

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

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**J.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Buffalo, NY, Employer**

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**Docket No. 09-528  
Issued: February 23, 2010**

*Appearances:*  
*David W. Covino, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 16, 2008 appellant filed a timely appeal from the June 25, 2008 merit decision of the Office of Workers' Compensation Programs that denied her recurrence of disability claim, and an October 22, 2008 decision which denied further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

**ISSUES**

The issues are: (1) whether appellant sustained a recurrence of disability commencing March 28, 2005 causally related to her August 6, 2002 injury; and (2) whether the Office properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On August 6, 2002 appellant, then a 54-year-old mail handler, injured her right shoulder when lifting a flat box out of a mail cart onto a belt. The Office accepted her claim for right shoulder strain and paid compensation. Appellant did not stop work. The record establishes that as of September 3, 2002, her restricted duty assignment was for five hours a day, receiving wage-loss for the hours she did not work. She was to use one hand only with no lifting over 5 pounds with her right hand and no overhead reaching.

An August 6, 2002 right shoulder x-ray revealed no abnormalities. On September 3, 2002 appellant was treated by Dr. A. Marc Tetro, a Board-certified orthopedic surgeon. In reports dated through November 18, 2004, he diagnosed right rotator cuff sprain, probable long head biceps tendinitis tenosynovitis/possible tear, possible labral injury and joint arthrosis. He recommended conservative treatment and reiterated that appellant could work light duty, five hours per day with restrictions. An April 28, 2003 magnetic resonance imaging (MRI) scan of the right shoulder showed moderate acromioclavicular joint degenerative changes and a pattern consistent with impingement. There was also a large high grade partial thickness undersurface tear. After conservative treatment failed, Dr. Tetro recommended surgery and continued restrictions of light-duty work for five hours per day.<sup>1</sup> The record reflects that appellant did not undergo surgery.

On June 9, 2004 appellant underwent a fitness-for-duty examination by Dr. Deborah F. Miller, a Board-certified internist. She reviewed the reports of Dr. Tetro, noting that appellant would continue with her present 5 pound restriction on lifting and only five hours of work a day. Dr. Miller diagnosed right shoulder rotator cuff tendinitis with partial thickness rotator cuff tear and a history of left ulnar nerve neuropathy due to a non-employment related injury.<sup>2</sup>

On February 28, 2005, appellant began treatment with Dr. Jerry J. Tracy, III, a Board-certified orthopedic surgeon. He diagnosed right shoulder rotator cuff tear, acromioclavicular joint impingement, bursitis, co-morbidity and depression and advised that she was moderately disabled. On April 14, 2005 report, Dr. Tracy noted that appellant had been off work since March 28, 2005 due to increased shoulder pain and fibromyalgia. He diagnosed right shoulder rotator cuff tear/acromioclavicular bursitis in the aftermath of the work injury, co-morbidity and depression. On April 21, 2005, Dr. Tracy diagnosed shoulder pain, neck cervicalgia, bursitis, and pain in the low back from a work-related injury. He opined that appellant was totally disabled and submitted subsequent notes reiterating that she was totally disabled.

The record indicates that the employing establishment began the process of preparing a proposed modified duty assignment for appellant. A limited duty assignment with proposed hours and duties was prepared by Maryann Sheehan, a supervisor, and directed to the attention of Dr. Miller. However, appellant stopped work as of March 27, 2005 and claimed compensation commencing March 28, 2005. The employing establishment noted that she had been receiving compensation for partial wage loss but now claimed total disability. On May 3, 2005 appellant claimed a recurrence of disability commencing March 28, 2005. She noted working limited duty, five hours per day prior to stopping work on March 28, 2005. The employing establishment noted that accommodations had been made following the 2002 employment injury.

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<sup>1</sup> Appellant was examined by Dr. Melvin Brothman, an orthopedic surgeon, on April 22, 2003. He noted the history of injury and that appellant had performed restricted duty since the date of injury. He found that she could work five hours a day, advising that she could increase to six hours a day with restrictions on lifting over 20 pounds and overhead reaching.

<sup>2</sup> The record reflects that appellant was released from care by Dr. Tetro as of December 22, 2004 as he was unable to provide further nonsurgical medical management.

An April 1, 2005 prescription note from Dr. Deirdre Bastible, a family practitioner, advised that appellant would be off work for one month.

In a June 24, 2005 decision, the Office denied appellant's recurrence of disability claim.

