

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

T.D., Appellant)

and)

U.S. POSTAL SERVICE, CENTRAL)
MASSACHUSETTS PROCESSING &)
DISTRIBUTION CENTER, Shrewsbury, MA,)
Employer)

Docket Nos. 09-1028 & 09-1029

Issued: January 11, 2010

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument October 15, 2009

DECISION AND ORDER

Before:

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

JURISDICTION

On March 9, 2009 appellant filed a timely appeal of the September 23, 2008 merit decision of the Office of Workers' Compensation Programs denying her request to change her attending physician in Office File No. xxxxxx602. The Board docketed the appeal as No. 09-1028. Appellant also filed a timely appeal of the Office's January 30, 2009 nonmerit decision denying her request for reconsideration in Office File No. xxxxxx214. The Board docketed the appeal as No. 09-1029. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case docketed as No. 09-1028. The Board, however, lacks jurisdiction to review the merits of the case docketed as No. 09-1029 pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 because more than one year has elapsed between the most recent Office merit decision dated November 28, 2007 and the filing of the appeal.

ISSUE -- OFFICE FILE NO. xxxxxx602

The issue is whether the Office properly terminated appellant's medical benefits on the grounds that she no longer had any residuals causally related to her accepted employment injury.

On appeal, before the Board, appellant contended that the Office failed to respond to her repeated requests to change her attending physician.

FACTUAL HISTORY -- OFFICE FILE NO. xxxxxx602

This case has previously been before the Board. In a June 19, 2008 decision,¹ the Board set aside the Office's September 5, 2006 decision, which found that appellant did not sustain a left shoulder injury in the performance of duty on March 3, 2006.² It found that her contention that she had ongoing problems with her November 28, 2005 employment-related left shoulder condition and the medical evidence of record, which stated that the accepted March 3, 2006 employment incident aggravated her accepted employment-related condition were sufficient to require further development of the claim.³ The Office, by letter dated August 21, 2008, subsequently accepted appellant's claim for temporary aggravation of tendinitis in the left shoulder. It paid her compensation.

In an August 26, 2008 letter, appellant requested authorization to change her attending physician from Dr. Donald H. Hangen, a Board-certified orthopedic surgeon, to Dr. Florindo J. Celona, a Board-certified internist. She feared possible irreversible damage from either undergoing injections or surgery which were the only options recommended by Dr. Hangen.

By decision dated September 23, 2008, the Office denied appellant's request to change her physician. It found that the evidence did not demonstrate that she was not receiving proper or adequate care from Dr. Hangen. The Office further found that Dr. Medhat M. Kader, a Board-certified orthopedic surgeon and an Office referral physician, advised in an August 12, 2008 medical report that appellant did not have any ongoing traumatic pathology in the left shoulder and that the results of this injury had completely subsided, leaving no residuals. Dr. Kader opined that she had reached maximum medical improvement and there was no medical necessity for further testing or treatment.

LEGAL PRECEDENT -- OFFICE FILE NO. xxxxxx602

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion

¹ Docket No. 07-2331 (issued June 19, 2008).

² On July 16, 2006 appellant, then a 58-year-old flat sorter, filed a traumatic injury claim alleging that on March 3, 2006 she hurt her left shoulder as a result of being forced to repetitively pitch flats in the manual flats section.

³ In the June 19, 2008 decision, the Board determined that the remaining issue of whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124 in a July 24, 2007 decision was moot in light of its disposition of the performance of duty issue.

