

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHELDON C. HUBOCAN and U.S. POSTAL SERVICE,  
POST OFFICE, Inglewood, Calif.

*Docket No. 96-454; Submitted on the Record;  
Issued May 18, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying merit review of the case record on May 8, 1995; (2) whether the Office properly denied appellant's request for hearing on August 3, 1995; and (3) whether the Office properly denied authorization for a medical evaluation of appellant's right knee on September 13, 1995.

In the present case, the Office has accepted that appellant, an equipment handler, sustained a contusion/abrasion of the mid anterior shin and sprain of the left knee on December 31, 1986. In his notice of injury, appellant indicated that he had injured his left leg and knee and had some pain in the right knee. Appellant did not seek medical treatment for a right knee condition until 1991. In a report dated May 31, 1991, Dr. Guy H. Gottschalk, a specialist in occupational medicine, indicated that a magnetic resonance imaging (MRI) examination of appellant's right knee revealed moderate to large horizontal tear of the posterior horn of the medial meniscus, chondromalacia of the medial epicondyle and effusion of a small Baker's cyst of the right knee. Dr. Gottschalk indicated that appellant required arthroscopic surgery of both knees. The Office denied appellant's request for authorization of right knee surgery by decision dated August 8, 1991, on the grounds that the record contained no rationalized medical opinion causally relating the employee's right knee condition to his injury of December 31, 1986. By decision dated March 25, 1992, an Office hearing representative vacated the denial of the claim. The hearing representative found that although appellant's treating physician, Dr. Gottschalk, provided little medical rationale in support of his opinions, he had in general terms supported a finding of causal relationship between appellant's right knee condition and the accepted employment injury. The hearing representative remanded the case to the Office for further development of the medical evidence. The Office thereafter referred appellant to Dr. William Dixon, a Board-certified orthopedic surgeon. Dr. Dixon concluded in a report dated May 28, 1992, that appellant's right knee condition was caused by degenerative changes and was not due to employment-related trauma. By decision dated July 10, 1992, the Office again denied appellant's claim finding that appellant had failed to

establish that his right knee condition, right knee surgery, and bilateral varicose veins were related to or a consequence of the December 31, 1986 employment injury. By decision dated May 2, 1994, an Office hearing representative affirmed the July 10, 1992 denial of appellant's claim. The hearing representative noted that appellant had testified at the hearing that during the December 31, 1986 incident, the gang mail box had not hit his knees. The hearing representative stated that therefore Dr. Gottschalk's opinion that appellant's condition was due to trauma as his knees were struck by the falling mailbox was not factually accurate. The hearing representative concluded that Dr. Dixon's opinion that appellant's tear of the medial meniscus of the right knee was degenerative in nature and not the result of trauma or overuse syndrome was based upon the factual evidence of record and constituted the weight of the medical evidence.

On March 23, 1995 appellant, through his representative, requested that the Office reconsider his case. In support of this request for reconsideration appellant submitted a July 22, 1994 report from Dr. Gottschalk. Dr. Gottschalk again opined that appellant's right knee condition was causally related to his employment injury. He stated that appellant had initially reported injury to both knees, the MRI was consistent with internal derangement and torn meniscus, and the right knee condition was consistent with the injury of being struck on the knee. By decision dated May 8, 1995, the Office denied appellant's application for review on the grounds that the evidence submitted from Dr. Gottschalk was cumulative and was not sufficient to warrant merit review. On July 1, 1995 appellant requested a hearing before an Office hearing representative. In his July 1, 1995 letter to the Office, appellant also requested authorization to see another orthopedic surgeon for evaluation as to whether his right knee condition was causally related to the accepted injury. By decision dated August 3, 1995, the Office denied appellant's request for hearing on the grounds that appellant had previously requested reconsideration under Section 8128, and was not, as a matter of right, entitled to a hearing on the same issue. Appellant was advised that his request for hearing had however been considered and was denied as the issue in the case was essentially a medical issue that could be addressed by submitting a well-reasoned medical report.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion by denying merit review on May 8, 1995.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. 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 these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>1</sup>

In support of his March 23, 1995 request for reconsideration, appellant submitted another report from Dr. Gottschalk. Dr. Gottschalk's additional report did not provide any new and relevant medical evidence to substantiate that appellant had sustained a right knee injury on December 31, 1986. Rather, Dr. Gottschalk in his report reiterated his previous findings and

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<sup>1</sup> 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

conclusions and again relied upon an inaccurate history of injury. As properly pointed out by the hearing representative in the May 2, 1994 decision, appellant testified that on December 31, 1986 the mailbox struck his legs but did not hit his knees. Dr. Gottschalk's continued opinion that appellant's right knee condition was causally related to the December 31, 1986 incident because appellant was struck on both knees by the mailbox was not factually accurate and diminished the probative value of his opinion regarding the cause of the right knee condition. As Dr. Gottschalk's continuing reports were merely cumulative, and appellant did not show that the Office erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion by denying merit review in this case.

The Board also finds that the Office properly denied appellant's request for hearing.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision to a hearing o his claim before a representative of the Secretary."<sup>2</sup>

As appellant had previously obtained review of his claim under section 8128(a), he was not entitled as a matter of right to a hearing on his claim before a representative the Secretary. The Office, in its broad discretionary authority in the administration of the Act, however, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>3</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), have been found by the Board to be a proper interpretation of the Act and Board precedent.<sup>4</sup>

In the present case, the Office properly determined that appellant was not entitled to a hearing as a matter of right since appellant's request was made after a reconsideration of his case pursuant to section 8128(a). The Office also exercised its discretion and further considered the hearing request but concluded that as the case involved a medical issue, appellant could equally well pursue his claim by requesting reconsideration and submitting new medical evidence. The Office's decision dated August 3, 1995 denying appellant's request for hearing was therefore proper.

Finally, the Board also finds that the Office properly denied appellant's request for further medical evaluation of his right knee.

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>4</sup> *Id.*

The Office's decision dated July 10, 1992, found that appellant's right knee condition was not causally related to the accepted 1986 employment injury and that medical care was not authorized for treatment of the right knee condition. Appellant subsequently requested that the Office authorize an additional medical evaluation of the right knee condition. Section 8123(a) of the Act,<sup>5</sup> provides that "an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. As the Office had previously determined in decisions dating from July 10, 1992 that appellant's right knee condition was not causally related to his employment injury, further medical evaluation of the right knee was not reasonably required by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 13, August 3 and May 8, 1995 are hereby affirmed.

Dated, Washington, D.C.  
May 18, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> 5 U.S.C. § 8123(a)