

FACTUAL HISTORY

On January 23, 2007 appellant, then a 59-year-old rural carrier, injured her left knee, neck and shoulder in a motor vehicle accident. The Office accepted the claim for a neck sprain, a left knee contusion, right shoulder rotator cuff syndrome and right bicipital tenosynovitis. Appellant stopped work on April 19, 2007.

On February 26, 2008 Dr. Saqib Rehman, an attending Board-certified orthopedic surgeon, diagnosed rotator cuff tendinosis with a partial tear and bicipital tendinitis and found that appellant was totally disabled. On March 4, 2008 Dr. Irvin D. Strouse, a Board-certified orthopedic surgeon, diagnosed resolved cervical sprain and adhesive capsulitis of the right shoulder. He found that appellant could work part time with restrictions.

The Office determined that a conflict in medical opinion arose between Dr. Rehman and Dr. Strouse regarding appellant's work capability. It referred her to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination. On September 19, 2008 Dr. Fries diagnosed resolved neck sprain, degenerative cervical disc disease, right trapezius myalgia, right rotator cuff and bicipital tendinitis, a partial tear of a degenerative cuff and acromioclavicular and glenohumeral arthritis. In a work restriction evaluation, he found that she could work eight hours per day with restrictions on reaching above her shoulder and pushing, pulling and lifting less than 20 pounds. Dr. Fries stated:

“A relationship of [appellant's] current symptoms and pathology to the January 23, 2007 motor vehicle accident is not established. She confirms no shoulder symptoms until three and a half weeks after the accident. Rotator cuff tendinitis, partial tendon tears and acromioclavicular arthritis -- all MRI [magnetic resonance imaging] [scan] findings -- are common degenerative conditions that occur spontaneously, and are expected to advance.

“The Office has accepted the conditions of a neck sprain, left knee contusion [fully resolved], right rotator cuff syndrome, and right bicipital tendinitis. I disagree these right shoulder pathologies are causally related to the January 24, 2007 accident. However, if the Office determination stands, than limitations I provided on the attached OWCP-5c should be considered due to the accident.”

By decision dated May 8, 2009, the Office terminated appellant's compensation benefits and authorization for medical treatment effective May 9, 2009. It found that the opinion of Dr. Fries was entitled to special weight and established that she had no further employment-related disability or condition. The Office determined that the work restrictions provided by Dr. Fries were due to a degenerative right shoulder condition unrelated to her work injury.

On November 10, 2009 appellant, through her attorney, requested reconsideration. He noted that Dr. Strouse, the second opinion physician, diagnosed adhesive capsulitis of the rotator cuff and found that she could not perform her usual employment. Counsel argued that Dr. Fries supported that appellant was unable to return to her date-of-injury position. He asserted that Dr. Fries' opinion was inconsistent and he disagreed that the right rotator cuff syndrome and right bicipital tendinitis were due to the employment injury but that “if the [O]ffice determination

stands, then limitations I provided on the attached OWCP-5 should be considered due to the accident.” Counsel argued that the Office erred in terminating appellant’s compensation as the medical evidence supported that she had residuals of her employment injury and was unable to return to her usual employment.

By decision dated February 9, 2010, the Office denied appellant’s request for reconsideration after finding that the arguments raised were insufficient to warrant reopening the case for further merit review. It found that counsel’s argument that Dr. Fries found that she could not resume her usual employment was not substantive as he found that her right shoulder condition was degenerative in nature and unrelated to the January 23, 2007 work injury.

On appeal appellant’s attorney argues that the Office failed to meet its burden to terminate compensation. He further contends that it erred in failing to reopen the case for further review of the merits. Counsel asserts that both Dr. Strouse and Dr. Fries determined that appellant was unable to return to her regular employment due to residuals of her work injury.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² 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.³ 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.⁴ 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.⁵

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant’s burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁶

ANALYSIS

The Office accepted that appellant sustained neck sprain, a contusion of the left knee, right shoulder rotator cuff syndrome and right bicipital tenosynovitis as the result of a

² 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.”

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ See *Donald T. Pippin*, 54 ECAB 631 (2003); *Mark H. Dever*, 53 ECAB 710 (2002).

January 23, 2007 motor vehicle accident. It paid her compensation for total disability beginning April 19, 2007. The Office terminated appellant's compensation effective May 9, 2009 based on its finding that the opinion of Dr. Fries, the impartial medical examiner, constituted the weight of the medical evidence and established that she had no further employment-related disability or condition. It noted that he provided some work restrictions for the right shoulder but found that the restrictions were not employment related but instead due to a progressive, degenerative shoulder condition.

On November 10, 2009 appellant's attorney requested reconsideration. On appeal to the Board and in his request for reconsideration to the Office, he argued that Dr. Fries' opinion was insufficient to support the termination of compensation and medical benefits as the report was inconsistent regarding whether she remained disabled from employment due to her work injury. Counsel noted that he provided restrictions for the right shoulder due to her right rotator cuff syndrome and right bicipital tendinitis. While Dr. Fries indicated that he believed that these conditions were not due to the motor vehicle accident, he further provided that, if the Office accepted these conditions as work related, then his work limitations "should be considered due to the accident." Counsel's argument is relevant, not previously considered and pertinent to the issue of whether the Office properly terminated appellant's compensation benefits based on the opinion of Dr. Fries. As appellant has advanced a legal argument not previously considered by the Office, she is entitled to a review of the merits of her claim under section 10.606(b) of the Office's regulations.⁷ The case will be remanded for this purpose.

CONCLUSION

The Board finds that the Office improperly denied appellant's request to reopen her case for further review of the merits of her claim under section 8128.

⁷ See *L.T.*, Docket No. 09-1798 (issued August 5, 2010).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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