

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JEREMY LEE GOERS and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, LOLO NATIONAL FOREST, Missoula, MT

*Docket No. 01-656; Submitted on the Record;  
Issued August 13, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective January 11, 2000 on the grounds that residuals of an accepted September 29, 1998 left knee injury had ceased; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

The Office accepted that on September 29, 1998 appellant, then a 50-year-old seasonal firefighter,<sup>1</sup> sustained an injury to the medial collateral ligament of the left knee when struck by a log rolling downhill.<sup>2</sup> He first received treatment from by Dr. J. Michael Wise, an emergency room physician, who diagnosed an acute tear of the medial collateral ligament.

Appellant submitted periodic reports from Dr. Mark F. Rotar, an attending orthopedic surgeon, who treated him beginning on September 30, 1998. Dr. Rotar released appellant to limited duty as of May 27, 1999 with restrictions on squatting and walking downhill, noting that appellant's left knee improved with physical therapy and a customized brace.

In a June 24, 1999 report, Dr. Rotar stated that appellant had passed the "step test" required by the employing establishment for his return to work. He released appellant to return to full duty with limited downhill walking. Dr. Rotar noted that appellant reported going on a three- to four-mile hike the previous day with no left knee swelling or instability.

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<sup>1</sup> Appellant's position as a seasonal firefighter was classified as "temporary," with all crew members terminated at the end of each work season.

<sup>2</sup> An October 6, 1998 magnetic resonance imaging (MRI) scan of the left knee demonstrated a tear of the medial collateral ligament and disruption of the anterior cruciate ligament (ACL). Appellant received continuation of pay from September 30 to November 21, 1998 and wage-loss compensation through January 2, 1999. He also received appropriate medical benefits.

In a June 24, 1999 work release form which described appellant's job requirements of long distance hiking over steep terrain, with strenuous labor for 10 to 16 hours a day, Dr. Rotar released appellant to work, noting that he needed "to gradually work into downhill walking."

In a July 22, 1999 report, Dr. Rotar noted that appellant had returned to work and had "been fully functional" without "any problems with his knee. He has had no pain or swelling. Dr. Rotar has not been on any very steep ground but he had ... been up in the hills going up and down without problems." On examination, he found "a slight anterior laxity," no rotary laxity, no tenderness or effusion, and a full range of motion. Dr. Rotar recommended that appellant wear his knee brace at work and when playing sports, and that he continue home strengthening exercises.<sup>3</sup>

By decision dated January 11, 2000, the Office terminated appellant's wage loss and medical benefits effective that day on the grounds that he no longer had residuals of the accepted September 29, 1998 left knee injury. The Office found that appellant had successfully returned to work on May 27, 1999. The Office further found that Dr. Rotar stated in his July 22, 1999 report that appellant was "fully functional," able to go up and down hills "without problems," and no longer had any pain or swelling.

Appellant disagreed with this decision and requested reconsideration in a May 5, 2000 letter. Appellant stated that he continued to have residuals of the September 29, 1998 left knee injury that prevented him from returning to his normal activities, and that he had to wear a knee brace. He asserted that continuing instability in his left knee entitled him to "future medical compensation" due to possible future reinjury. Appellant did not submit any other evidence in support of his request for reconsideration.

By decision dated June 6, 2000, the Office denied reconsideration on the grounds that the evidence submitted was "of a nonsubstantive nature" insufficient to warrant a merit review of the prior decision. The Office found that appellant's May 5, 2000 letter, the only evidence he submitted in support of his request for reconsideration, was not "relevant to the issue of whether [appellant] still ... [had] medical residuals from the work accident," as it was not medical evidence. The Office also noted that "potential future injuries" were not compensable.

Regarding the first issue, the Board finds that the Office properly terminated appellant's compensation benefits effective January 11, 2000 on the grounds that residuals of an accepted September 29, 1998 left knee injury had ceased.

Once the Office accepts a claim and pays compensation, it has the burden of justifying the termination or modification of compensation benefits.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to

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<sup>3</sup> In a September 3, 1999 closure report, Marjorie Hickey, a rehabilitation field nurse, noted that appellant had returned to light duty work with "permanent restrictions" on May 27, 1999. Ms. Hickey noted that appellant had to wear a knee brace "for activities and work," should return to his doctor as needed and continue prescribed exercises.

<sup>4</sup> *Raymond W. Behrens*, 50 ECAB \_\_\_\_ (Docket No. 97-1289, issued January 14, 1999).

the employment.<sup>5</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.<sup>7</sup>

In this case, appellant submitted reports from his attending orthopedic surgeon, Dr. Mark F. Rotar, indicating that he no longer had residuals of the accepted left knee injury as of July 22, 1999. Dr. Rotar released appellant to work on May 27, 1999 with temporary limitations on walking downhill and squatting. On June 24, 1999 he noted that appellant went on a three to four mile hike the previous day with no left knee swelling or instability. In a July 22, 1999 report, Dr. Rotar noted that appellant was "fully functional" at work without any knee problems, and was able to go up and down hills without difficulty.

Dr. Rotar found that appellant was able to perform full duty without any limitations or problems due to the accepted left knee injury. While Dr. Rotar did note "a slight anterior laxity" and recommended that appellant wear his knee brace and continue maintenance strengthening exercises, he did not opine that these measures were anything other than precautionary, that appellant was in any way disabled for work or that he required further medical treatment.

Thus, the Board finds that the medical record demonstrates that appellant no longer had residuals of the accepted September 29, 1998 injury as of July 22, 1999, and that the Office's termination of compensation benefits on this basis was proper.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.<sup>8</sup>

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>9</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>10</sup> which provides that a claimant may obtain review of the merits if his written

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<sup>5</sup> *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

<sup>6</sup> *Raymond W. Behrens*, *supra* note 4.

<sup>7</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>8</sup> *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.606(b).

application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>11</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>12</sup>

The only evidence appellant submitted in support of his May 5, 2000 request for reconsideration was the letter itself. Appellant asserted that he had residuals of the accepted left knee injury and that he was entitled to compensation for any future left knee injuries. However, appellant did not submit medical evidence demonstrating that he had any residuals of the September 29, 1998 injury on or after January 11, 2000. As a layperson, appellant’s medical opinion that he did have work-related residuals is of no probative value.<sup>13</sup> Also, there is no compensation payable under the Act for possible future injuries.<sup>14</sup> Consequently, the Board finds that the Office’s June 6, 2000 decision denying appellant’s request for a merit review was proper under the law and facts of the case.<sup>15</sup>

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<sup>11</sup> 20 C.F.R. § 10.138(b)(1).

<sup>12</sup> 20 C.F.R. § 10.608(b).

<sup>13</sup> See *James A. Long*, 40 ECAB 538 (1989)

<sup>14</sup> See *Joseph G. Cutrufello*, 46 ECAB 285 (1994).

<sup>15</sup> On appeal, appellant submitted an October 5, 2000 report from Dr. Rotar. The Board, however, cannot consider this evidence, since the Board’s review of the case is limited to the evidence of record which was before the Office at the time of its final decision; see 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; see 20 C.F.R. § 501.7(a).

The decisions of the Office of Workers' Compensation Programs dated June 6 and January 11, 2000 are hereby affirmed.

Dated, Washington, DC  
August 13, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member