and returned the case to the Office for acceptance.

² During the period October 17 through December 11, 2006, appellant filed several claims for compensation (Form CA-7) for wage loss and leave buyback compensation for the period September 8 through December 3, 2006.

In a work capacity evaluation report (Form OWCP-5c) dated June 16, 2007, Dr. Stearns provided additional work restrictions and indicated that maximum medical improvement had been reached.

The Office determined that a conflict in medical opinion arose between Drs. Stearns and Ghanma as to whether appellant had residuals of her employment injury, requiring her to work limited duty. It referred appellant, along with her case file and a statement of accepted facts, to Dr. Kenneth Chapman, a Board-certified orthopedic surgeon, for an impartial medical examination.

By medical report dated November 4, 2007, Dr. Chapman detailed the medical and factual history of appellant's right shoulder injury. Physical examination revealed a limited range of motion of the right shoulder with grating and grinding and some discomfort. Dr. Chapman diagnosed degenerative arthritis of the right shoulder and degenerative arthritis of the AC joint, noting that these conditions were not work related. He stated that the accepted labral tear appeared to be resolved by the successful surgery performed by Dr. Stearns and that there was no evidence that the original condition was still active. Dr. Chapman stated that there was no doubt that appellant had preexisting arthritis and this diagnosis was stated in Dr. Stearns' first medical note when discussing appellant's x-rays. He noted that the arthritic changes could not have developed in the short time between the injury and the x-rays. Dr. Chapman agreed with Dr. Ghanma's findings on examination that appellant's SLAP lesion had healed and that all present limitations were due to preexisting degenerative arthritis in the shoulder. He provided work restrictions, noting that the restrictions were solely due to appellant's nonwork-related arthritis.

On December 14, 2007 the Office notified appellant of the proposed termination of her compensation and medical benefits. It gave special weight to Dr. Chapman's medical opinion, due to his status as an impartial medical examiner and found that it established that appellant was no longer experiencing residuals of her accepted work injury or any continuing work-related disability. The Office invited appellant to submit additional evidence within 30 days if she disagreed with the proposed termination. Appellant did not respond.

By decision dated January 16, 2008, the Office terminated appellant's disability compensation benefits and medical benefits effective that day. It found that the November 4, 2007 medical report from Dr. Chapman was entitled to special weight and established that appellant did not continue to experience any residuals of the accepted conditions or any additional work-related disability.

In a February 16, 2008 letter to the Office, appellant requested a second opinion. The Office responded in a March 27, 2008 letter that her benefits were terminated on January 16, 2008 and that it would not be responsible for any medical costs she incurred.³

³ From June 10 through July 9, 2008, appellant submitted several forms for wage-loss compensation (Form CA-7) for the period May 24 through July 4, 2008. By letter dated June 12, 2008, the Office reminded appellant that her benefits were terminated on January 16, 2008 and that neither her nor her counsel had appealed or requested reconsideration.

On June 25, 2008 appellant, through counsel, filed a request for reconsideration. Counsel resubmitted Dr. Stearns' April 17, 2006 report. Appellant also submitted duty status reports from Dr. Stearns dated December 12, 2007 and May 28, 2008. Dr. Stearns provided work restrictions and a medical certification noting that he treated appellant for a SLAP tear of the right shoulder and that she was disabled during the period September 8, 2006 through January 8, 2007.

By decision dated July 22, 2008, the Office denied appellant's request for reconsideration on the basis that the additional evidence was either duplicative in nature or did not address the relevant issue of disputing the impartial medical examiner's findings.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁵ To terminate authorization for medical treatment, the Office must establish that an employee no longer has residuals of an employment-related condition, which require further medical treatment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The Federal Employees' Compensation Act provide that if there is a disagreement between the physician making the examination for the United States and the physician of the employee the Secretary of Labor shall appoint a third physician who shall make an examination.⁸ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a SLAP lesion and labral tear of the right shoulder due to her employment and authorized medical and disability compensation. On September 8, 2006 appellant underwent a successful right shoulder arthroscopy, debridement and

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁵ *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *See T.P.*, *supra* note 6; *Larry Warner*, 43 ECAB 1027 (1992).

⁸ 5 U.S.C. §§ 8101-8193, 8123.

⁹ 20 C.F.R. § 10.321.

subacrominal decompression by Dr. Stearns, who returned her to full-time work with medical restrictions due to residuals of her accepted condition.

