

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

JOHN P. KENNEDY, Appellant

and

**U.S. POSTAL SERVICE, WORLDWAY AIR
MAIL CENTER, Los Angeles, CA, Employer**

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**Docket No. 05-317
Issued: April 19, 2005**

Appearances:

*Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On November 18, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs decision dated October 22, 2004, finding that appellant's request for reconsideration was insufficient to warrant merit review of the claim. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to final decisions issued within one year of the filing of the appeal. The only decision under review on this appeal is the October 22, 2004 decision.

ISSUE

The issue is whether the Office properly determined that appellant's August 6, 2004 request for reconsideration was insufficient to warrant merit review of the claim.

FACTUAL HISTORY

On March 14, 2002 appellant, then a 47-year-old mail handler, filed an occupational disease claim for compensation (Form CA-2) alleging that his bilateral knee condition was casually related to his federal employment. Appellant underwent right knee surgery on November 7, 2001. By decision dated June 14, 2002, the Office denied the claim on the grounds

that the medical evidence did not establish causal relationship between a knee condition and federal employment. Appellant requested reconsideration, and by decision dated October 15, 2002, the Office denied modification of the prior decision.

Appellant again requested reconsideration and submitted additional evidence, including a September 25, 2002 report from Dr. Dilip Tapadiya, a Board-certified orthopedic surgeon, who diagnosed bilateral degenerative changes in the knees, status post rotator cuff tear, status post carpal tunnel releases and tennis elbow, and cervical radiculopathy.¹ He opined that appellant's problems were employment related with heavy-duty work, multiple injuries and repetitive trauma.

The Office reviewed the case on its merits and denied modification by decision dated April 16, 2003. Appellant requested reconsideration on June 10, 2003 and submitted additional evidence, including reports from Dr. Tapadiya. By decision dated August 9, 2003, the Office reviewed the case on its merits and denied modification.

In a letter dated August 6, 2004, appellant requested reconsideration. He submitted a report dated August 4, 2004 from Dr. John Dorsey, a Board-certified orthopedic surgeon, who provided a history and results on examination. He diagnosed osteoarthritis of the knees. Dr. Dorsey stated that appellant had a preexisting knee condition, and when he began working at the employing establishment, his job duties included prolonged activity such as walking, kneeling, squatting and stooping. He stated that it would stand to reason that someone with a compromised knee who engaged in those activities would without question aggravate the prior condition. Dr. Dorsey noted that since appellant left the military his condition had materially worsened, and it was medically reasonable to conclude that activities appellant performed at work resulted in a progressive deterioration of an already compromised condition. He opined that appellant's bilateral knee condition was causally related to his federal employment.

By decision dated October 22, 2004, the Office denied the request for reconsideration and stated that it had not reviewed the merits of the claim. The Office found that Dr. Dorsey's explanation as to causal relationship was "substantially similar" to the attending physician Dr. Tapadiya and that "Dr. Dorsey did not provide any new evidence but essentially provided the same conclusions previously submitted in this claim." The Office concluded that the evidence was cumulative in nature and insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument

¹ The record indicates that appellant has a separate claim with respect to the upper extremities.

² 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office].”³ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁴

ANALYSIS

As the standard above indicates, evidence that is new, relevant and pertinent is sufficient to require a merit review of the claim. On reconsideration appellant submitted an August 4, 2004 report from Dr. Dorsey, who had not previously submitted a report in this case. The Office found that Dr. Dorsey’s opinion was “substantially similar” to Dr. Tapadiya’s and therefore was cumulative evidence that was not “new evidence.” The Office has misinterpreted 20 C.F.R. § 10.606(b)(2)(iii) in this case. Dr. Dorsey’s report is clearly new evidence that was not previously considered by the Office. Dr. Dorsey had not submitted any prior evidence in the case and his August 4, 2004 report represents new evidence with respect to the claim in this case. Moreover, his report is relevant and pertinent to the issue presented. The claim was denied on the grounds that causal relationship between a bilateral knee condition and federal employment was not established. Dr. Dorsey specifically addresses the issue and provides an opinion on causal relationship.

The August 4, 2004 report is clearly “relevant and pertinent evidence not previously considered” by the Office. Appellant has met the standard set forth at 20 C.F.R. § 10.606(b)(2)(iii) and he is entitled to a merit review of his claim.

CONCLUSION

The Board finds that appellant has submitted relevant and pertinent evidence not previously considered by the Office and therefore he is entitled to a merit review of his claim.

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2004 is set aside and the case remanded to the Office for a decision on the merits of the claim.

Issued: April 19, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member