

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK H. DEVER and DEPARTMENT OF THE INTERIOR,
INDIANA DUNES NATIONAL LAKESHORE, Porter, IN

*Docket No. 01-1453; Submitted on the Record;
Issued July 29, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

This is the second appeal in this case.¹ On the first appeal, the Board reviewed an October 18, 1996 decision, by which an Office hearing representative found that the position of Cashier II represented appellant's wage-earning capacity beginning May 26, 1996. By decision dated January 27, 2000, the Board affirmed the Office's October 18, 1996 decision.² The complete facts of this case are set forth in the Board's January 27, 2000 decision and are herein incorporated by reference.

Subsequent to the Board's January 27, 2000 decision, by letter dated March 7, 2000, the Office informed appellant that, as requested, his prior 1983 and 1987 claims for various right knee injuries had been combined under his claim number A9-358161, which already contained

¹ Docket Nos. 98-396 & 98-522 (issued January 27, 2000).

² In its January 27, 2000 decision, the Board also affirmed decisions of the Office dated June 12, September 23 and October 28, 1997, on the separate issue of whether appellant met his burden of proof to establish that he was disabled for the period March 23, 1992 to July 12, 1993. The June 12, September 23 and October 28, 1997 decisions of the Office are not the subject of the instant appeal.

both his April 29, 1991 left elbow claim and July 29, 1991 right knee claim.³ By letter dated October 30, 2000, appellant requested reconsideration of the Office's determination that he maintained the wage-earning capacity of a Cashier II, stating that the consideration of his right knee condition by the Office would cause the Office to modify its prior decision.

In a decision dated February 7, 2001, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was immaterial in nature. The Office specifically found that the issue of appellant's right knee condition had been fully addressed in the prior decisions, and noted that the Cashier II position was basically sedentary in nature. The Office concluded that as appellant had submitted no new relevant evidence, and the arguments concerning his right knee condition had been previously considered, further review was not warranted.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ Consequently, the only decision properly before the Board is the Office's February 7, 2001 decision denying appellant's request for reconsideration.

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

³ On December 8, 1983 appellant filed a claim numbered A9-279213, alleging that he sustained torn cartilage in his right knee on November 29, 1983. In decisions dated February 13 and October 1, 1984, March 19 and October 25, 1985, the Office denied appellant's claim on the grounds that he failed to meet his burden to establish that his injury was causally related to his employment. On appeal by decision dated March 31, 1986, the Board affirmed the Office's prior denials. Appellant requested reconsideration, and in a decision dated July 17, 1987, the Office declined to modify its prior decision. On appeal by decision dated January 12, 1988, the Board affirmed the Office's July 17, 1987 decision. On May 26, 1987 appellant filed a claim number A9-311431 alleging that on April 24, 1987 he sustained a right knee injury in the performance of duty. The Office initially accepted appellant's claim for a right acute anterior cruciate ligament rupture, but later set its acceptance aside as premature. On October 8, 1987 appellant filed a claim numbered A9-315172 alleging that on October 5, 1987 he sustained additional right knee injuries in the performance of duty. The Office subsequently approved appellant's claim for a right knee strain on April 8, 1988. On June 21, 1991 under claim number A9-375612, the Office accepted that on May 2, 1991 appellant sustained injury to his left elbow and later expanded its acceptance on June 21, 1993 to include chronic tendinitis of the left elbow. On September 15, 1991 the Office accepted under claim number A9-358161 that appellant sustained a right knee sprain on July 29, 1991. All of these claims are now contained in the record currently before the Board. In addition to these claims, the record contains evidence that appellant has filed as many as 16 additional claims for bee stings and head, neck, back, wrist and shoulder injuries.

⁴ 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (2000) and 20 C.F.R. § 10.607(a) (2000).

⁵ 20 C.F.R. § 10.606(b).

In the present case, the consolidation, for the first time, of all of appellant's right knee claims and accompanying evidence, effectively constitutes new and relevant evidence now contained in the record, which was not considered by the Office in its prior decisions. While the Office previously addressed the issue of appellant's right knee injury and its potential effect on his ability to perform the duties of the selected position of Cashier II, at the time of the final October 18, 1996 Office decision on the issue of appellant's loss of wage-earning capacity, the only knee injury to have been doubled with appellant's left elbow claim was his July 29, 1991 knee injury claim. In considering appellant's arguments that his knee condition rendered him unable to perform the duties of the selected position, the Office hearing representative properly found that as only physical impairments which preexisted the accepted condition may be taken into consideration when selecting a job for purposes of determining wage-earning capacity, appellant's July 29, 1991 knee injury, which occurred subsequent to his accepted April 29, 1991 left elbow injury, could not be considered.⁶ Now that appellant has been successful in getting his cases consolidated, however, the record contains evidence of several knee injuries which occurred prior to appellant's accepted left elbow condition which, therefore, constitutes new evidence which was not considered previously and must be taken into consideration when selecting a job for the purposes of determining wage-earning capacity.⁷

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁸ The requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁹

The Board finds that the recent addition to the record of appellant's prior 1983 and 1987 right knee claims, and accompanying evidence, constitutes relevant and pertinent new evidence not previously considered by the Office and sufficient to require a merit review under 20 C.F.R. § 10.606(b)(2). Thus, the Office's denial of appellant's request for review of the merits of his claim constituted an abuse of discretion. Consequently, the case must be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

⁶ *Pope D. Cox*, 39 ECAB 143 (1987)

⁷ In determining loss of wage-earning capacity, physical impairments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity. *Pope D. Cox*, *supra* note 6.

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See* 20 C.F.R. § 10.606(b)(3).

The decision of the Office of Workers' Compensation Programs dated February 7, 2001 is hereby reversed and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
July 29, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member