

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MURDICE JEAN HARMON and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, South Suburban, IL

*Docket No. 99-1709; Submitted on the Record;  
Issued September 7, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On August 31, 1993 appellant, then a 41-year-old automated mark-up clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 1993 she sustained an injury in the form of a swollen right knee. Appellant alleged that she hit her knee on a rail causing her pants to rip. The Office accepted appellant's claim for a right knee medial meniscus tear and paid her appropriate compensation benefits.

On March 16, 1994 appellant filed a recurrence of disability claim (Form CA-2a) alleging that on March 3, 1994 she sustained a recurrence of her August 30, 1993 employment injury. On the claim form, appellant alleged that she sustained worsening right knee pain and swelling and that her right knee "started giving out" while standing and walking.

On September 19, 1994 appellant returned to work in a light-duty clerk position. On December 4, 1995 appellant began work as a general clerk, which the Office found fairly and reasonably represented her wage-earning capacity.<sup>1</sup>

On August 20, 1996 appellant filed a second recurrence of disability claim (Form CA-2a) alleging that on or after August 21, 1996, she sustained a recurrence of her August 30, 1993 employment injury. She stopped work on August 21, 1996. The Office accepted appellant's recurrence of disability claim on September 19, 1996.

On April 14, 1997 appellant again filed a recurrence of disability claim (Form CA-2a) alleging that she sustained a recurrence of disability on or after January 9, 1997 causally related to her August 30, 1993 employment injury. On the claim form, she stated that when she returned

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<sup>1</sup> The Board notes that this position was awarded to appellant as the "best qualified applicant."

to work after her August 30, 1993 employment injury, she wore a knee brace, used a cane or crutch, had difficulty walking more than 200 feet and was restricted to minimal walking and lifting no more than 10 pounds. On the reverse side of the claim form, appellant's supervisor indicated that appellant stopped work on January 10, 1997 and was permitted to park in a handicapped space so that she walked less than 200 feet to her duty station. The supervisor also stated that the office clerk position was consistent with appellant's work restrictions.

By notice of proposed termination of compensation and medical benefits, dated August 21, 1997, the Office advised appellant that the weight of the medical evidence showed that her August 30, 1993 employment injury had resolved and that she was capable of returning to work as a postal clerk without restrictions. Appellant was allotted 30 days within which to submit additional evidence demonstrating continued employment-related disability.

By decision dated August 22, 1997, the Office denied appellant's recurrence of total disability claim on the grounds that the weight of the medical evidence failed to show that her condition worsened or that she sustained a total recurrence of disability.

By letter dated September 17, 1997, appellant responded to the Office's August 21, 1997 decision denying her claim. She stated that she was awaiting additional medical evidence and that she would submit it to the Office when received. Appellant discussed her claim form submissions, return to work and medical treatment.

By letter dated September 17, 1997, appellant requested a review of the written record.

By decision dated September 29, 1997, the Office terminated appellant's compensation benefits effective September 29, 1997 on the grounds that the weight of the medical evidence established that she was capable of "returning to full-time duties in accordance with the factors set forth in 5 U.S.C. § 8115(a)."

By decision dated January 7, 1998, the Office hearing representative affirmed the Office's August 22, 1997 decision on the grounds that the weight of the medical evidence showed no changes in appellant's condition or in her light-duty job requirements.

By letter dated January 6, 1999, appellant requested reconsideration of the Office hearing representative's January 7, 1998 decision denying her claim. To support her reconsideration request, appellant submitted progress notes from Dr. John B. McClellan, a Board-certified orthopedic surgeon, dated January 5 to June 4, 1998. In his notes dated January 5, 1998, Dr. McClellan noted that appellant's knee brace was uncomfortable and that she used a cane to ambulate at home. He also noted appellant's range of motion, medial joint line tenderness and genu varnum. Dr. McClellan stated, "We feel this is post-traumatic osteoarthritis of the right knee and secondary genu varnum." In his notes dated February 5, 1998, Dr. McClellan again stated that appellant's brace caused her discomfort but that it fit properly. He noted that appellant had a mildly antalgic right gait, she was able to perform an equinus gait, but was unable to perform a calcaneus gait. Dr. McClellan also noted that appellant's range of motion. He further noted medial joint line tenderness. Dr. McClellan discussed further treatment including a total knee replacement and magnetic resonance imaging (MRI) scan. In his notes dated April 22, 1998, Dr. McClellan noted appellant's second opinion examination with

Dr. Mitchell Creiger, a family practitioner and Dr. Creiger's recommendation for a total knee replacement. He discussed appellant's March 4, 1998 MRI scan and stated:

“(1) Marked progression of [appellant's] medial tibial femoral compartment. (2) Osteochondral defect involving the lateral portion of the medial femoral condyle. (3) Severe chondromalacia of the medial compartment with milder changes involving the medial articular facet of the patella. (4) Interval development of a complex tear of the posterior horn and body of the medial meniscus. (5) Small fluid collection anterior to the lateral meniscus contiguous with the lateral transverse genicular ligament. This could represent a small synovial projection related to [appellant's] joint effusion. It could also be a small ganglion cyst not seen previously.”

In his notes dated June 4, 1998, Dr. McClellan stated that appellant's pain had worsened.

By decision dated January 22, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted to support her request was insufficient to warrant review of the case on its merits as it did not address the issue of whether appellant sustained a recurrence of disability on or after January 9, 1997 causally related to her August 30, 1993 employment injury.

The Board finds that the Office, by its January 22, 1999 decision, did not abuse its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).<sup>2</sup>

In order to warrant a grant of a claimant's reconsideration request, the claimant must show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting her claim not previously considered by the Office, or submit new and relevant evidence not previously considered by the Office.<sup>3</sup> Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a case for further merit review.<sup>4</sup> Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup> The submission of evidence or argument which repeats or duplicates evidence or argument already

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<sup>2</sup> The Board's jurisdiction to consider and decide appeals from final Office decisions extends only to those decisions issued within one year of the filing of the appeal. Therefore, the Board lacks jurisdiction to review the Office's decisions dated January 7, 1998, September 29 and August 22, 1997 as more than one year lapsed between those decisions and April 26, 1999, the date on which appellant filed this appeal. *Jeanette Butler*, 47 ECAB 128 (1995).

<sup>3</sup> *Alton L. Vann*, 48 ECAB 259, 269 (1996); 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

<sup>5</sup> 20 C.F.R. § 10.608(b).

considered by the Office does not constitute a basis for reopening a case for further review on the merits.<sup>6</sup>

In its January 22, 1999 decision denying appellant's request for reconsideration, the Office acknowledged appellant's submission of Dr. McClellan's progress notes dated January 5 to June 4, 1998 but found that they were insufficient to warrant review of the hearing representative's January 7, 1998 decision. The Office properly found that Dr. McClellan's progress notes failed to address the threshold issue of whether appellant's alleged recurrence of total disability commencing January 7, 1997 was causally related to her August 30, 1993 employment injury and, therefore, were irrelevant.

The decision of the Office of Workers' Compensation Programs dated January 22, 1999 is affirmed.

Dated, Washington, D.C.  
September 7, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> *David E. Newman*, 48 ECAB 305, 308 (1997); see *Eugene F. Butler*, 36 ECAB 393, 398 (1984).