

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN HERNDON and U.S. POSTAL SERVICE,
POST OFFICE, Savannah, GA

*Docket No. 02-1113; Submitted on the Record;
Issued October 21, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for right knee surgery; and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On January 20, 2000 appellant, then a 56-year-old manual clerk, filed a traumatic injury claim alleging that on December 13, 1999 she pulled muscles and sustained a torn meniscus in her right knee and leg while picking up letter trays from the floor.

By letter dated March 16, 2000, the Office accepted appellant's claim for a medial meniscal tear of the right knee.

On October 23, 2000 Dr. James W. Wilson, a Board-certified orthopedic surgeon and appellant's treating physician, submitted his October 23, 2000 treatment notes indicating that appellant was experiencing pain in her right knee and that she wished to undergo right knee replacement surgery. Dr. Wilson stated that he would proceed with the surgery and requested authorization for total right knee arthroplasty.

On November 3, 2000 an Office medical adviser reviewed appellant's medical records and stated that there was no history or physical examination in the records indicating a need for total knee arthroplasty. He advised the Office to obtain a second opinion.

Based on the Office medical adviser's recommendation, the Office, by letter dated February 22, 2001, referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Gary R. Loveless, a Board-certified orthopedic surgeon, for a second opinion examination to determine, *inter alia*, whether right knee replacement surgery was necessary due to appellant's December 13, 1999 employment injury.

Dr. Loveless submitted an April 4, 2001 report finding that the proposed right knee surgery was not related to appellant's December 13, 1999 employment injury.

By decision dated May 2, 2001, the Office denied appellant's request for right knee surgery based on Dr. Loveless' opinion. In a May 22, 2001 letter, appellant, through her counsel, requested a review of the written record.

In an October 2, 2001 decision, the hearing representative affirmed the Office's decision. Appellant, through her counsel, requested reconsideration of the hearing representative's decision by letter dated December 10, 2001.

By decision dated February 15, 2002, the Office denied appellant's request for a merit review of her claim on the grounds that the evidence submitted was either previously considered or was irrelevant, and thus, insufficient to warrant a review of its prior decision.

The Board has duly reviewed the case record in this appeal and finds that the Office properly denied appellant's request for right knee surgery.

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.¹ The Office has the general objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²

In this case, Dr. Wilson requested authorization for appellant to undergo total right knee arthroplasty, noting appellant's pain in the right knee. However, he did not give any rationale in support of his request. Dr. Wilson did not specify how the surgery would cure, give relief or lessen the degree or the period of appellant's disability for her employment-related right knee medial meniscal tear. His report, therefore, has diminished probative value.

As noted earlier, upon review of appellant's medical records, the Office medical adviser recommended that appellant undergo a second opinion examination to determine whether the proposed total right knee arthroplasty was necessary for the treatment of appellant's December 13, 1999 employment injury. To resolve this issue, the Office referred appellant to Dr. Loveless. In an April 4, 2001 report, Dr. Loveless provided a history of appellant's December 13, 1999 employment injury and medical treatment. He noted appellant's complaint

¹ 5 U.S.C. § 8103(a).

² *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

of arthritic pain in her right knee and a review of appellant's medical records and statement of accepted facts. Dr. Loveless also noted his findings on physical and objective examination. He diagnosed medial meniscus tear of the right knee secondary to the December 1999 employment injury, preexisting chondromalacia patella of the right knee and preexisting osteoarthritis of the right knee secondary to constitutional factors including, marked exogenous and exogenous obesity. In response to the Office's questions, Dr. Loveless stated that, based on appellant's history following arthroscopic surgery,³ her prior history of arthritis and conservative treatment for 10 years and x-ray appearance of severe osteoarthritis, surgery would ordinarily be indicated. He recommended that appellant reduce her weight prior to right knee surgery. In addition, Dr. Loveless stated that the surgery was not directly related to appellant's employment injury. He explained:

“[Appellant] had problems with her knee requiring conservative treatment dating back to 1991. Findings of the surgical procedure in February 2000, demonstrated that she had advanced osteoarthritis of the knee which did not occur or could not occur in the two-month period from the time of injury to the time of surgery.”

