



## **FACTUAL HISTORY**

This case was previously before the Board. On June 13, 2005 appellant, then a 50-year-old letter carrier, filed an occupational disease claim asserting changes in mental status, confusion, back pain, shortness of breath and a repetitive motion injury to his right shoulder in August 2004. Appellant attributed his condition to a fall from the top of a stairway on May 18, 2005. The Office assigned the case file number xxxxxx304.

Appellant also filed a claim for a traumatic injury occurring on May 18, 2005 when he fell down stairs. The Office accepted the claim, assigned file number xxxxxx971, for a sprain/strain of the left shoulder, enthesopathy and tendinitis of the right shoulder.

In response to the Office's request for additional information in file number xxxxxx304, by letter dated July 12, 2005, appellant related that he and his physician believed that his fall on May 18, 2005 resulted in mental status changes, confusion and shortness of breath. He also maintained that repetitive motion at work caused a right shoulder injury beginning August 2004.

By decision dated August 3, 2005, the Office denied appellant's occupational disease claim after finding that he did not sustain an injury causally related to factors of his federal employment. It noted that he attributed the claimed conditions to his May 18, 2005 fall and did not describe other work factors that he believed caused or contributed to an occupational disease.

On July 12, 2006 appellant requested reconsideration of his claim and indicated that he was submitting a psychological evaluation in support of his request. By decision dated July 21, 2006, the Office denied merit review of its August 3, 2005 decision, noting that he had not submitted a psychological evaluation.

Appellant appealed to the Board. By decision dated March 26, 2007, the Board affirmed a July 21, 2006 nonmerit decision denying his request for reconsideration under section 8128.<sup>2</sup> The Board noted that appellant's attorney argued that he had submitted a December 6, 2006 neuropsychological evaluation from Dr. Gordon Teichner, a clinical psychologist, in support of his request for reconsideration but that it was not of record at the time of the Office's decision.

On April 7, 2008 appellant, through his attorney, requested reconsideration. Counsel reiterated that he had submitted a December 6, 2006 neuropsychological evaluation to the Office on March 7, 2007. In a decision dated April 18, 2008, the Office denied his request for reconsideration as it was untimely and did not establish clear evidence of error. It noted that it had not received a neuropsychological evaluation.

On July 9, 2008 the Office received a December 6, 2006 neuropsychological evaluation from Dr. Teichner, who noted that appellant experienced a "mild closed head injury in May 2005." Dr. Teichner diagnosed a cognitive disorder not otherwise specified, dysfunction, a mood disorder and a major depressive-like episode and anxiety disorder due to a mild traumatic brain injury and a pain disorder due to psychological factors and a general medical condition.

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<sup>2</sup> Docket No. 06-1926 (issued March 26, 2007).

He opined that appellant's brain injury probably contributed to his depression and anxiety which in turn exacerbated his pain symptoms.

By decision dated July 29, 2008, the Office reviewed the case on its merits and denied modification of its prior merit decision. It noted that Dr. Teichner's December 6, 2006 evaluation was in the case record under file number xxxxxx971. The Office found that appellant was claiming a mental condition due to his May 18, 2005 traumatic injury, accepted for a left shoulder strain and right shoulder adhesive capsulitis. It directed him to request an expansion of his claim under that file number if he believed that he sustained a head injury or mental changes as a result of his May 18, 2005 fall. The Office found no evidence that factors of employment caused back pain, shortness of breath, numbness or confusion.

By letter dated July 30, 2008, received by the Office on August 8, 2008, counsel contended that appellant sustained a serious injury due to his employment as evidenced by the December 6, 2006 report from Dr. Teichner.

On November 1, 2008 appellant appealed to the Board.

On March 12, 2009 the Office expanded its acceptance under file number xxxxxx971 to include a mood disorder with a major depressive-like episode and an anxiety disorder with generalized anxiety due to a mild traumatic brain injury. It based its acceptance on Dr. Teichner's evaluation.

By letter dated March 25, 2009, appellant's attorney informed the Clerk of the Board that file number xxxxxx971 included the shoulder and the traumatic brain injury but that the traumatic brain injury was also under file number xxxxxx304. He specified that the claim under file number xxxxxx304 was "for a change of mental status as a result of [appellant's] fall at work on or about May 18, 2005."

On May 11, 2009 the Board dismissed appellant's appeal at his request.<sup>3</sup> On May 19, 2009 his attorney requested reconsideration and enclosed a March 3, 2009 neuropsychological evaluation from Dr. Teichner, who diagnosed postconcussive syndrome and a cognitive disorder, resolving and a mood disorder with depression and an anxiety due to a mild traumatic brain injury.

