

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

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R.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Versailles, KY, Employer

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**Docket No. 10-1990  
Issued: May 18, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2010 appellant filed a timely appeal from a February 10, 2010 decision of the Office of Workers' Compensation Programs which denied merit review. Because more than 180 days has elapsed since the most recent merit decision dated November 6, 2009 and the filing of this appeal on July 29, 2010, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration under section 8128(a).

**FACTUAL HISTORY**

On June 26, 2005 appellant, then a 36-year-old part-time rural carrier, filed an occupational disease claim alleging that she developed a right shoulder injury while performing

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

her letter carrier duties. The Office accepted the claim for right shoulder strain and impingement syndrome and paid appropriate compensation.<sup>2</sup> Appellant stopped work on January 29, 2006 and did not return.

Appellant was initially treated by Dr. Robert T. Grant, a Board-certified orthopedic surgeon, beginning July 5, 2005, for right shoulder pain and locking. Dr. Grant diagnosed impingement and rotator cuff tendinosis of the right shoulder and recommended physical therapy and light-duty work. On May 25, 2007 he diagnosed subacromial impingement, possible partial rotator cuff repair, a labral tear, mild arthrosis of the right shoulder and possible peripheral neuropathy. Dr. Grant recommended surgery. A June 7, 2006 magnetic resonance imaging (MRI) scan of the right shoulder revealed no abnormalities.

On March 6, 2009 the Office referred appellant to a second opinion examination with Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, who, in a March 27, 2009 report, opined that she did not have residuals of her accepted right shoulder and elbow injuries and could return to work in her preinjury position without restrictions.

On April 20, 2009 the Office issued a notice of proposed termination of all compensation and medical benefits on the grounds that Dr. Collis' report dated March 27, 2009 established no residuals of the work-related conditions.

In an April 30, 2009 statement, appellant disagreed with the notice of proposed termination and the findings of the second opinion physician. She submitted reports from Dr. Travis A. Hunt, a Board-certified orthopedic surgeon, dated May 7 and June 25, 2009, who noted a history of injury and diagnosed right shoulder impingement syndrome.<sup>3</sup> Dr. Hunt opined that appellant still had residuals of impingement syndrome and had not returned to preinjury status. He noted that appellant could return to work with restrictions. A May 15, 2009 MRI scan revealed mild supraspinatus tendinopathy without evidence of rotator cuff tear, subacromial subdeltoid bursitis and mild acromion joint degenerative changes.

Thereafter, the Office found a medical conflict between Drs. Collis and Hunt and referred appellant to Dr. Daniel D. Primm, Jr., a Board-certified orthopedic surgeon, to resolve the conflict. In a September 9, 2009 report, Dr. Primm diagnosed right shoulder subacromial bursitis with impingement syndrome. He could not explain why appellant had not experienced significant improvement in her right shoulder pain symptoms and bursitis since she had not worked and performed repetitive duties with the right arm in over two years. Dr. Primm noted that he could not relate appellant's current symptoms and need for surgery to her work activities in 2005 but opined that otherwise it would be reasonable for her to undergo the surgery. He opined that appellant did not have residuals of her accepted conditions and could return to work as a part-time carrier, 14.5 hours a week, subject to restrictions unrelated to her work injury.

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<sup>2</sup> On August 31, 2005 the Office combined the present claim, File No. xxxxxx818, with appellant's claim May 23, 2005 an occupational disease claim, File No. xxxxxx823, which was accepted for right epicondylitis.

<sup>3</sup> Dr. Hunt advised that appellant related that the right elbow epicondylitis was no longer a problem.

By decision dated November 6, 2009, the Office terminated appellant's compensation and medical benefits effective November 6, 2009 for the accepted conditions of right rotator cuff syndrome on the grounds that the weight of the medical evidence established that she had no continuing disability resulting from her accepted employment injuries.

On February 1, 2010 appellant requested reconsideration. In a February 1, 2010 statement, she noted that Dr. Primm was in agreement with her physician that her diagnosed conditions were right shoulder subacromial bursitis with impingement syndrome. Appellant asserted that the claims examiner improperly terminated her compensation based on Dr. Primm's report. She noted that Dr. Primm was consulted to determine if her injury resolved and not to determine if her injury was work related. Appellant noted that the Office improperly noted that she cancelled surgery in 2007, rather she decided to forego surgery after learning Dr. Primm wanted to removed a piece of her collarbone. She asserted that Dr. Primm improperly noted that she worked 14.5 hours a week when her tour was longer. Appellant submitted pay stubs from pay period 8 in 2004 and pay periods 2, 3, 4, 6, 8, 9, 12 and 15 in 2005 which indicated that she worked from 27 hours to 71.07 hours a week. Also submitted was a February 27, 2009 statement of accepted facts with handwritten notes indicating the number of hours she worked in 2005.

In a February 10, 2010 decision, the Office denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Act,<sup>4</sup> the Office 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 provides 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:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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>5</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 the Office without review of the merits of the claim.<sup>6</sup>

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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).

## ANALYSIS

The Office terminated appellant's compensation and medical benefits on November 6, 2009 based on the opinion of a referee physician, Dr. Primm. In a report dated September 9, 2009, Dr. Primm diagnosed right shoulder subacromial bursitis with impingement syndrome and opined that he could not relate her current symptoms and a need for surgery to her work activities in 2005. He opined that appellant did not have residuals of her accepted conditions and could return to work subject to restrictions unrelated to her work injury. Appellant requested reconsideration of the November 6, 2009 decision.

As noted above, the Board does not have jurisdiction over the November 6, 2009 Office decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim. In her February 1, 2010 application for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She disagreed with the findings of the referee physician and noted that he agreed with her treating physician's diagnoses of right shoulder subacromial bursitis with impingement syndrome and that the proposed surgery was appropriate. Appellant asserted that the referee physician improperly commented on whether her condition was work related when her shoulder condition was already accepted and his opinion was sought only to determine if she had residuals of her work injury. However, this assertion does not show error in applying a point of law as Dr. Primm clearly found that appellant's present symptoms were not due to the accepted conditions. The underlying issue in this case, whether appellant had residuals of her accepted conditions, is a medical issue which must be addressed by relevant medical evidence.<sup>7</sup> A claimant may be entitled to a merit review by submitting new and relevant evidence, but she did not submit any new and relevant medical evidence in this case. Rather, appellant submitted intermittent pay stubs from 2004 and 2005 and disputed a February 27, 2009 statement of accepted facts regarding the number of hours she worked.<sup>8</sup> This evidence does not constitute new and relevant evidence.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

On appeal, appellant reiterated her assertion that Dr. Primm's report was inadequate to terminate her compensation benefits based on the deficiencies she noted above. The Board notes, however, that it only has jurisdiction over whether the Office properly denied a merit

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<sup>7</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>8</sup> Dr. Primm referenced the statement of accepted facts which noted that appellant averaged working 14.5 hours a week in the year before her injury. The pay stubs submitted by appellant do not encompass the entire year before she filed her claim and thus do not show an error in the statement of accepted facts. In any event, Dr. Primm noted that her continuing work limitations were not due to the accepted conditions.

review of the claim. As explained, appellant did not submit any evidence or argument in support of her reconsideration request that warrants reopening of her 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 10, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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