The Office referred appellant to Dr. Ghanma, a Board-certified orthopedic surgeon, for a second opinion evaluation addressing the extent of any residuals or disability from the accepted condition. In an April 9, 2007 medical report, Dr. Ghanma found that the accepted labral tear had healed and that appellant's remaining disability related solely to her preexisting right shoulder arthritis. In response to the Office's request for comments on Dr. Ghanma's medical report, Dr. Stearns provided additional work-related restrictions.

The Office properly determined that a conflict of medical opinion arose with regard to the extent of the residuals of the accepted condition and appellant's work-related disability. It referred her, together with the medical records and a statement of accepted facts, to Dr. Chapman, a Board-certified orthopedic surgeon, for an impartial medical examination.¹⁰

In a November 4, 2007 medical report, Dr. Chapman found that appellant did not currently have any residuals from her accepted conditions. He attributed any remaining disability to her preexisting right shoulder arthritis. Dr. Chapman stated that the SLAP lesion was resolved by the successful surgery and there was no evidence that the original condition was active. Citing to Dr. Stearns' original treatment notes interpreting an x-ray, he opined that appellant's arthritis preexisted her injury, as the degenerative changes could not have taken place in the short time between the injury and the x-ray. Dr. Chapman further found that the arthritis was the sole cause of her remaining disability.

The Board finds that the Office properly relied on Dr. Chapman's medical opinion, finding that appellant did not have any remaining residuals or disability from her work-related condition, in terminating her compensation benefits. Dr. Chapman provided a well-rationalized opinion, which was based on a proper factual background.¹¹ Thus, his opinion is entitled to the special weight provided an impartial medical examiner.¹²

The Office properly provided appellant 30 days notice of the proposed termination of benefits, by letter dated December 14, 2007 and invited her to submit additional evidence.¹³ Appellant did not respond. Therefore, the Board finds that the Office properly terminated medical and wage-loss benefits, effective January 16, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹⁴ does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine

¹⁰ See *J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009).

¹¹ See *I.J.*, *supra* note 4.

¹² See *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹³ See 20 C.F.R. § 10.540(a). See also *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

¹⁴ 5 U.S.C. §§ 8101-8193.

whether it will review an award for or against compensation.¹⁵ It, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁶

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

Appellant did not argue that the Office erroneously applied a point of law, nor did she advance a previously unconsidered legal argument. Thus, the issue is whether she submitted relevant and pertinent new evidence.

In support of her request for reconsideration, appellant resubmitted an April 17, 2006 report of Dr. Stearns, accompanied by two additional work restriction reports, dated December 12, 2007 and May 28, 2008 and a medical certification noting her period of disability from September 8, 2006 through January 8, 2007.²¹

As the April 17, 2006 report was previously of record and reviewed by the Office, the Board finds that it is insufficient to warrant further merit review of the case. The Board has held that evidence which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.²²

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹⁷ 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).

¹⁸ 20 C.F.R. § 10.606(b)(2).

¹⁹ *Id.* at § 10.607(a).

²⁰ *Id.* at § 10.608(b).

²¹ The Board notes that appellant's representative stated that the basis of the reconsideration request was an April 17, 2006 medical report from Dr. Stearns, however, the report was not included with the request. The record does contain an April 17, 2006 medical report from Dr. Stearns, however, this report was previously considered by the Office and fails to address the relevant issue of disability after January 16, 2008.

²² *Eugene F. Butler*, 36 ECAB 393 (1984).

The Office terminated appellant's compensation on January 16, 2008. Thus, the relevant issue is appellant's work-related residuals and disability after January 16, 2008. Because the medical certification and December 12, 2007 report address periods prior to the January 16, 2008 date, they are irrelevant to the present issue. Moreover, in the May 28, 2008 status report, Dr. Stearns does not address the cause of appellant's disability. The pertinent issue is whether she has residuals of disability related to the employment injury. As Dr. Stearns did not address the reason for providing the work restrictions, the May 28, 2008 status report does not constitute relevant and pertinent new evidence.

Therefore, the Board finds that the Office properly denied appellant's request for reconsideration because she did not provide relevant and pertinent new evidence.

CONCLUSION

The Board finds that the Office properly terminated appellant's medical and compensation benefits effective January 16, 2008. The Board also finds that the Office properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 22 and January 16, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 4, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees, Compensation Appeals Board