

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

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C.S., Appellant )

and )

**DEPARTMENT OF THE ARMY, MILITARY  
PERSONNEL OFFICE,  
Fort Leonard Wood, MO, Employer** )

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**Docket No. 09-1667  
Issued: March 22, 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 June 22, 2009 appellant filed a timely appeal from a January 26, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. There is no merit decision within 180 days of the appeal.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.2, the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> In her application for appeal, appellant noted a November 27, 2008 decision of the Office. There is no decision of record issued on that date.

On appeal, appellant alleges that a supervisor violated her civil rights and sabotaged her compensation claim.<sup>2</sup>

### **FACTUAL HISTORY**

On January 29, 2007 appellant, then a 60-year-old human resources assistant, claimed that, on or before August 31, 2006, she sustained a right-sided neck condition due to ergonomic problems with her computer mouse and telephone. She also attributed her condition to an increased workload and working overtime during August 2006. In a February 14, 2007 letter, the Office advised appellant of the evidence needed to establish her claim. It requested a rationalized report from her attending physician explaining how and why the identified work factors caused her claimed condition.

Appellant's supervisor confirmed that appellant worked 7.5 hours of overtime on August 12, 2006 and performed extensive typing for the remainder of the month.<sup>3</sup> An October 2006 industrial hygiene survey found that ergonomic deficiencies in appellant's workstation caused her to hyperextend her right arm to use her computer mouse and answer the telephone.

Dr. Kevin Brewer, an attending osteopathic physician specializing in internal medicine, submitted October and November 2006 notes restricting right upper extremity activities. Dr. Robert Strang, an attending Board-certified neurosurgeon, submitted reports from December 2006 to March 2007 diagnosing a right-sided C6-7 disc herniation. In a March 9, 2007 form report, he checked a box "no" indicating that the condition was not work related. Appellant also provided reports from a physician's assistant.

By decision dated March 9, 2007, the Office denied appellant's claim on the grounds that causal relationship was not established. It found that she submitted insufficient rationalized medical evidence to establish that her work factors caused or aggravated the claimed neck condition.

In an August 24, 2007 letter, appellant requested reconsideration. She submitted reports from Dr. Brewer dated September 25, 2006 to February 28, 2007, noting right shoulder pain, tendinitis and C7 radiculopathy. In a February 28, 2007 form report, Dr. Brewer checked a box "yes" indicating that appellant's condition was aggravated by typing. Appellant submitted additional reports from a physician's assistant.

By decision dated November 27, 2007, the Office denied modification of the March 9, 2007 decision. The additional medical evidence was found insufficiently rationalized to establish causal relationship.

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<sup>2</sup> Appellant submitted new evidence on appeal which she asserted would establish her claim. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

<sup>3</sup> Appellant submitted descriptions and list of completed work and a position description.

In November 21, 24 and 25, 2008 letters, appellant requested reconsideration. She submitted a November 28, 2007 report from Dr. Strang prescribing a neck brace and work restrictions. Dr. Glenn Kunkel, an attending Board-certified anesthesiologist, noted on October 29, 2008 that epidural injections and radio frequency ablation improved appellant's C6-7 radiculopathy. Appellant also submitted October 2006 reports by a physician's assistant and a nurse.

By decision dated January 26, 2009, the Office denied reconsideration on the grounds that the evidence submitted did not raise a substantial legal question or include new, relevant evidence.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>4</sup> section 10.606(b)(2) of Title 20 of the Code of Federal 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.<sup>5</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim 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>6</sup>

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>7</sup> The claimant need only submit relevant, pertinent evidence not previously considered by the Office.<sup>8</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>9</sup>

### **ANALYSIS**

Appellant claimed that she sustained a neck condition due to ergonomic problems with her workstation and an increased workload in August 2006. The Office advised appellant in a February 14, 2007 letter of the necessity of providing rationalized medical evidence supporting a causal relationship between the identified work factors and the claimed condition. As appellant did not submit such evidence, the Office denied the claim by March 9 and November 27, 2007 decisions.

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<sup>4</sup> 5 U.S.C. § 8128(a).

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

<sup>6</sup> *Id.* at § 10.608(b). *See also T.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-2227, issued March 19, 2008).

<sup>7</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>8</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>9</sup> *Annette Louise*, 54 ECAB 783 (2003).

Appellant requested reconsideration on November 21, 2008. At the time of the last merit decision, the critical issue was the lack of evidence supporting causal relationship. To be relevant, the evidence submitted in support of the November 21, 2008 request for reconsideration must address that issue.

In support of her request, appellant submitted a November 28, 2007 report from Dr. Strang, an attending Board-certified neurosurgeon, and an October 29, 2008 report from Dr. Kunkel, an attending Board-certified anesthesiologist. Neither physician addressed causal relationship. Therefore, these reports are irrelevant to the critical issue in the case.<sup>10</sup> Appellant also submitted reports by a physician's assistant and a nurse, professionals who are not considered physicians under the Act.<sup>11</sup> Causal relationship is a medical issue which must be resolved by competent medical opinion.<sup>12</sup> The reports from laypersons, such as nurses and physician's assistants, are of no relevance to the issue of causal relationship and do not comprise a basis for reopening a case.<sup>13</sup>

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act. She did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

On appeal, appellant asserts that a supervisor violated her civil rights and interfered with her compensation claim. There is no evidence of record supporting these allegations.

### **CONCLUSION**

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

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<sup>10</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>11</sup> 5 U.S.C. § 8101(2); *Richard E. Simpson*, 57 ECAB 668 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

<sup>12</sup> *Carol A. Lyles*, 57 ECAB 265 (2005).

<sup>13</sup> *Joseph A. Brown, Jr.*, *supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 26, 2009 is affirmed.

Issued: March 22, 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