



OWCP accepted her claim for right elbow sprain, right brachial neuritis, right lateral epicondylitis and reflex sympathetic dystrophy of the right arm. Appellant worked intermittently and was granted a disability retirement on October 28, 1999.

From November 4, 1996 to March 20, 2002, appellant was treated by Dr. Earl B. McFadden, Jr., a Board-certified orthopedic surgeon, for right epicondylitis and right shoulder pain which developed after performing repetitive duties at work. Dr. McFadden noted impingement of the right shoulder, tendinopathy and Type 3 acromion. He performed a right tennis elbow release on March 25, 1997 and a decompression of the right radial nerve on November 25, 1997. On October 8, 1998 Dr. Edward L. Hay, a Board-certified orthopedic surgeon and fitness-for-duty physician, noted appellant's complaints of right arm pain. He diagnosed status post right arm surgery possible brachial plexus trauma. Appellant was subsequently treated by Dr. W. Daniel Westerkam, a Board-certified physiatrist, on September 27, 1999. Dr. Westerkam diagnosed right lateral epicondylitis, right brachial plexus of the upper trunk and opined that she had 33 percent right arm impairment.<sup>2</sup>

On December 18, 2007 appellant was referred for a second opinion to Dr. Julian C. Adams, a Board-certified orthopedic surgeon. OWCP provided a list of questions for Dr. Adams requesting that he address whether she had residuals of her accepted conditions. In a January 4, 2008 report, Dr. Adams found that appellant had no evidence of organic neurological disease. He noted a normal neurological examination, normal motor examination with discrepancies on sensory examination indicative of malingering.

In an August 20, 2008 report, Dr. McFadden reviewed appellant's history and disagreed with Dr. Adams. He opined that she was unable to do any repetitive duties with the right upper extremity.

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. McFadden, and the second opinion physician, Dr. Adams, as to whether she had residuals of her accepted conditions. Appellant was referred to Dr. David K. Lee, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 12, 2008 report, Dr. Lee diagnosed status post right elbow lateral epicondyle release and debridement, status post right radial nerve decompression and right arm pain. He found appellant at maximum medical improvement and recommended a magnetic resonance imaging (MRI) scan of the cervical spine and an electromyogram (EMG). In a February 19, 2009 supplemental report, Dr. Lee reviewed the EMG and MRI scan test results and diagnosed right carpal tunnel syndrome and bilateral neural foraminal stenosis at C5/6. He opined that these conditions were not causally related to appellant's work. Dr. Lee found no evidence of brachial plexopathy and opined that her work-related conditions had resolved.

Appellant sought treatment from Dr. Michael McCaffrey, a Board-certified orthopedic surgeon, from September 2, 2008 to May 18, 2009, who diagnosed chronic regional pain

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<sup>2</sup> OWCP referred appellant to Dr. W. Dean Lorenz, a Board-certified physiatrist, who on August 24, 2000 opined that appellant had 24 percent impairment of the right arm. On February 6, 2001 it issued a schedule award for 24 percent impairment of the right arm.

syndrome of the right upper extremity. She underwent an MRI scan of the cervical spine, which revealed mild canal stenosis and bilateral neuroforaminal stenosis at C5/6 and an EMG which revealed mild carpal tunnel syndrome of the right upper extremity.

On April 23, 2009 OWCP proposed to terminate appellant's compensation benefits based upon Dr. Lee's referee reports. Appellant submitted a May 18, 2009 report from Dr. McCaffrey, who diagnosed chronic regional pain syndrome of the right upper extremity and opined that this condition was causally related to her original work injury.

By decision dated May 28, 2009, OWCP terminated her wage-loss and medical benefits.

On June 14, 2009 appellant requested an oral hearing which was held October 13, 2009. She submitted an October 21, 2009 report from Dr. McCaffrey who diagnosed causalgia of the upper limb and reflex sympathetic dystrophy of the upper limb.

In a decision dated January 28, 2010, an OWCP hearing representative affirmed the May 28, 2009 decision.

On January 27, 2011 appellant through her attorney requested reconsideration. She asserted that Dr. Lee found that she had continuing residuals of her work-related injury, which required work restrictions. Appellant asserted that Dr. Adams and Dr. Lee failed to fully address the accepted work-related condition of right reflex dystrophy and that Dr. Lee did not resolve the conflict of medical opinion. She contended that the questions sent to the examining physicians were not appropriate because they were not asked to give an opinion as to whether the authorized treatment for the accepted conditions caused or aggravated the other diagnoses. Appellant asserted that her schedule award for permanent impairment supported that she had residuals of her work-related injuries.