By decision dated June 24, 2009, the Office denied his request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant reopening his case for further merit review. It noted that the March 25, 2009 letter from appellant's attorney attributed his traumatic brain injury to a fall on or around May 18, 2005, which the Office had accepted under file number xxxxxx971. The Office found that appellant did not describe any repetitive work activities but instead referred to the May 18, 2005 incident relevant to the other file number.

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<sup>3</sup> Order Dismissing Appeal, Docket No. 09-2777 (issued May 11, 2009).

On appeal, counsel noted that evidence regarding appellant's mental status claim was placed in his "file for trauma to his shoulder." He requested that appellant's "neuropsychological evaluation information be considered in [file number] xxxxxx304."

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>4</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

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;<sup>7</sup> (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>8</sup> and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

On June 13, 2005 appellant filed an occupational disease claim alleging that he sustained injuries resulting from a fall down a stairway on May 18, 2005. He further indicated that he sustained a repetitive motion injury to his right shoulder in August 2004. The Office assigned the case file number xxxxxx304. Appellant also filed a claim alleging that he sustained a traumatic injury on May 18, 2005 when he fell down stairs. The Office assigned his traumatic injury claim file number xxxxxx971. In file number xxxxxx971, it accepted that appellant sustained a left shoulder sprain, right shoulder tendinitis and adhesive capsulitis, a mood disorder with a major depressive-like episode due to a mild traumatic brain injury and an anxiety disorder with generalized anxiety due to a mild traumatic brain injury.

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *See Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>7</sup> *Michael R. Shaffer*, 55 ECAB 386 (2004).

<sup>8</sup> *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

<sup>9</sup> *Beverly A. Spencer*, 55 ECAB 501 (2004).

The Board finds that appellant has not established that he sustained an occupational disease in file number xxxxxx304. In response to the Office's request for information, appellant related that a fall on May 18, 2005 caused his mental status changes, confusion and shortness of breath. He also asserted that repetitive work duties resulted in a right shoulder injury which began in August 2004. By letter dated March 25, 2009, his attorney clarified that he was claiming only that he sustained a change in his mental status due to a fall at work on or around May 18, 2005 under number file xxxxxx304.<sup>10</sup> Therefore, he is claiming that he sustained a traumatic injury to his brain on May 18, 2005 rather than an occupational disease due to factors of his federal employment.<sup>11</sup> The Office adjudicated his claim for an injury to the brain as the result of a traumatic injury on May 18, 2005 under file number xxxxxx971 and accepted a mood disorder with a major depressive-like episode and an anxiety disorder with generalized anxiety due to a mild traumatic brain injury. Appellant has not alleged that he sustained mental status changes due to any factor of his employment other than the May 18, 2005 work injury, accepted in file number xxxxxx971. Consequently, the Office properly denied his occupational disease claim.

On appeal, appellant's attorney contends that the Office should consider Dr. Teichner's neuropsychiatric evaluation in the present file number. Dr. Teichner's neuropsychiatric evaluations, however, are relevant to the traumatic brain injury rather than to a mental or emotional condition arising out of factors of employment occurring over the course of more than one work shift. Based on Dr. Teichner's report, the Office has expanded the accepted conditions in file number xxxxxx971. There is no basis for accepting the traumatic injury again under this claim for occupational disease.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>12</sup> the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.<sup>13</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>14</sup> When a claimant fails to meet one of the above

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<sup>10</sup> Counsel further indicated that appellant's shoulder claim was under file number xxxxxx971 rather than xxxxxx304.

<sup>11</sup> A traumatic injury is defined as a "condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift." 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

<sup>12</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> *Id.* at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>15</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>17</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

In support of his request for reconsideration, appellant submitted the March 3, 2009 neuropsychological evaluation from Dr. Teichner, who diagnosed a resolving cognitive disorder, postconcussive syndrome and a mood disorder with depression and anxiety resulting from a mild traumatic brain injury. Dr. Teichner did not identify any cause of appellant's condition other than the May 18, 2005 traumatic injury. Consequently, his opinion is not relevant to the issue of whether appellant sustained an occupational disease. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>19</sup>

As noted, appellant's attorney argues that appellant experienced a serious work injury from his employment. He did not, however, describe any work factors to which appellant attributed the injury or condition. Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained an occupational disease causally related to factors of his federal employment. The Board further finds that the Office properly denied his request for further review of the merits of the claim under section 8128.

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<sup>15</sup> *Id.* at § 10.608(b).

<sup>16</sup> *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

<sup>17</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>18</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>19</sup> *Freddie Mosley*, 54 ECAB 255 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 24, 2009 and July 29, 2008 are affirmed.

Issued: August 11, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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