

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of WANDA L. HURD and U.S. POSTAL SERVICE,
POST OFFICE, Hagerstown, MD

*Docket No. 99-1351; Submitted on the Record;
Issued January 17, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decisions before the Board in this appeal are the Office's decisions dated March 1, 1999, and August 5 and April 9, 1998 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision issued on December 22, 1997 and the date of appellant's appeal, March 18, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.¹

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 provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴ To be entitled to merit review

¹ 20 C.F.R. § 501.3(d)(2).

² Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁵

On August 31, 1988 appellant, then a 30-year-old letter carrier, filed a claim for traumatic injury (Form CA-1) alleging that she injured her right knee while in the performance of duty.

In a report of termination of disability (Form CA-3) dated November 1, 1988, the employing establishment noted that appellant was on continuation of pay from September 8 to October 9, 1988 and further noted that she was placed on limited duty “consistent with a knee injury pending surgery.”

On February 22, 1989 the Office accepted appellant’s claim for right knee strain. On the same day the Office requested information from Dr. Robert Cirincione, appellant’s treating physician and a Board-certified orthopedic surgeon, with respect to the nature and extent of any permanent impairment of appellant’s right knee.

On October 1, 1990 the Office awarded appellant a 20 percent permanent impairment based on her work-related right knee strain.

The record contains a January 29, 1997 claim for recurrence of disability alleging a recurrence of her right knee disability on January 7, 1997, causally related to her 1988 work-related injury.

In an undated letter postmarked April 14, 1997, appellant requested authorization for surgery for her right knee.

In a medical report dated May 6, 1997, Dr. Cirincione stated that appellant had swelling in both knees, right and left.

On May 13, 1997 Dr. Cirincione performed an arthroscopic chondroplasty procedure on appellant’s right knee.

In a medical report dated January 24, 1997 and received by the Office on July 14, 1997, Dr. Cirincione stated that appellant’s magnetic resonance imaging (MRI) scan showed “findings consistent with chondromalacia of the right patella. She has tenderness to palpitation. She has retropatellar crepitus. The MRI report indicates the left knee, but actually the right knee is the knee that was examined.”⁶

In a medical report dated May 8, 1997 and received by the Office on July 14, 1997, Dr. Cirincione stated that appellant had acute pain in the left knee and crepitus in the retropatellar surface, and that on that day he aspirated the knee. He related that “the other night she felt her kneecap slip or slide and then developed increasing pain and swelling in the left knee.”

⁵ 20 C.F.R. § 10.607.

⁶ The record includes a January 21, 1997 MRI scan of the left knee which Dr. Cirincione noted was actually a scan of the right knee.

In a medical report dated May 13, 1997 and received by the Office on July 14, 1997, Dr. Cirincione stated that appellant "is doing very well with both her knees." He noted that appellant's left knee "had minimal effusion, with some retropatellar crepitus but doing very well." Dr. Cirincione also noted that her right knee was doing well postoperatively and that her condition began on January 7, 1997 when she twisted her right knee.

In a medical report dated June 23, 1997 and received by the Office on July 14, 1997, Dr. Cirincione stated that appellant's left knee "feels a little bit better. She had mild effusion."

On August 5, 1997 the Office noted appellant's January 29, 1997 claim for recurrence of disability. The Office stated that appellant twisted her right knee on January 7, 1997 causing pain. It recommended that "a new case should be created from the CA-2a regarding the January 7, 1997 incident" and that appellant's schedule award claim "be doubled into the new January 7, 1997 injury."

In a treatment note dated September 5, 1997, Dr. Cirincione stated that appellant had tenderness, lateral pain and crepitus in the subacromial space in her left knee.

In a treatment note dated September 29, 1997, Dr. Cirincione stated that appellant was doing "fairly well with her right knee," but that she was having increasing pain and crepitus in her left knee with pain upon palpation. He noted that he had seen her "[i]n May 1997 and had developed acute pain in the left knee. (sic) Appellant said she felt her left knee slip or slide causing increasing pain and she was noted to have crepitus in the knee at that time. I believe what we are seeing now is related to that episode I believe that arthroscopic debridement."

On October 7, 1997 appellant filed a notice of occupational disease noting that she sustained degenerative arthritis while of the left knee in the performance of duty, and noted that her treating physician found "the same type of injury [as her right knee] which he believes to be caused by the stress and pressure placed on it while performing my duties as a city carrier over the years."

By letter dated October 15, 1997, the Office advised appellant that the information thus far submitted was insufficient to establish that she sustained an injury to her right knee as alleged. The Office requested that appellant submit medical records pertaining to her injury including a medical report from her treating physician noting whether her condition was causally related to factors of federal employment.

In a medical report dated October 15, 1997, Dr. Cirincione requested authorization to perform arthroscopic debridement and chondroplasty on appellant's left knee. He stated that appellant's date of injury was October 6, 1997, but also stated with an asterisk that "patient gave injury date of January 7, 1997."

