

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

D.V., Appellant

and

U.S. POSTAL SERVICE, INDIAN SCHOOL
STATION, Phoenix, AZ, Employer

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**Docket No. 09-2294
Issued: June 10, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 15, 2009 appellant filed a timely appeal of an August 21, 2009 Office of Workers' Compensation Programs' nonmerit decision denying her request for reconsideration of the merits. Because more than 180 days have elapsed between the most recent Office merit decision dated August 14, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

On December 22, 2005 appellant, then a 54-year-old mail processing clerk, filed an occupational disease claim alleging that on August 5, 2005 she first realized that her left shoulder and arm condition was due to her employment duties requiring that she "perform jobs that

require two arms with just my left arm.” On March 25, 2006 she filed an updated occupational disease claim attributing her back, arm and left shoulder condition to her employment duties. Appellant noted on this form that the original claim form had been dated December 22, 2005.¹

In support of her claim, appellant submitted medical and factual evidence including her undated statement, duty status reports² dated July 13, 2005 and March 13, 2006 providing work restrictions; and her July 13, 2005 acceptance of a modified job offer. The March 13, 2006 duty status report noted a diagnosis of left shoulder overuse and left shoulder pain while the July 13, 2005 report diagnosed epicondylitis due to her employment injury and overuse of the right arm.

In a letter dated April 5, 2006, the Office informed appellant that the evidence was insufficient to support her occupational disease claim and advised her as to the medical and factual evidence required to support her claim. Appellant was given 30 days to submit the requested information.

In response appellant submitted medical and factual evidence including an Equal Employment Opportunity (EEO) complaint she filed for alleged discrimination; disability notes dated December 6, 2005 and March 31, 2006 by H. Reece, a certified physician’s assistant; a March 23, 2006 report by John-David Michels, a certified physician’s assistant and Dr. Gary T. Purcell, a treating Board-certified orthopedic surgeon;³ a September 22, 2005 recurrence claim; progress notes and report dated January 3, 2006 by Dr. John T. Porter, a treating physician; and a May 9, 2006 progress note by Dr. Purcell diagnosing left shoulder bursitis.

In his January 3, 2006 progress note, Dr. Porter noted appellant was seen for chronic pain management. Appellant related she aggravated her left arm because of her job duties. Dr. Porter reviewed the job duties and concluded she was unable to perform the job due to the repetitive nature of the duties. Dr. Porter, in his January 3, 2006 report, stated appellant was having significant bilateral upper extremity problems due to her repetitive job duties. He diagnosed chronic myofascial pain of both upper extremities.

In the March 3, 2006 progress note by Mr. Michels and Dr. Purcell, the chief complaint was noted as left arm and shoulder pain which began August 8, 2005 due to overuse. The report noted appellant had right upper extremity restrictions and provided physical findings of the left shoulder.

By decision dated May 9, 2006, the Office denied her claim as the evidence was insufficient to establish that her left shoulder injury was employment related.

¹ Appellant stopped work in October 2006 and went on disability retirement in November 2006.

² The signatures on the duty status reports are illegible.

³ The report contains the names of both Mr. Michels and Dr. Purcell with the signature appearing to be that of Mr. Michels.

On June 24, 2006 appellant requested an oral hearing and a telephone hearing was held on February 16, 2007. With her request for an oral hearing, she submitted a June 6, 2006 report⁴ by Mr. Michels and Dr. Purcell diagnosing left shoulder impingement syndrome with tendinitis.

In a July 11, 2006 progress note, Dr. Purcell diagnosed fibromyalgia. He noted appellant continued to have complaints of a significant amount of left shoulder pain.

Subsequent to the hearing appellant submitted factual and medical evidence including her statements, evidence from her EEO claim; a March 23, 2006 report by Mr. Michels and Dr. Purcell; and a March 21, 2007 report by Dr. A. Todd Alijani, an examining Board-certified orthopedic surgeon.

In his March 21, 2007 report, Dr. Alijani diagnosed left shoulder impingement syndrome and myofascial syndrome of the upper back and upper rhomboids. Appellant attributed her left upper extremity condition to her job duties which included extensive lifting and pushing. A physical examination revealed rhomboid trigger point tenderness, out of proportion tenderness over the biceps and acromioclavicular joint and full left shoulder range of motion.

By decision dated May 22, 2007, the Office hearing representative affirmed the May 9, 2006 Office decision.

On July 19, 2007 appellant requested reconsideration.

By decision dated July 31, 2007, the Office denied appellant's reconsideration request without reviewing the case on the merits.

On August 2, 2007 Dr. Robert B. Ogensen, diagnosed severe emotional stress as a result of appellant's inability to perform her light-duty job assigned in August 2005. He opined the light-duty job was not medically suitable for appellant.

On August 7, 2007 Dr. Purcell opined the light-duty job was not suitable and recommended a sedentary position with no repetitive use of her shoulders or lower extremity.

In an August 13, 2007 report, Dr. Alijani diagnosed left shoulder impingement syndrome and myofascial pain of her upper back and upper rhomboids. He attributed her condition to her employment as "she had no pain prior to the injury and has had pain after, with a degree of medical certainty that the job resulted in the injury."

On May 20, 2008 the Office received medical and factual evidence from appellant including evidence previously submitted, evidence pertaining to her light-duty job offer evidence concerning an appeal of a grievance; evidence from her EEO claim and her contentions that she was required to work outside her restrictions and that the modified job was not suitable.

On May 18, 2008 appellant requested reconsideration.

⁴ The report was unsigned.

By decision dated August 14, 2008, the Office denied appellant's request for modification of the denial of her claim.

By letter dated August 3, 2009, received by the Office on August 7, 2009, appellant requested reconsideration. In support of her claim, she submitted her statement contending that she did not elect disability retirement in October 2006 as she had applied in December 2005; however, the employing establishment delayed the processing of her application because it "consciously sent erroneous information to the [d]isability office." Further, appellant contended that she had proved that her work caused her arm injury. She did not submit any evidence with her requested.

By decision dated August 21, 2009, the Office denied appellant's request for reconsideration on the merits. It noted that appellant did not submit any new evidence with her request.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰

⁵ 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.

⁶ 20 C.F.R. § 10.606(b)(2). *See J.M.*, 60 ECAB ____ (Docket No. 09-218, issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁷ 20 C.F.R. § 10.607(a). *See S.J.*, 60 ECAB ____ (Docket No. 08-2048, issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁸ 20 C.F.R. § 10.608(b). *See Y.S.*, 60 ECAB ____ (Docket No. 08-440, issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁹ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

ANALYSIS

In support of her August 3, 2009 reconsideration request, appellant submitted her statement contending that she had proved that her left arm condition was employment related. Her August 3, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. She did not submit any pertinent new and relevant evidence with her request for reconsideration. The issue to be resolved is a medical one and appellant did not submit any medical evidence with her request. Consequently, appellant is not entitled to a review of the merits of her claim based on the above-noted requirements under section 10.606(b)(2). Although she contended that the employing establishment delayed the effective date of her disability retirement because it did not cooperate, this argument is irrelevant to the threshold issue of whether she sustained an injury in the performance of duty causally related to factors of her federal employment. Thus, the Board finds that such contention is insufficient to warrant a merit review.¹¹

The Board finds that the Office properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(2), and thus the Office properly denied her August 3, 2009 request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 21, 2009 is affirmed.

Issued: June 10, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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