Appellant submitted reports from Dr. McFadden dated May 29, 1997 to August 20, 2008, an October 8, 1998 report from Dr. Hay, a September 27, 1999 report from Dr. Westerkam, a October 28, 1999 notice of personnel action for disability retirement, reports from Dr. McCaffrey February 25, 2000 to October 21, 2009, a August 24, 2000 report from Dr. Lorenz, a schedule award decision dated February 6, 2001, questions to the second opinion physician dated March 29, 2007, a January 18, 2008 report from the second opinion physician, Dr. Adams, and reports from Dr. Lee, the referee physician, dated November 12, 2008 and February 19, 2009, all previously of record. She submitted letters to OWCP dated May 16 and June 15, 2009 regarding her claim, all previously of record.

Appellant submitted a June 21, 2010 report from Dr. McCaffrey who treated her for right arm pain and chronic regional pain syndrome. She reported swelling of her right shoulder with excessive activity. Dr. McCaffrey noted examination of the right ulnar nerve and median nerve distribution revealed diminished sensation to pinprick, no motor weakness in the lower extremities and normal reflexes. He diagnosed reflex sympathetic dystrophy of the upper limb and carpal tunnel syndrome.

By decision dated May 6, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

### LEGAL PRECEDENT

Under section 8128(a) of FECA,<sup>3</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide 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:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>4</sup>

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 OWCP without review of the merits of the claim.<sup>5</sup>

### ANALYSIS

OWCP’s most recent merit decision dated January 28, 2010 affirmed the termination of appellant’s wage-loss and medical benefits for the conditions of right elbow sprain, right brachial neuritis, right lateral epicondylitis and reflex sympathetic dystrophy of the right arm based on the opinion of a referee physician. As noted, the Board does not have jurisdiction over the January 28, 2010 merit decision.

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen her case for a review of the merits. In her January 27, 2011 reconsideration request, she did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not establish that a specific point of law was erroneously applied or interpreted. She did not advance a new and relevant legal argument. Appellant asserted that she still had residuals of her work-related injuries and the referee physician findings support her contention. She believed that Dr. Adams and Dr. Lee failed to fully address the accepted work-related condition of right reflex dystrophy and that Dr. Lee did not resolve the conflict of opinion. Appellant further indicated that the questions to the examining physicians were not appropriate. She asserted that the schedule award she received for permanent impairment on February 6, 2001 supported that she has residuals of her work-related injuries. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.608(b).

color of validity.<sup>6</sup> The fact that appellant has received a schedule award does not establish OWCP error on the issue of disability or constitute a relevant legal contention.<sup>7</sup> The underlying issue in this case, whether she had residuals of her accepted conditions, is a medical issue which must be addressed by relevant medical evidence.<sup>8</sup> Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also submitted reports from Dr. McFadden, Dr. Hay, Dr. Westerkam, Dr. McCaffrey, Dr. Lorenz, Dr. Adams and Dr. Lee, a notice of personnel action for disability retirement, questions to the second opinion physician and letters to OWCP, all previously of record. This evidence is duplicative of that previously of record and considered by OWCP in the decisions dated May 28, 2009 and January 28, 2010 and found to be insufficient.<sup>9</sup> Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

Appellant submitted a new report from Dr. McCaffrey dated June 21, 2010. Dr. McCaffrey diagnosed reflex sympathetic dystrophy of the upper limb and carpal tunnel syndrome. He noted positive findings upon examination of diminished sensation of the right ulnar nerve and median nerve distribution. Although this report is new, it is not relevant because it is similar to Dr. McCaffrey's reports dated September 2, 2008 and January 12 and March 9, 2009, previously of record and found to be insufficient. Additionally, this report is not relevant because it does not address the particular issue involved, whether appellant continued to have residuals of her accepted work-related conditions. Therefore, this evidence is not relevant and is insufficient to warrant reopening the case for a merit review. The nonmedical evidence submitted by appellant, such as a patient rating summary for Dr. Adams, a statement of errors allegedly made by senior claims examiners, a summary of quotes and a March 21, 2011 letter to her Congressional representative, is not relevant because none of these documents are from a physician or support that she has ongoing work-related residuals or disability beginning May 28, 2009. This evidence is insufficient to warrant a merit review of the claim.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that she continued to have residuals of her work injury and submitted sufficient medical evidence in support of her claim. The Board notes, however, that it

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<sup>6</sup> *L.H.*, 59 ECAB 253 (2007).

<sup>7</sup> *See, e.g., Merle J. Marceau*, 53 ECAB 197 (2001) (as the Board has held that disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages).

<sup>8</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>9</sup> *See D.K.*, 59 ECAB 141 (2007) (the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

only has jurisdiction over whether OWCP properly denied a merit review of her claim under 20 C.F.R. § 10.606(b)(2).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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