

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID M. DIEVART and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-1658; Submitted on the Record;
Issued January 25, 2002*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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 refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on April 11, 2000, the only decision before the Board is the Office's November 4, 1999 decision, denying appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of Federal Employees' Compensation Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.² A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).³

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² Section 10.606(b)(2)(i-iii).

³ Section 10.608(a).

The Office accepted appellant's claim for a right knee strain and right knee meniscus tear. He underwent surgery on his knee on October 16, 1992. By decision dated June 21, 1993, the Office issued appellant a schedule award of a 15 percent loss of use of the right leg. By decision dated December 31, 1996, the Office awarded him an additional 5 percent impairment for a total loss of use of the right leg of 20 percent. Appellant was laid off due to a reduction-in-force by the employing establishment on June 7, 1996. He worked sporadically in the private sector. Appellant sought compensation for disability from March 21, 1997 through the time of additional surgery he underwent on September 14, 1998 consisting of total knee replacement.

By decision dated August 29, 1997, the Office denied appellant's claim, stating that appellant did not establish that the claimed disability beginning March 21, 1997 was causally related to the September 26, 1992 employment injury.

Appellant requested an oral hearing before an Office hearing representative which was held on February 24, 1998. By decision dated April 10, 1998, the Office hearing representative affirmed the Office's August 29, 1997 decision.

By letter dated May 19, 1998, appellant requested reconsideration of the Office's decision. By decision dated August 14, 1998, the Office modified its prior decision to approve surgery consisting of a total knee replacement for appellant but affirmed the denial of disability as of March 21, 1997.

By letter dated August 10, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence.

By decision dated November 4, 1999, the Office denied appellant's request for reconsideration.

In support of his request for reconsideration, appellant submitted progress notes and medical reports from his treating physician, Dr. Stuart L. Gordon, a Board-certified orthopedic surgeon, dated October 30, 1992 through July 30, 1999 and from his other treating physician, Dr. Jeffrey Malumed, a Board-certified orthopedic surgeon, dated October 1, 1992 to July 2, 1998. Appellant also submitted some hospital notes for emergency treatment of his right knee dated June 12, 1999 and subsequent related treatment dated June 25 and July 16, 1999. The medical reports appellant submitted from Drs. Gordon and Malumed document ongoing problems with his right knee but the reports preceding March 21, 1997 are not relevant to whether appellant sustained a recurrence of disability on that date. The documents dated after March 21, 1997 from Drs. Gordon and Malumed are either repetitive or duplicative of evidence previously submitted. Documents from Dr. Gordon dated August 7, September 1, October 23 and 27, 1998 do not address whether a recurrence of disability occurred on March 21, 1997 and some of them state that appellant required permanent restrictions and would undergo a total knee replacement. The September 1, 1998 report stated that appellant should be kept out of work for approximately four months. A report from Dr. Gordon dated July 30, 1999 stated that appellant could perform physical therapy on an independent basis. The hospital records dated as of June 12 through July 16, 1999 do not address whether a recurrence of disability occurred on March 21, 1997. The evidence appellant submitted is therefore either repetitive or irrelevant.

Inasmuch as appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument or present relevant and pertinent new evidence not previously considered by the Office, appellant did not establish his claim. The Office acted within its discretion in denying his request for reconsideration.

The Office of Workers' Compensation Programs' November 4, 1999 decision is affirmed.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member