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

evidence based on a proper factual and medical background.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.⁶

Office procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls.⁷ Pretermination notice is not required when the claimant dies, returns to work, is convicted of defrauding the Federal Employees' Compensation Act program or forfeits compensation by failing to report earnings.⁸ The Board has held that the Office must follow its procedures and provide notice an opportunity to respond prior to the termination of compensation benefits.⁹

ANALYSIS -- OFFICE FILE NO. xxxxxx602

On August 21, 2008 the Office accepted appellant's claim for temporary aggravation of tendinitis in the left shoulder. In a September 23, 2008 decision, it denied her request to change her attending physician from Dr. Hangen to Dr. Celona because the evidence did not demonstrate that she was not receiving proper and adequate care from Dr. Hangen. The Office further denied appellant's request because Dr. Kader, an Office referral physician, opined that she no longer had any residuals related to her left shoulder, she had reached maximum medical improvement and there was no medical necessity for further testing or treatment. The Board finds, however, that by denying appellant's request to change her physician based on Dr. Kader's medical opinion that she no longer had any employment-related residuals or need for medical treatment, the Office in effect terminated her medical benefits as of September 23, 2008. The Board further finds that the Office failed to meet its burden of proof in terminating her medical benefits.

Under the Office's procedures a notice of proposed termination should have been sent to appellant allowing her 30 days to respond. Since there is no evidence that the Office provided notice and an opportunity to respond prior to termination of all her medical benefits, the termination was improper in this case.¹⁰ Accordingly, its September 23, 2008 decision is reversed.

ISSUE -- OFFICE FILE NO. xxxxxx214

The issue is whether the Office properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

⁵ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (a) (March 1997).

⁸ *Id.*, Chapter 2.1400.6(c) (March 1997).

⁹ *Winton A. Miller*, 52 ECAB 405 (2001).

¹⁰ *Marsha K. Stanowski*, 48 ECAB 607 (1997); 20 C.F.R. § 10.5(f).

Appellant contended that the Office failed to notify her about missing evidence prior to the issuance of its January 30, 2009 decision denying her request for reconsideration.

FACTUAL HISTORY -- OFFICE FILE NO. xxxxxx214

This case has previously been before the Board. In an October 22, 2007 decision, the Board affirmed the Office's May 24, 2006 decision, which found that appellant did not sustain a right wrist injury in the performance of duty on March 21, 2006, as alleged.¹¹ The Board reversed the Office's September 5, 2006 decision, which denied her request for reconsideration of the May 24, 2006 decision under 5 U.S.C. § 8128(a).¹² It found that appellant had submitted pertinent new and relevant medical evidence not previously considered by the Office which constituted a basis for reopening her claim for further merit review. Accordingly, the Board remanded the case to the Office to address the merits of her request for modification of the denial of her claim of injury.

By decision dated November 28, 2007, the Office denied modification of its finding that appellant did not sustain a right wrist injury in the performance of duty on March 21, 2006. It found the medical evidence insufficient to establish that the claimed injury was causally related to the accepted March 21, 2006 employment incident.

In a December 6, 2007 report, Dr. Hangen noted appellant's continuing left shoulder symptoms. He stated that a magnetic resonance imaging scan of the left shoulder revealed mild supraspinatus tendonopathy with a Type II acromion with some narrowing of the supraspinatus inlet and some minimal long head of the biceps tendonopathy, but there was no evidence of a rotator cuff tear. Appellant rejected Dr. Hangen's recommendation that she undergo a subacromial injection and possible surgery. On January 3, 2008 Dr. Hangen advised the employing establishment that she sustained left shoulder tendinitis.

In reports dated January 18 and September 24, 2008, Dr. Celona advised that appellant sustained tendinitis and a ganglion cyst of the right wrist. In a September 24, 2008 report, he opined that her right wrist tendinitis and ganglion cyst were caused or aggravated by the March 21, 2006 employment incident. Dr. Celona explained that appellant performed repetitive work duties.

By letter dated November 1, 2008, appellant requested reconsideration of the November 28, 2007 decision. She stated that medical records, including Dr. Celona's March 17, April 8 and September 24, 2008 progress notes accompanied her request. On January 21, 2008 Dr. Celona stated that appellant's continuing tendinitis and ganglion cyst residuals were related to a March 18, 2003 employment injury. In reports dated May 24, 2006, he reiterated that her tendinitis and ganglion cyst were due to the accepted March 21, 2006 employment incident.

