

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

D.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dickson, TN, Employer**

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**Docket No. 10-2218
Issued: June 15, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 September 1, 2010 appellant, through her representative, filed a timely appeal from the July 30, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration of her case. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUE

The issue is whether the Office properly denied appellant's June 25, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 10, 2008 appellant, a 36-year-old rural carrier associate, sustained an injury in the performance of duty when she pulled her vehicle up to a mailbox, opened the lid to place mail in the box, and a bird flew out from the newspaper holder, scaring her. She jerked her arm

¹ 5 U.S.C. § 8101 *et seq.*

and hit the back side of her arm on the vehicle door. Appellant did not stop work at that time. The Office accepted her claim for right elbow contusion and sprain of the right shoulder and upper arm.

Appellant claimed compensation for total disability from May 28 to June 18, 2009. In an August 12, 2009 decision, the Office denied her claim. An Office hearing representative affirmed the denial in a November 19, 2009 decision.

The Office subsequently accepted appellant's claim for right shoulder rotator cuff impingement and a rotator cuff tear.

Appellant requested reconsideration of her claim for total disability. She noted that she was removed from work after conservative measures were exhausted and until she could see her orthopedic surgeon on June 15, 2009. Appellant was diagnosed with a partial rotator cuff tear, right shoulder impingement and acromioclavicular arthropathy.

The Office authorized arthroscopic surgery, which appellant underwent on April 16, 2010.

In a May 17, 2010 decision, the Office vacated its August 12, 2009 decision in part. It received documentation that appellant had a medical appointment on May 28, 2009, the first date of claimed disability, so it paid compensation for up to four hours. Appellant's orthopedic surgeon certified disability from June 15 to 18, 2009 and the Office paid compensation for those dates. The Office found, however, that it could pay no further compensation because the only certification for the remainder of the period claimed came from a physician's assistant, who was not a physician, and who could not certify disability.

On June 25, 2010 appellant requested reconsideration. She stated that the Office accepted the physician's assistant's original diagnosis of right elbow contusion and right shoulder sprain, so she saw no reason she should incur a wage loss for following the physician's assistant's treatment recommendations. Appellant noted that her orthopedic surgeon did not disagree with the physician's assistant or change the return to work date.

In a decision dated July 30, 2010, the Office denied appellant's request for reconsideration. It found that appellant failed to provide additional evidence from a qualified physician to support that she was totally disabled from May 29 to June 14, 2009. The Office found that appellant failed to submit a new argument relevant to its prior decision.

LEGAL PRECEDENT

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.² The employee shall exercise this right through a request to the district Office.³

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.605.

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

Appellant filed her June 25, 2010 request for reconsideration within one year of the Office's May 17, 2010 merit decision. The request was therefore timely. The issue is whether her request met at least one of the standards for obtaining a merit review of her case.

Appellant's request for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law. She identified no specific point of law or showed how the Office erroneously applied or interpreted the law in her case. Appellant's request for reconsideration did not advance a relevant legal argument not previously considered by the Office. She argued that it accepted the physician's assistant's original diagnosis of right elbow contusion and right shoulder sprain. The record shows that the physician's assistant diagnosed right shoulder tendinitis. Appellant's argument is irrelevant as a physician's assistant is not a physician as defined under the Act and is not competent to address the issue of disability for work.⁷ There is no evidence from her orthopedic surgeon with respect to the remainder of the period of compensation claimed. The lack of certification by appellant's orthopedic surgeon cannot be regarded as an adoption of the recommendations of a physician's assistant. Appellant's request for reconsideration did not contain any relevant and pertinent new evidence not previously considered by the Office.

Accordingly, the Board finds that appellant's June 25, 2010 request for reconsideration did not meet at least one of the standards for obtaining a merit review of her case. As the Office properly denied her request without reopening the case for a review on the merits, the Board will affirm the Office's July 30, 2010 decision.

⁴ *Id.* § 10.606.

⁵ *Id.* § 10.607(a).

⁶ *Id.* § 10.608.

⁷ 5 U.S.C. § 8101(2); *see also Ricky Storms*, 52 ECAB 353 (2001).

CONCLUSION

The Board finds that the Office properly denied appellant's June 25, 2010 request for reconsideration. Appellant's request did not meet at least one of the standards for obtaining a merit review of her case.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2011
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