

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

M.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Egg Harbor City, NJ, Employer**

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**Docket No. 09-2006
Issued: June 4, 2010**

Appearances:
Aaron B. Aumiller, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2009 appellant filed a timely appeal of decisions dated August 20, 2008 and April 20, 2009 of the Office of Workers' Compensation Programs denying appellant's request for reconsideration without a merit review. As the most recent merit decision of the Office was issued on November 14, 2007, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e).¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review.

¹ For Office decisions dated November 19, 2008 or later, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e) (2009); 73 Fed. Reg. 62,190 (October 20, 2008). For Office decisions issued before November 19, 2008, a claimant had one year in which to file an appeal. See 20 C.F.R. § 501.3(d)(2) (2008).

FACTUAL HISTORY

On March 6, 2007 appellant, then a 58-year-old rural delivery carrier, filed an occupational disease claim alleging that she sustained a labral tear of her left shoulder due to repetitive reaching for mail in the back of her vehicle. She first became aware of her condition on December 7, 2006 and realized that such condition was caused or aggravated by employment activities on March 5, 2007. Appellant did not stop work, but had been on light duty since January 6, 2007 for left carpal tunnel syndrome, which was filed under a separate claim.² In a November 26, 2006 statement, she noted working for the employing establishment since November 18, 1967 and sorting mail for over 40 years. In statements dated March 13, 2007, appellant explained that her work duties consisted of casing mail and constant reaching for mail with her left arm. She indicated that on December 7, 2006 she woke up with left arm and shoulder pain but continued working. Appellant also indicated that she filed an occupational disease claim in November 1992 for left elbow tendinitis and in November 2006 for bilateral carpal tunnel syndrome.

In a March 8, 2007 report, Dr. John Baker, a Board-certified orthopedic surgeon, noted first treating appellant on March 5, 2007 for left shoulder pain. He indicated that appellant noticed left shoulder pain since December 2006 after dancing but that she was also a mail carrier who often reached into the backseat of her truck to lift mail using her left arm. Dr. Baker diagnosed possible anterior labral tear and recommended an arthrogram magnetic resonance imaging (MRI) scan. He also submitted duty status reports listing work restrictions.

In a May 7, 2007 decision, the Office denied appellant's claim finding that she did not submit sufficient evidence to establish that she sustained an occupational disease as alleged.

Appellant subsequently submitted an April 20, 2007 report from Dr. Ernesto Go, a Board-certified radiologist, who noted that a left shoulder MRI scan revealed no evidence of labral tear or rotator cuff tear. Dr. Go found degenerative cystic change in the posterolateral aspect of the humeral head and thickening of the bursa of the subacromial subdeltoid consistent with bursitis.

On May 3, 2007 Dr. Baker indicated that appellant's MRI scan revealed no evidence of a labral tear of the left shoulder but that, based on his own review of the MRI scan, there appeared to be a labral tear. He stated that the mechanism of injury was repetitive reaching into the back of a mail truck to pull out mail and the onset of pain was December 2006. Dr. Baker indicated that, although appellant initially noted this condition after dancing, she also noted that her work duties aggravated her left shoulder. He opined that her condition was a hyperextension-type injury and could be caused by the type of activity over a repetitive process that she described as her daily work. Dr. Baker recommended surgery.

On May 19, 2007 appellant requested reconsideration and described the difficulties she encountered obtaining a medical report from Dr. Baker. She also submitted a May 1, 2007 letter to Dr. Baker requesting that he submit a medical report to the Office.

² The claim for left carpal tunnel syndrome was assigned case file number xxxxxx197 and is not presently before the Board.

In a July 27, 2007 decision, the Office denied appellant's reconsideration request finding that the evidence submitted was insufficient to warrant a reopening of the case.

On August 28, 2007 appellant requested reconsideration. She submitted an August 7, 2006 report of Dr. Bradford Tucker, a Board-certified orthopedic surgeon, who noted her complaint of left shoulder pain for one year. Dr. Tucker also noted that appellant delivered mail in a rural setting where she was in a car constantly reaching behind her to grab mail. He indicated that she had developed severe bilateral shoulder pain and hand numbness in August 2006 after delivering mail without particular incident and she subsequently underwent bilateral carpal tunnel release. Dr. Tucker noted that a left shoulder x-ray showed superior labral tear evidenced by gadolinium tracking completely under the superior labrum. He diagnosed left shoulder superior labral tear from anterior to posterior (SLAP) tear. Dr. Tucker opined that appellant's history, diagnostic testing were all consistent with a SLAP tear and that this tear was related to her work and was caused by repeatedly reaching behind her which stressed the superior labrum. He further opined that this tear occurred over time.

On September 19, 2007 the Office referred appellant, with a statement of accepted facts, to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 16, 2007 report, Dr. Stark noted appellant's history and indicated that she reported developing pain in her left hand on August 29, 2006 that radiated down to her left shoulder. He noted findings on examination of the upper extremities, noting full range of motion of the left shoulder although extreme motion produced pain. Dr. Stark opined that, based on a review of the statement of accepted facts and appellant's medical record, she had a labral tear in her left shoulder which was not a condition related to reaching in the course of her employment. He explained that appellant reported having a left shoulder problem since August 2006 but that there were no medical documents of record until March 2007 regarding this condition.