On July 4, 2005 appellant requested reconsideration. She submitted a June 9, 2005 work capacity evaluation form. Dr. Tracy noted that appellant was off work until evaluation on August 4, 2005. In a June 27, 2005 note, Dr. Tracy stated that appellant had a recent exacerbation of right shoulder pain and was treated on June 8, 2005, at which time she was taken off work. He noted reduced shoulder range of motion with tender points. Dr. Tracy diagnosed shoulder arthropathy and bursitis, exacerbated and caused by the August 6, 2002 injury. He advised that appellant would be considered totally disabled until her August 4, 2005 evaluation. In a June 28, 2005 attending physician's report, he checked a box "yes" that appellant's condition was caused by the August 6, 2002 injury and aggravated by her current work. He also noted that appellant's mail handler job involved lifting, carrying and repetitive upper arm use which caused her condition to worsen. Appellant could not work as of March 28, 2005 due to increased pain. Dr. Tracey attributed her disability to the accepted work injury.

On August 4, 2005, Dr. Tracy advised that appellant continued to have right shoulder pain in the anterior deltoid and lateral deltoid regions and requested authorization for injection treatment. He noted that appellant was also receiving treatment for lumbar disc herniations and spinal stenosis. In a September 27, 2005, Dr. Tracy stated that following the accepted injury appellant has returned to her usual work as a mail handler. He reviewed her job description and stated that she returned to work doing heavy lifting and carrying with reaching and pulling with her injured right shoulder. Dr. Tracy stated that his reports from 2003 to 2005 showed that appellant had increasing pain and loss of shoulder motion as she continued her in her work. He found that her work aggravated the diagnosed torn rotator cuff and shoulder impingement. The record reflects that appellant retired on disability as of November 23, 2005.

In a May 10, 2006 work capacity evaluation Dr. Eugene J. Gosy, a Board-certified orthopedic surgeon, found appellant totally disabled. In reports dated September 18, 2006 and January 18, 2007 Dr. Gosy diagnosed shoulder pain and noted appellant's disability status was moderate.

On March 29, 2007 the Office referred appellant for a second opinion examination to Dr. John Ring, a Board-certified orthopedic surgeon, to determine the nature of any residuals of her accepted injury. In a May 3, 2007 report, Dr. Ring reviewed appellant's history of injury and medical treatment. He diagnosed right shoulder injury causally related to her work beginning August 6, 2002 and impingement syndrome. Dr. Ring found that appellant had disabling residuals including range of motion deficits on flexion, extension, adduction, internal and external rotation. He opined that she could not perform her regular mail handler job due to her work injury; however, she could perform full-time limited duty with restrictions of no lifting of the right arm above the chest and no lifting over five pounds.<sup>3</sup>

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<sup>3</sup> On September 25, 2007 the Office granted appellant a schedule award for 17 percent impairment of the right arm.

In reports dated October 10, 2007 and January 10, 2008, Dr Gosy diagnosed pain in the shoulder region. A February 8, 2008 work capacity evaluation from Dr. Bastible diagnosed right arm rotator cuff, spinal stenosis of the lumbar spine and found appellant totally disabled.

On June 11, 2008 the Office noted that it had a copy of the March 21, 2005 limited-duty job offer and inquired as to the status of the offer. In an undated response, the employing establishment noted that appellant claimed a recurrence of disability as of March 28, 2005 and, had never worked at the job. The employing establishment stated that no job offer was made because she was granted a disability retirement on November 23, 2005.

In a June 25, 2008 decision, the Office denied appellant's recurrence of disability claim. It found that the medical evidence was not sufficient to establish total disability for the limited duty work she had been performing.

On July 26, 2008 appellant requested reconsideration. She contended that she never received the modified mail handler position job offer. In a July 24, 2008 letter, she noted that her schedule award was ending and requested placement on the periodic rolls. In statements dated August 16 to October 23, 2008, she reiterated that she was never offered a modified mail handler position in March 2005. On September 12, 2008, Dr, Gosy noted limited range of motion of the right shoulder and diagnosed pain in the shoulder joint region. He advised that appellant was 50 percent disabled.

In an October 22, 2008 decision, the Office denied appellant's reconsideration request finding that it was insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>4</sup>

Causal relationship is a medical issue,<sup>5</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be

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<sup>4</sup> *Terry R. Hedman*, 38 ECAB 222 (1986). See 20 C.F.R. § 10.5(x) for the definition of a recurrence of disability.

