

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES E. TUCKER and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 97-2643; Submitted on the Record;
Issued August 19, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 20 C.F.R. § 10.138.

On June 2, 1995 appellant, then a 47-year-old electronics mechanic, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on May 30, 1995 he sustained an injury to his right knee in the performance of his duties. Appellant ceased working on June 2, 1995 and received an initial diagnosis of right knee contusion. He was subsequently released to return to work in a limited-duty capacity on June 12, 1995. However, on October 25, 1995 appellant's light-duty status was modified to six hours of work per day. On November 9, 1995 appellant filed a claim to repurchase leave he had utilized as a result of his May 30, 1995 injury. On December 17, 1995 the Office accepted appellant's claim for right knee contusion.

By letter dated December 29, 1995, the Office advised appellant that it needed further information regarding his claim. The Office specifically noted that the record included a prior history of right knee surgery and, therefore, the Office requested that appellant provide any treatment records concerning his preexisting knee condition. The Office also advised appellant of the need for a narrative medical report addressing the current condition of his right knee and whether the injury of May 30, 1995, aggravated his preexisting condition. The Office also requested information regarding appellant's current work restrictions and the time frame in which he was expected to be able to resume full-time employment. In response, the Office received treatment notes from Dr. David M. Fowler, a Board-certified orthopedic surgeon. Dr. Fowler initially treated appellant on October 19, 1995 for synovitis of the right ankle and subsequently on December 21, 1995 for plantar fasciitis of the right foot. On April 22, 1996 the Office denied appellant's claim on the basis that the evidence failed to establish that the claimed medical condition or disability was causally related to the May 30, 1995 employment injury.

Appellant subsequently filed a request for reconsideration on April 14, 1997. In support of his request, appellant submitted an August 6, 1996 operative report from Dr. Fleming G. Brooks, who performed an arthroscopic right medial meniscectomy. Appellant also submitted a March 6, 1997 note from Marshall F. Sinback, Jr., PA-C, that indicated appellant sustained an employment-related right knee injury on May 30, 1995 and that he subsequently underwent arthroscopic surgery for a torn medial meniscus.¹ On May 14, 1997 the Office denied appellant's request for a merit review of his claim on the basis that the evidence submitted in support of the request was insufficient to warrant review of the prior decision. Appellant filed a timely appeal with the Board on July 11, 1997.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal with the Board on July 11, 1997, the Board lacks jurisdiction to review the Office's most recent merit decision dated April 22, 1996. Consequently, the only decision properly before the Board is the Office's May 14, 1997 decision, denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) 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 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.⁴

In his April 14, 1997 request for reconsideration, appellant did not argue that the Office erroneously applied or interpreted a point of law. Moreover, appellant did not raise a new point of law not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement; submitting relevant and pertinent evidence not previously considered, as noted above, the newly submitted evidence on reconsideration included Dr. Brooks' August 6, 1996 operative report, an April 22, 1996 Form CA-17 from Mr. Sinback, as well as a March 6, 1997 note from Mr. Sinback. This evidence, however, is insufficient to require merit review because it is not relevant medical evidence. Dr. Brooks' August 6, 1996 operative report, while detailing appellant's knee surgery, does not

¹ Additionally, the record includes an April 22, 1996 duty status report (Form CA-17) signed by Mr. Sinback.

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

address the pertinent issue of causal relationship between appellant's knee condition and his employment. As such, his report is insufficient to warrant merit review.⁵ With respect to the two items of evidence provided by Mr. Sinback, although both reports related appellant's knee condition to his employment, this evidence cannot be considered competent medical evidence in light of Mr. Sinback's status as a physician's assistant.⁶ The question of whether a particular injury causes disability for employment is a medical issue that must be resolved by competent medical evidence.⁷ Mr. Sinback is not considered a "physician" under the Federal Employees' Compensation Act, therefore, the evidence he provided regarding the issue of causal relationship is insufficient to require the Office to reopen appellant's claim. Inasmuch as the newly submitted evidence on reconsideration does not constitute relevant medical evidence, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).

As appellant is not entitled to a review of the merits of his claim based on any of the above-noted requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's April 14, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated May 14, 1997 is, hereby, affirmed.

Dated, Washington, D.C.
August 19, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁵ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁶ *See* 5 U.S.C. § 8101(2). A physician's assistant is not a "physician" as that term is defined under section 8101(2). Thus, the report of a physician's assistant does not constitute competent medical evidence. *John D. Williams*, 37 ECAB 238, 239 n. 2 (1985).

⁷ *Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990).