



## **FACTUAL HISTORY**

On July 10, 2002 appellant, then a 62-year-old rural mail carrier, filed an occupational disease claim, Form CA-2, alleging that he had a torn rotator cuff as a result of moving mail into and out of the back seat of his vehicle in the performance of duty. On February 25, 2003 the Office accepted his claim for left rotator cuff tear and repair.

On February 17, 2004 appellant was examined by Dr. Michael Clarke, a Board-certified orthopedic surgeon, to determine the permanent impairment rating of his left arm. On April 12, 2004 appellant received a schedule award, issued by the Office, for a 28 percent impairment of his left arm.

On July 26, 2004 appellant requested that the Office accept a tear in his right rotator cuff as a consequence of his accepted employment injury. He stated that he had undergone right rotator cuff repair surgery in December 2003 and that his right arm was still very sore when he was examined by Dr. Clarke on February 17, 2004. Appellant alleged that Dr. Clarke twisted his right arm during the examination, which caused immediate and extreme discomfort, including a tearing sensation. He underwent corrective surgery on April 27, 2004 to repair the new tear in his right shoulder. Appellant contended that the second tear of his right rotator cuff was a direct result of the second opinion examination performed by Dr. Clarke and should therefore be compensable.

On September 10, 2004 the Office submitted the record to an Office medical adviser. By report dated September 15, 2004, the Office medical adviser opined that appellant's claim should not be accepted at that time, and requested medical documentation on both of appellant's right shoulder surgeries and his postoperative physical therapy. On March 18, 2005 appellant submitted the requested medical information and a written statement. Dr. Clarke submitted two letters, dated May 5 and 12, 2005, stating that he did examine both arms, but that appellant was not injured.

By decision dated July 13, 2005, the Office denied appellant's claim for compensation benefits for his right shoulder condition. The Office found that the contemporaneous medical and factual evidence did not establish that he was injured in February 2004, as alleged.

On July 11, 2006 appellant requested reconsideration of the Office's denial on the basis of a deposition given by Dr. Clarke on July 10, 2006. In a written statement, he challenged the Office's reliance on Dr. Clarke's statements and reported on several statements made in the deposition. Appellant argued that Dr. Clark admitted to maneuvering his right shoulder outwards and backwards and to making no notation of the right arm examination. Dr. Clarke left the deposition before its completion and appellant was unsure when it would be rescheduled. In a July 11, 2006 telephone call, appellant informed the Office that the deposition transcript would not be ready for some time, but that he would provide it as soon as possible.

By decision dated October 4, 2006, the Office denied further merit review of the case on the grounds that appellant had submitted no relevant new medical evidence. The Office noted that appellant's written statement was the only new evidence submitted with his reconsideration. It found that the fact of whether his right arm was physically maneuvered on examination was

not relevant to the medical issue of whether the examination caused a second right rotator cuff tear.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.<sup>2</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> Section 10.608(b) provides 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.<sup>4</sup>

### **ANALYSIS**

The Board finds that appellant met none of the regulatory requirement for a review of the merits of the Office's July 13, 2005 decision. His July 11, 2006 request for reconsideration stated several points of disagreement with the merit decision, but did not raise new arguments or present evidence that the Office erroneously applied or interpreted a specific point of law. Appellant also did not advance any relevant legal arguments not previously considered by the Office. He is thus not entitled to further review on the merits of his case under the first two subsections of section 10.606(b)(2).<sup>5</sup>

With his request for reconsideration, appellant submitted a written statement reporting on the deposition of Dr. Clarke, which occurred on July 10, 2006. He stated that Dr. Clarke admitted that he moved appellant's right arm backwards and outwards during the course of the examination and that he did not report these actions in his notes. The Board finds, however, that this factual evidence is not relevant to the medical issue of whether appellant was injured during the course of the second opinion examination, regardless of how the arm was moved. As there was no relevant and pertinent new evidence for the Office to consider, appellant was not entitled to review under the third section of 10.606(b)(2).<sup>6</sup>

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied the July 11, 2006 request for reconsideration.

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2)(i) and (ii).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2)(iii).

**CONCLUSION**

The Board finds that the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 4, 2006 is affirmed.

Issued: June 21, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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