<sup>5</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup>

### ANALYSIS

The Office accepted that appellant sustained a right shoulder strain on August 6, 2002. Thereafter, she performed restricted duty for five hours a day. As of September 3, 2002 she was to use only one hand with lifting on the right restricted to 5 pounds and no overhead lifting. She received compensation for the hours she did not work. Through 2004, the reports of Dr. Tetro, an attending physician, reiterated appellant's physical restrictions and capacity for part-time work.

On February 28, 2005 appellant began treatment with Dr. Tracy. The record reveals that she stopped work on March 28, 2005 and subsequently claimed a recurrence of total disability as of that date due to her accepted injury. The Board finds that appellant has not submitted sufficient medical evidence to establish a change in the nature or extent of her accepted condition or a change in the nature and extent of her limited-duty job requirements.

Dr. Tracy noted on April 14, 2005 that appellant had taken herself off work as of March 28, 2005. He noted increased shoulder pain, fibromyalgia and depression. Dr. Tracy diagnosed right shoulder rotator cuff tear/acromioclavicular bursitis, co-morbidity, neck cervicalgia, low back pain and depression. As of April 21, 2005, he advised that appellant was totally disabled due to her accepted work injury. The Board notes, however, that Dr. Tracy did not provide any medical opinion explaining why appellant was unable to continue in her restricted work with the five pound limitation on use of her right hand and the preclusion of overhead work. He did not address why appellant was unable to continue in her employment for five hours a day due to residuals of the accepted right shoulder strain.

In reports dated June 27, 2005, Dr. Tracy reiterated appellant had right shoulder pain with reduced range of motion. He found, without explanation, that she was totally disabled for work until further evaluation on August 4, 2005. Again, the physician did not provide any explanation for his finding of total disability or how it related to the August 6, 2002 injury. He did not address why appellant was unable to continue in her restricted duty.

In the September 27, 2005 report, Dr. Tracy noted a history that appellant had returned to her regular duty as a mail handler following the accepted injury. He noted that she was required to perform heavy lifting and carrying, with reaching and pulling of the injured right shoulder. This history, however, does not conform to the evidence of record which reflects that Dr. Tetro imposed a five pound lifting restriction on use of the right arm and precluded any overhead work. The medical evidence of treatment from 2002 to 2005 reflects that appellant continued under the right arm work limitations. No limitations were noted concerning the use of her left hand. On June 9, 2004, Dr. Miller noted that appellant was continued in 5 hour a day employment under the restrictions recommended by Dr. Tetro. There is no evidence of appellant having contended that her work limitations were not honored prior to the time she stopped work

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<sup>6</sup> Gary L. Fowler, 45 ECAB 365 (1994); Victor J. Woodhams, 41 ECAB 345 (1989).

in March, 2005. In the September 27, 2005 report, Dr. Tracy noted that he was relying on appellant's statements as to her employment duties and those of coworkers that were provided to for his review. However, the evidence of record does not establish that the employing establishment changed the nature of the restricted duty appellant had been performing under the recommendation of Dr. Tetro since 2002.

On appeal, counsel for appellant notes that she was never provided a modified duty job offer in March of 2005. His contention is supported by the evidence of record which shows that appellant's supervisor was in the process of having Dr. Miller review a proposed full-time modified job offer prior to the time appellant stopped work on March 27, 2005. The employing establishment acknowledged that a job offer was never made to appellant since she retired in November, 2005. Whether or not she ever received a modified duty job offer, however, is not determinative of appellant's recurrence claim, the issue adjudicated by the Office. The Office did not adjudicate whether she refused an offer of suitable work.<sup>7</sup> It is appellant's burden to establish that she was unable to continue in her restricted duty assignment due to a change in her accepted medical condition or that a change was made in her work requirements. Appellant has failed to substantiate her contention that her work duties did not conform to her medical restrictions.<sup>8</sup> The April 1, 2005 prescription note of Dr. Bastible advised that appellant would be off work for one month. The physician provided no opinion relating appellant's disability for work to the accepted injury. As noted, the reports of Dr. Tracy were initially unrationalized as to the reasons for appellant's inability to work as of March 28 2005. After September 27, 2005, his medical opinion is of reduced probative value as it is based on an erroneous history of appellant's employment activities following the accepted injury. His reports most contemporaneous with March 28, 2005 do not address appellant's capacity for work or identify a particular change in the nature of appellant's accepted condition which prevented her from continuing in her light-duty position.<sup>9</sup> Additionally, the Board notes that there is no explanation addressing conditions not accepted in this case, such as cervical cervicalgia, bursitis, low back pain, fibromyalgia or depression were caused or contributed to by the accepted right shoulder strain.<sup>10</sup> The Office never accepted these conditions as a result of the August 6, 2002 work injury.<sup>11</sup> The Board has found that unrationalized medical opinions on causal relationship are of diminished probative value.<sup>12</sup> Therefore, the evidence is insufficient to establish either a change

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<sup>7</sup> See 5 U.S.C. § 8106(c).