¹¹ Docket No. 07-853 (issued October 22, 2007).

¹² In the Office's September 5, 2006 decision, it addressed the medical evidence submitted by appellant, including Dr. Celona's May 24, 2006 reports which advised that appellant's right wrist tendinitis and ganglion cyst were caused by the accepted March 21, 2006 employment incident.

By decision dated January 30, 2009, the Office denied appellant's request for reconsideration. It found that the evidence submitted was duplicative in nature and not relevant and, thus, insufficient to warrant further merit review of appellant's claim. The Office stated that it did not receive Dr. Celona's March 17, April 8 and September 24, 2008 progress that were claimed to have been submitted by appellant.

LEGAL PRECEDENT -- OFFICE FILE No. xxxxxx214

To require the Office to reopen a case for merit review under section 8128 of the Act,¹³ 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) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁴ 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.¹⁵ 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 of the merits.

ANALYSIS -- OFFICE FILE NO. xxxxxx214

In a November 1, 2008 letter, appellant disagreed with the Office's November 28, 2007 decision, which found that she did not sustain a right wrist injury in the performance of duty on March 21, 2006. The underlying issue is whether she sustained a right wrist injury causally related to the accepted March 21, 2006 employment incident and medical in nature.

Dr. Hangen's December 6, 2007 report advised that, although appellant sustained mild supraspinatus tendonopathy with a Type II acromion with some narrowing of the supraspinatus inlet and some minimal long head of the biceps tendonopathy of the left shoulder, there was no evidence of a rotator cuff tear. His January 3, 2008 opinion advised that appellant sustained left shoulder tendinitis. This evidence does not contain an opinion addressing the relevant issue of whether appellant sustained a right wrist injury causally related to the accepted March 21, 2006 employment incident. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁶ The Board finds that Dr. Hangen's report and opinion are insufficient to reopen appellant's claim for further merit review.

Similarly, Dr. Celona's January 21, 2008 opinion which stated that appellant's continuing right wrist tendinitis and ganglion cyst residuals were related to a March 18, 2003 employment injury is insufficient to reopen her claim for further merit review. He did not provide an opinion

¹³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *D. Wayne Avila*, 57 ECAB 642 (2006).

addressing the relevant issue of whether appellant's right wrist conditions were caused or aggravated by the accepted March 21, 2006 employment incident.¹⁷ The Board finds that Dr. Celona's January 21, 2008 opinion is insufficient to reopen her claim for further merit review. Appellant resubmitted Dr. Celona's May 24, 2006 reports finding that her right wrist tendinitis and ganglion cyst were caused by the March 21, 2006 employment incident. The submission of this evidence does not require the reopening of her claim for merit review because the evidence had previously been considered by the Office. The Board has held that evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁸ Although Dr. Celona's January 18 and September 24, 2008 reports which found that appellant's right wrist tendinitis and ganglion cyst were caused by the accepted employment incident constitute new evidence as this is their first submission, they are similar in content to his May 24, 2006 reports, which were previously reviewed by the Office. His reports contained no new information or reasoning to support his opinion that appellant sustained a right wrist injury due to the March 21, 2006 employment incident. As Dr. Celona's reports are repetitious of his earlier reports, the Board finds that are insufficient to reopen appellant's claim for further merit review. The record contains no additional medical evidence submitted on reconsideration.

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law; advanced a relevant legal argument not previously considered; or constituted relevant and pertinent new evidence not previously considered by the Office. Appellant did not meet any of the regulatory requirements and the Office properly declined to reopen her claim for further merit review.¹⁹

CONCLUSIONS

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation in Office File No. xxxxxx602. The Board further finds that the Office properly denied her request for further merit review under 5 U.S.C. § 8128(a) in Office File No. xxxxxx214.

¹⁷ *Id.*

¹⁸ See *L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

¹⁹ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed in Office File No. xxxxxx214. The Office's September 23, 2008 decision in Office File No. xxxxxx602 is reversed.

Issued: January 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