In a November 4, 1997 statement of accepted facts, the Office noted that it had accepted appellant's right knee injury sustained on August 29, 1988 and her January 7, 1997 right knee chondromalacia as a new injury, and approved her May 13, 1997 surgery.

By letter dated November 6, 1997, the Office advised appellant that it had accepted her claim for right knee chondromalacia.

By letter dated November 17, 1997, the Office advised appellant that the information thus far submitted was insufficient to establish that she sustained an injury to her left knee as alleged. The Office requested that appellant describe her activities at work that gave rise to the injury and also a medical report that addresses the causal relationship between appellant's left knee condition and her employment. The Office indicated that it would keep the record open for 30 days from the date of the letter.

In a medical report dated November 28, 1997, Dr. Cirincione stated that appellant related that, while at work on August 9, 1997, her:

“[R]ight knee buckled, she lost her balance and fell down sustaining injury to the left knee. [Appellant] initially injured her right knee when she was delivering mail across a railing and twisted her right leg. She underwent an arthroscopic examination November of 1998. [Appellant] was seen in May of 1997 with problems with the right knee in January of 1997 she had problems with her right knee, she had twisted the knee and since that time she had difficulty. I believe that she had chronic problems with the right knee since at least 1988.”

In a report dated December 4, 1997, the employing establishment stated that appellant has been assigned limited duty since August 1997 when she returned from her right knee surgery, but that she is still required intermittently to lift up to 70 pounds, stand 3 to 4 hours daily, walk on concrete sidewalks, go up and down stairs, bend, twist, stoop, and push and pull equipment.

In an undated narrative received by the Office on December 5, 1997, appellant stated that her left knee hurt after her 1989 surgery to her right knee but that she had injured both her knees, right worse than left, in January 1989.

By decision dated December 22, 1997, the Office denied appellant's claim. In an attached memorandum dated December 17, 1997, the Office noted that appellant's claim was based on an allegation of degenerative arthritis of her left knee which the medical evidence failed to establish.

By letter dated March 11, 1998, appellant requested reconsideration. In her letter appellant stated that Dr. Cirincione believes that her condition is work related, but “is hesitant to determine whether it is due to a traumatic injury (the fall in 1988 and the fall in 1997), or is due to stress placed on the knee over time, without first performing the surgery to actually see inside and assess the type of damage.” In support of her request, appellant submitted a medical report dated January 26, 1998 from Dr. Cirincione in which he stated that appellant injured her right knee on August 29, 1988, that “[S]ubsequent treatment all related to that injury” and that she had synovitis and chondromalacia of the right knee.⁷

⁷ Dr. Cirincione's report was submitted in response to the Office's inquiry regarding appellant's injuries sustained on August 29, 1988 and January 7, 1997.

By nonmerit decision dated April 9, 1998 the Office denied appellant's request for reconsideration on the grounds that she failed to submit substantive legal questions or include new and relevant evidence not previously considered by the Office.

By letter dated May 27, 1998, appellant requested the Office to explain what she needed to provide to the Office in order to have her request for surgery on her left knee approved. The Office determined that this letter was a request for reconsideration and, on August 5, 1998 the Office in a nonmerit decision denied appellant's request for reconsideration on the same grounds as its April 9, 1998 decision, that she failed to submit substantive legal questions nor included new and relevant evidence not previously considered by the Office.

By letter dated December 7, 1998, appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted an August 7, 1998 medical report from Dr. Cirincione in which he stated that appellant sustained injuries to both her knees on January 1997. He stated that, upon examination that day, appellant had severe tenderness over the medial aspect of the left knee with pain to palpitation over the medial synovial plica. Dr. Cirincione then stated that "... we are continuing to see the pain in her left knee secondary to her multiple recurrent injuries dating back to the late 1980s."⁸

By nonmerit decision dated March 1, 1999, the Office denied appellant's request for reconsideration. In an attached memorandum, the Office noted that, although appellant's medical evidence discussed employment factors that may contribute to a medical condition, it failed to provide a diagnosis of a condition which resulted from the claimant's employment factors.

In this case, appellant's medical evidence submitted in support of her requests for reconsideration essentially constituted repetitive evidence which the Office had previously considered. The Office considered Dr. Cirincione's reports in which he stated that her left knee condition was related to her multiple injuries sustained in the 1980s, but that none of the reports established a causal relationship between her earlier injuries and her 1997 claim for degenerative arthritis in the her left knee. Indeed, appellant stated that Dr. Cirincione was hesitant to determine the cause of her left knee condition.

Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.608, noted above.

For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

⁸ Appellant also submitted an October 30, 1998 report from Dr. Cirincione in which he essentially repeated his opinion that appellant's left knee condition is secondary to "the multiple injuries dating back to the 1980's."

The decisions of the Office of Workers' Compensation Programs dated March 1, 1999 and August 5 and April 9, 1998 are hereby affirmed.

Dated, Washington, DC
January 17, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member