United States Department of Labor
Employees' Compensation Appeals Board

W.W., Appellant	)	
and	)	**Docket No. 09-04**
	)	**Issued: July 17, 2009**
DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Bethel, AK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 30, 2008 appellant filed a timely appeal from an October 5, 2007 decision of the Office of Workers' Compensation Programs denying his wage-loss claim from July 9 to 21, 2007 and two September 5, 2008 decisions, denying his requests for reconsideration.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has does not have jurisdiction over an August 1, 2007 merit decision denying his claim for lost wages from May 13 to 26, 2007.

ISSUES

The issues are: (1) whether appellant's disability from July 9 to 21, 2007 was causally related to his May 30, 2002 employment injury; and (2) whether the Office abused its discretion in denying appellant's requests for reconsideration.

[1] The Board notes that on June 3, 2009 appellant withdrew his appeal as to the November 20, 2007, January 30 and September 5, 2008 Office decisions denying his claim for a consequential injury.

FACTUAL HISTORY

On May 30, 2002 appellant, then a 42-year-old meteorological technician in Bethel, Alaska, sustained a right knee acromioclavicular (AC) ligament tear and medial and lateral meniscal tears when he fell from a ladder. On February 13, 2003 he underwent surgery to repair the AC tear. On December 8, 2006 appellant underwent additional right knee surgery. He returned to regular full-time work on January 25, 2007. Appellant stopped work on April 25, 2007 and went to Indiana for additional medical treatment that was authorized by the Office.

Appellant filed compensation claims for lost wages from May 13 to 26 and July 9 to 21, 2007.

In a May 21, 2007 report from Portage Community Hospital, Dr. John H. Lee indicated that appellant was seen for right knee pain. On May 23, 2007 he provided findings on physical examination and noted that a magnetic resonance imaging (MRI) scan revealed a complete AC tear. On May 26, 2007 Dr. Lee noted that appellant was scheduled to undergo additional right knee surgery in two weeks. On May 31, 2007 he provided findings on physical examination and noted that appellant had a relatively large bony defect in his proximal tibia bone and distal femur bone from previous surgery, as well as osteoarthritis. Dr. Lee stated that appellant should avoid kneeling, squatting, climbing stairs and prolonged walking. He could perform sedentary work wearing his knee brace.

In a July 6, 2007 letter, Dr. Brian Cole, an orthopedic surgeon, stated that appellant was AC deficient in his right knee. Walking on uneven surfaces and outdoor terrain provoked giving-way and instability in his knee. Dr. Cole stated that appellant was restricted to sedentary desk work.

By letter dated July 11, 2007, the Office asked appellant to provide rationalized medical evidence establishing that his claimed disability was causally related to his May 30, 2002 employment injury.

On July 24, 2007 Dr. Lee stated that he first evaluated appellant on April 30, 2007 for right knee pain and instability. There were subsequent consultations on May 23 and 31, 2007. Due to the complex nature of his knee injury, Dr. Lee referred appellant to Dr. Cole at the University of Chicago. He advised that appellant was not able to perform his job from April 30 to May 31, 2007 due to his right knee instability.

On July 31, 2007 appellant underwent a right knee AC revision/reconstruction performed by Dr. Cole.

In an August 21, 2007 report, Dr. Lee stated that he saw appellant on April 30 and May 31, 2007 for right knee pain and instability. He stated that appellant was not able to perform his job because his knee gave out at work due to a work environment that required stressing of his knee and pivoting of his right knee. Due to the unstable nature of his right knee, appellant was unable to perform his regular job.

By merit decisions dated September 25 and October 5, 2007, the Office denied appellant's claim for lost wages from July 9 to 21, 2007.

On July 6, 2008 appellant requested reconsideration of the August 1, 2007 decision and the denial of his claim for lost wages from May 1 to July 31, 2007. His attorney argued that it "was nonsense to argue that the claimant could have seen Dr. Lee on the 30th of April, then gone back to Alaska, then come back to Indiana for an appointment on May 31, [2007] then go back to Alaska and come back to Chicago for an appointment on the 25th of June then return to Alaska and come back to Chicago for the surgery on July 31, [2007]."

On July 11, 2008 the Office received reports dated April 30 and June 25, 2007, in which Dr. Lee provided a review of appellant's medical history, course of treatment and findings on physical examination. Dr. Lee did not address the issue of whether appellant was disabled July 9 to 21, 2007 due to his May 30, 2002 accepted right knee conditions.

In two decisions dated September 5, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review.[2]

LEGAL PRECEDENT -- ISSUE 1

An employee has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.[3] Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.[4] Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.[5]

ANALYSIS -- ISSUE 1

The only merit issue before the Board is whether appellant met his burden of proof to establish that his disability from July 9 to 21, 2007 was causally related to his May 30, 2002 accepted right knee conditions, a right knee AC tear and medial and lateral meniscal tears.

In a July 6, 2007 letter, Dr. Cole stated that appellant was AC deficient in his right knee. Walking on uneven surfaces and outdoor terrain provoked giving-way and instability in his knee. Dr. Cole stated that appellant was restricted to sedentary desk work. However, he did not state that appellant was disabled from July 9 to 21, 2007 due to May 30, 2002 work-related right knee conditions. Therefore, this report is not sufficient to establish appellant's claim for lost wages.

[2] Subsequent to the September 5, 2008 the Office decisions, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[3] *David H. Goss*, 32 ECAB 24 (1980).

[4] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

[5] *Edward H. Horten*, 41 ECAB 301 (1989).

On July 24, 2007 Dr. Lee stated that he first evaluated appellant on April 30, 2007 for right knee pain and instability. There were subsequent consultations on May 23 and 31, 2007. However, Dr. Lee did not address whether appellant's claimed disability from July 9 to 21, 2007 was causally related to his May 30, 2002 employment injury. He did not explain any change in appellant's accepted right knee conditions such that he was disabled for work from July 9 to 21, 2007.

The Board finds that appellant has not met his burden of proof to establish that he was disabled from July 9 to 21, 2007 due to his accepted May 30, 2002 right knee conditions.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[8]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that the evidence or argument submitted by 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.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

ANALYSIS -- ISSUE 2

As relevant to this appeal, appellant requested reconsideration of the denial of his claim for lost wages from July 9 to 21, 2007. He submitted a July 6, 2008 statement from his attorney who argued that it "was nonsense to argue that the claimant could have seen Dr. Lee on the 30th of April, then gone back to Alaska, then come back to Indiana for an appointment on May 31,

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8128(a).

[8] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[9] Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Id*. at § 10.607(a).

[12] *Id*. at § 10.608(b).

[2007] then go back to Alaska and come back to Chicago for an appointment on the 25th of June then return to Alaska and come back to Chicago for the surgery on July 31, [2007]." However, an employee has the burden of proving that he was disabled for work as the result of an employment injury. Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues. The argument raised did not advance a relevant legal argument not previously considered. On means, appellant did not submit any relevant new evidence. The reports of Dr. Lee were of record and previously considered by the Office in the denial of his claim. Therefore, this evidence does not constitute relevant and pertinent new evidence not previously considered by the Office.

Because appellant did not submit evidence or argument that showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered or constituted relevant and pertinent new evidence not previously considered by the Office, properly denied his requests for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that his disability from July 9 to 21, 2007 was causally related to his May 30, 2002 accepted right knee injury. The Board further finds that the Office did not abuse its discretion in denying his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 5, 2008 and October 5, 2007 are affirmed.

Issued: July 17, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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