Dr. Loveless concluded:

“It is my feeling that the surgical procedure of February 10, 2000 is medically connected to the work injury. I do not feel that the necessity for right knee total arthroplasty is connected to the work injury. It is my feeling that the preexisting arthritis prevented [appellant] from rehabilitating in the knee following arthroscopic meniscectomy.”

The Board finds that the opinion of Dr. Loveless is well rationalized and represents the weight of the medical evidence. The Board has carefully reviewed Dr. Loveless' opinion and notes that it has reliability, probative value and convincing quality with respect to the conclusions regarding the relevant issue in the present case. He reviewed the evidence of record, provided a complete and accurate factual and medical history and reached conclusions, which comported with the relevant history as well as his own findings on examination.⁴ Dr. Loveless provided rationale for his opinion that the proposed total right knee arthroplasty was not necessary for the treatment of appellant's employment-related right knee medial meniscal tear. The Office, therefore, did not abuse its discretion in denying appellant's request for surgery on her right knee as it has not been established that such surgery is “likely to cure or give relief” to her accepted right knee medial meniscal tear. In light of the weight attributable to the medical opinion of Dr. Loveless, the Office properly denied authorization for the proposed total right knee arthroplasty.

The Board further finds that Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

³ The record reveals that appellant underwent arthroscopic surgery on her right knee on February 10, 2000.

⁴ See *Victor J. Woodhams*, 41 ECAB 345 (1989).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁸

In support of her request for reconsideration, appellant submitted duplicate copies of medical evidence already contained in the record and considered by the Office prior to its February 15, 2002 decision denying her request for a merit review. She also submitted duplicate copies of her prior response, copies of correspondence between herself and the Office and the Office's decisions that were previously of record. Appellant submitted an April 2, 2001 disability certificate of Dr. Wilson indicating that she needed to have a total knee replacement. Dr. Wilson's certificate is merely repetitious of his previous request for total right knee arthroplasty. The Board has held that material, which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.⁹ Thus, the duplicate medical evidence submitted by appellant, as well as, Dr. Wilson's April 2, 2001 disability certificate are insufficient to require the Office to reopen appellant's claim.

Appellant submitted medical evidence involving conditions other than her accepted medial meniscus tear of the right knee and conditions that predate her employment injury, employment documents and excerpts from a mechanical equipment handbook. In addition, she submitted medical evidence indicating that she sought medical treatment following her December 19, 1999 employment injury and she was disabled for work. The evidence submitted by appellant is irrelevant to the instant claim because the evidence failed to address the issue whether total right knee arthroplasty is necessary to treat appellant's employment-related right knee medial meniscus tear. Evidence which is not relevant to the particular issue in a claim is insufficient to warrant reopening a claim on its merits.¹⁰

Appellant submitted new evidence regarding her right knee condition. In his February 14, 2000 treatment notes, Dr. Wilson indicated that appellant was status post right knee arthroscopic surgery and that her range of motion was good and the pain was gone. In his

⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(1)-(2).

⁷ *Id.* at § 10.607(a).

⁸ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁹ *James A. England*, 47 ECAB 115 (1995).

¹⁰ *See James E. Salvatore*, 42 ECAB 309 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

February 29, 2000 treatment notes, he indicated that appellant stated her right knee felt great and she wanted to have total knee replacement surgery on her left knee. Dr. Wilson's March 28, 2000 treatment notes indicated that appellant had osteoarthritis in her left knee, but that her right knee pain was gone and she felt great. The new medical evidence submitted by appellant failed to indicate that she was in need of surgery due to her accepted medial meniscal tear of the right knee. Thus, the evidence submitted by appellant is insufficient to warrant a merit review of appellant's claim.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits in its February 15, 2002 decision.

The February 15, 2002 and October 2 and May 2, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 21, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member