In a November 14, 2007 decision, the Office denied modification of its May 7, 2007 decision finding that the medical evidence was insufficient to establish that the alleged condition was causally related to the identified employment duties.

In a May 22, 2008 letter, appellant's attorney requested reconsideration and indicated that the request was supported by an enclosed May 8, 2008 report from Dr. Tucker. He asserted that Dr. Tucker carried the weight of the medical evidence or created a medical conflict as he performed several comprehensive examinations of appellant, had knowledge of her medical and work history and provided a reasoned opinion on causal relationship. No report from Dr. Tucker was submitted with appellant's request.

In an August 20, 2008 decision, the Office denied appellant's reconsideration request without a merit review finding that she did not raise any substantive legal questions or provide any new relevant evidence.

In a September 9, 2008 letter, appellant requested reconsideration and noted that she was reiterating all arguments outlined in her May 22, 2008 reconsideration request letter. She also noted that she was enclosing Dr. Tucker's May 8, 2008 report.

In a May 8, 2008 addendum report, Dr. Tucker noted reviewing Dr. Stark's report and disagreed with his factual understanding of appellant's case. He indicated that Dr. Stark was not informed that appellant's work duties required her to repeatedly reach behind her to grab mail out of bins and deliver them to mailboxes. Dr. Tucker opined that repetitive extension, external rotation and abduction of the arm are the exact mechanism of how a superior labral tear occurs. He further opined that appellant sustained a left shoulder superior labral tear from repetitive reaching behind her while at work delivering mail.

In an April 20, 2009 decision, the Office denied appellant's reconsideration request finding that the evidence submitted was not sufficient to warrant a merit review of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office regulations provide that 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.⁴

ANALYSIS

Appellant's May 22, 2008 reconsideration request consisted of a letter indicating that she was attaching a May 8, 2008 report from Dr. Tucker asserting that he represented the weight of medical evidence or was sufficient to create a medical conflict. However, the report from Dr. Tucker did not accompany the reconsideration request. Consequently, appellant did not show that a specific point of law that was erroneously applied or interpreted and did not advance a relevant legal argument not previously considered.

The Board notes that appellant also did not submit any new and relevant evidence with her reconsideration request. As the issue of whether appellant sustained an occupational disease involving her left shoulder is medical in nature, it should be addressed by the submission of pertinent new medical evidence. However, no new medical evidence was submitted with this reconsideration request. The Office properly denied this request for reconsideration.

Appellant's September 9, 2008 reconsideration request consisted of a statement noting that she reiterated all of the arguments outlined in her May 22, 2008 reconsideration request letter. Also submitted was Dr. Tucker's May 8, 2008 report. Appellant's assertions were premised on Dr. Tucker's report representing the weight of the medical evidence or being sufficient to create a medical conflict. However, these assertions go to the merits of the

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007). *See* 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

underlying issue in the claim which, as noted, is medical in nature. As noted, the Board does not have jurisdiction over the merits of claim. Dr. Tucker's May 8, 2008 report can only be considered with regard to whether it meets one of the three regulatory criteria for reopening a claim for a merit review. These assertions on reconsideration about the report do not establish that a specific point of law that was erroneously applied or interpreted and do not advance a relevant legal argument not previously considered by the Office.

As Dr. Tucker's May 8, 2008 report is new evidence, the Board must consider whether it is relevant evidence. The Board finds that this new report is not relevant because it is cumulative or repetitive in nature. Dr. Tucker's May 8, 2008 report provides a similar opinion on causal relationship as that provided in his August 7, 2007 report, which was previously considered by the Office.⁵ Both reports essentially opine that repetitive reaching behind to grab mail caused appellant's left shoulder condition. As noted, repetitive or duplicative evidence is insufficient to reopen a case for merit review. Appellant did not submit any other medical evidence with her reconsideration request.

On appeal, appellant asserts that the Board should direct that the claim be accepted noting that the second opinion physician, Dr. Stark, was not provided with an accurate description of her duties, specifically regarding her repeatedly reaching behind her to deliver mail. She further asserts that this specific duty is the basis for establishing causal relationship. Appellant also asserts that the medical evidence from Dr. Tucker provides a rationalized medical opinion supporting causal relationship between her work duties and her left shoulder condition. The Board's jurisdiction is limited to a determination as to whether the Office properly denied her reconsideration request without conducting a merit review of the record. As appellant's arguments on appeal relate to the underlying merits of the claim, the Board has no jurisdiction to consider the merits of the matter. As noted, she did not, on reconsideration, submit sufficient evidence or argument to require the Office to reopen the claim for a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

⁵ See *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 Office of Workers' Compensation Programs' decisions dated April 20, 2009 and August 20, 2008 are affirmed.

Issued: June 4, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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