

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

S.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 10-993
Issued: December 6, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2010 appellant filed a timely appeal from an October 15, 2009 decision of the Officer of Workers' Compensation Programs denying his request for reconsideration without a merit review. Because more than 180 days elapsed between the most recent merit decision of the Office dated July 30, 2009, and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 18, 2009 appellant, then a 50-year-old letter carrier, filed an occupational disease claim alleging that he sustained "constant pain in the left part of my neck running down the back part of my left arm" and "in my left shoulder." He first became aware of his condition on April 27, 2004. Appellant attributed it to "28 years of carrying magazines on my arm." He did not stop working.

In a June 29, 2009 letter, the Office informed appellant that the evidence submitted was insufficient to establish his claim and advised him of the type of evidence needed to establish his claim.

Appellant submitted various medical records. In a May 13, 2009 report, Dr. Ronald O. Watson, a Board-certified internist, noted that appellant complained of work-related left shoulder pain for the past five or six years, reporting that it began when he carried magazines and letters in his left arm and worsened as he continued to carry mail with that arm. He examined appellant's left shoulder and found full range of motion (ROM), no tenderness, normal stability and strength, and negative signs of impingement. An x-ray of appellant's left shoulder on May 13, 2009 revealed early degenerative changes of the acromioclavicular (AC) joint with tiny marginal spurring.

In a June 17, 2009 follow-up report, Dr. Watson commented that appellant's left shoulder pain persisted and only improved when appellant was not working. Appellant stated that he was off work for four days. He denied any prior shoulder injuries, AC joint separations or falls. Dr. Watson examined appellant's left shoulder and found full ROM, no tenderness, joint stability to anterior and posterior stress and negative signs of impingement.

In a July 7, 2009 letter, Dr. Dennis J. Kvidera, a Board-certified orthopedic surgeon, noted that appellant had pain whenever he washed his hair or was aggressive with his weight training. He evaluated appellant's left shoulder and upper extremity and observed no atrophy, asymmetry, crepitus or tenderness. Dr. Kvidera observed that appellant exhibited good strength with external rotation and abduction against resistance, but the maneuvers caused some mild pain. He diagnosed appellant as having chronic pain in the left shoulder and suggested a gadolinium-enhanced magnetic resonance imaging (MRI) scan to look at the soft tissue above the shoulder.

Appellant also provided medical treatment records from 1995 and 2001, as well as physical therapy notes in 2009.

By decision dated July 30, 2009, the Office denied appellant's occupational disease claim on the grounds that the medical evidence failed to demonstrate that his claimed medical condition was related to work-related events.

In a letter dated August 12, 2009, appellant requested reconsideration. He notified the Office that he was scheduled for an MRI scan in three weeks and intended to both the MRI scan results and a written statement from his physician.

Appellant submitted a September 11, 2009 report from Dr. Tuyen Hoang, a Board-certified radiologist, who reviewed appellant's left shoulder magnetic resonance (MR) arthrogram and observed mild to moderate AC joint arthropathy, a Type II superior labral tear from anterior to posterior (SLAP) lesion, and anterior inferior labral detachment.

By decision dated October 15, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant review of the prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that the evidence or argument submitted by a claimant must either: (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.² Where a request for reconsideration fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.³

ANALYSIS

The Office's July 30, 2009 merit decision denied appellant's claim on the grounds that the medical evidence did not establish that his claimed shoulder condition was causally related to his federal employment. Appellant requested reconsideration on August 12, 2009 advising that he disagreed with the Office's findings. He did not identify a specific point of law that was erroneously applied or interpreted, nor did he advance a relevant legal argument not previously considered by the Office.

Appellant submitted additional evidence on reconsideration. He provided Dr. Hoang's September 11, 2009 report, which interpreted appellant's MR arthrogram as exhibiting mild to moderate AC joint arthropathy, a Type II SLAP lesion, and anterior inferior labral detachment. Dr. Hoang, however, did not give an opinion as to whether appellant's work duties caused a diagnosed condition. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁴ Although Dr. Hoang's report is new evidence not previously considered by the Office, it is not relevant because it did not address the causal relationship between the diagnosed condition and work factors, the issue upon which the Office based its denial of the claim.

Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered, or constitute relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim.

Appellant argues on appeal that he informed the Office in his August 12, 2009 letter requesting reconsideration that additional medical evidence accompanying Dr. Hoang's report was forthcoming, but was not subsequently informed that the evidence did not arrive. The Board only has jurisdiction over whether the Office properly denied a merit review of the claim based

¹ 5 U.S.C. §§ 8101-8193.

² *E.K.*, 61 ECAB ___ (Docket No. 09-1827, issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

³ *L.D.*, 59 ECAB 648 (2008).

⁴ *D.K.*, 59 ECAB 141 (2007).

on the evidence that was before the Office at the time it issued its October 15, 2009 decision.⁵ As explained, appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁵ The Board notes that the record on appeal contains evidence which the Office received after its October 15, 2009 decision. The Board lacks jurisdiction to review this evidence for the first time on appeal. 5 U.S.C. § 501.2(c). This, however, does not preclude appellant from having such evidence considered by the Office as part of a formal written request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.