<sup>8</sup> The Board notes that with her request for an appeal, appellant submitted new evidence including witness statements and an affidavit. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c).

<sup>9</sup> See *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

<sup>10</sup> See *Robert H. St. Onge*, 43 ECAB 1169, 1175 (1992).

<sup>11</sup> See *T.M.*, 60 ECAB \_\_\_\_ (Docket No. 08-975, issued February 6, 2009) (for conditions not accepted or approved by the Office as being due to an employment injury, the claimant bears the burden of proof to establish that such conditions are causally related to the employment injury through the submission of rationalized medical evidence).

<sup>12</sup> See *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

in the nature of appellant's injury-related condition or that her restricted duty work was changed causing her to be totally disabled as of March 28, 2005.

Dr. Gosy's reports from May 10, 2006 to January 10, 2008 noted appellant's treatment for right shoulder pain due to a work injury and found moderate disability. Likewise, work capacity evaluations from Dr. Bastible dated April 1, 2005 and February 8, 2008, diagnosed right arm rotator cuff, spinal stenosis of the lumbar spine and noted appellant was permanently and totally disabled. However, neither physician adequately addressed the issue of appellant's incapacity for work as of March 28, 2005. Dr. Bastible also listed diagnoses that are not accepted by the Office as related to the August 2002 injury.

To further develop the claim, the Office referred appellant to Dr. Ring for a second opinion. In a May 3, 2007 report, he diagnosed right shoulder injury causally related to her August 2002 work injury and impingement syndrome. Dr. Ring noted that appellant could not perform the regular duties of her mail handler job. He found, however, that she could work full-time at limited duty with restrictions of no lifting of the right arm above the chest and no lifting more than five pounds. The physical restrictions recommended by Dr. Ring reflect the restrictions set by Dr. Tetro in 2002. Dr. Ring does not support that appellant was totally disabled for work as of March 28, 2005.

Appellant contends that the Office erroneously dismissed the September 27, 2005 report of Dr. Tracy. As noted, however, the report is premised on facts concerning appellant's work duties that are not substantiated by the evidence of record. This diminished the probative value of the physician's opinion on the issue of disability. Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the restricted duty she performed after her return to work.

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

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>13</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>14</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain 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

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<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.606(b).

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

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>15</sup>

### ANALYSIS

Appellant’s request for reconsideration asserted that she was never offered a modified mail handler position on March 18, 2005 as noted in the Office’s June 25, 2008 decision. She referenced a supporting affidavit which is not of record. The contention, however, is not relevant to the issue of whether the Office erroneously applied or interpreted a specific point of law or relevant legal argument not previously considered. The underlying issue is whether appellant established a recurrence of total disability as of March 28, 2005. As noted, regardless of whether a job offer was ever made, appellant was provided light duty consistent with her physician’s restrictions in 2002 which she performed prior to stopping work. Appellant’s assertions regarding any possible modified duty offer by the employing establishment does not establish that the Office erred in applying or interpreting a specific point of law or advance a particular point of law or fact that the Office had not previously considered.<sup>16</sup>

By letters dated July 24 and October 23, 2008, appellant noted that her schedule award was expiring and requested that she be placed on the periodic roll in receipt of wage-loss compensation for total disability. The materials pertaining to her schedule award are insufficient to require further merit review as there are not relevant to establishing her recurrence of disability claim. The Office properly determined that this evidence did not constitute a basis for further merit review. The September 12, 2008 record from Dr. Gosity noted limited range of motion of the right shoulder and diagnosed pain in the shoulder joint. However, Dr. Gosity’s report is duplicative of his prior reports and does not address the issue relevant in this case as the physician did not discuss the cause of appellant’s disability beginning March 28, 2005.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2).

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of total disability commencing March 28, 2005. The Board also finds that the Office properly denied her request for reconsideration.

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<sup>15</sup> 20 C.F.R. § 10.608(b).

<sup>16</sup> *C.N.*, 60 ECAB \_\_\_ (Docket No. 08-1569, issued December 9, 2008) (evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22 and June 25, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: February 23, 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