

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. VOLLAND and DEPARTMENT OF THE NAVY,
MARINE CORPS BASE, Camp Pendleton, CA

*Docket No. 03-12; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On January 27, 1985 appellant, then a 31-year-old carpenter, filed a claim for a traumatic injury to his left knee sustained on January 25, 1985 when he turned while carrying lumber.

Appellant underwent arthroscopic debridement of his left knee on April 12, 1985. The postoperative diagnosis was degenerative arthritis of the medial and patellofemoral compartments.

Appellant's disability retirement was approved effective July 11, 1986. He elected to receive benefits under the Federal Employees' Compensation Act in preference to those under the Civil Service Retirement Act.

The Office accepted that appellant's January 25, 1985 injury resulted in a left knee strain, a permanent aggravation of degenerative arthritis of the left knee and the surgery performed on April 12, 1985.

On January 21, 1992 the Office issued appellant a schedule award for a 23 percent permanent loss of use of his left leg.

By decision dated May 4, 1998, the Office terminated appellant's compensation effective May 23, 1998 for refusing an offer of suitable work.

Appellant requested a hearing, which was held on March 16, 1999. By decision dated May 26, 1999, an Office hearing representative found that the position of clerk offered by the employing establishment was not suitable for the reason that the reading and writing skills required in this position were beyond appellant's capabilities.

The employing establishment modified the requirements of the clerk position and offered appellant the modified position on March 19, 2001. By letter dated April 6, 2001, the Office advised appellant that the offered position was suitable, and by letter dated May 10, 2001, the Office advised appellant that his reasons for not accepting the offer were not justified.

By decision dated June 6, 2001, the Office terminated appellant's compensation effective June 17, 2001 for refusing an offer of suitable work. The Office found that the requirements of the position of clerk, as modified, were within the recommendations of a learning disability specialist who evaluated appellant in April 2000 and that the physical requirements of the position did not exceed the work tolerance limitations set forth by an impartial medical examiner who examined appellant on December 12, 2000.

By letter dated December 27, 2001, appellant requested "a hearing or a letter of reconsideration, whichever is possible." Appellant stated: "I still do [not] feel I am ready for going back to work as stated in my September 30[,] 2001 letter.¹ The position that was offered me was a degrading position...." Appellant stated that his knee was still swelling on a regular basis if he had much activity and that medical information he was submitting showed he needed further surgery.

Appellant submitted a report dated August 22, 2001 from Dr. R. Sachs, an orthopedic surgeon, stating that appellant complained of increased swelling and pain for three months. Dr. Sachs noted decreased knee motion and medial laxity on examination, diagnosed moderately severe degenerative joint disease and recommended a cortisone shot before possible future surgery. Also submitted, subsequent to the Office's June 6, 2001 decision, were a May 15, 2001 report from Dr. M. Scott Wilson, a family practitioner and a May 21, 2001 report from Dr. William M. Ohara, an orthopedic surgeon. Dr. Wilson noted that appellant complained of left knee swelling for three days, found a moderate effusion on examination and recommended ice every hour for 15 minutes and "[o]ff times seven days given employment." Dr. Wilson stated, "[appellant] is temporarily totally disabled from May 15 through May 21[,] 2001."

Appellant complained to Dr. Ohara of some worsening of his symptoms over the past two to three weeks. He diagnosed left knee degenerative joint disease and described appellant's treatment options, recommending continued conservative treatment including a cortisone injection. Dr. Ohara stated that arthroscopy would be of limited long-term benefit in the face of arthritis and that appellant may eventually need a total knee replacement if the degenerative changes progressed.

By decision dated May 30, 2002, the Office found that the additional evidence submitted with appellant's request for reconsideration was immaterial and insufficient to warrant review of its prior decision.

The only Office decision before the Board on this appeal is the Office's May 30, 2002 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent

¹ Appellant's September 30, 2001 letter addressed the Office's August 23, 2001 preliminary determination that appellant received an overpayment of compensation and also stated that he was not ready to go back to work.

merit decision on June 6, 2001 and the filing of appellant's appeal on July 16, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.²

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.³

With his December 27, 2001 request for reconsideration, appellant submitted medical evidence not previously considered by the Office. This medical evidence, however, was not relevant, as it did not address the particular issue involved. The reports from Drs. Sachs and Ohara described appellant's condition and their plans for treating this condition, but did not address appellant's ability to work. The report of Dr. Wilson indicated that appellant was temporarily disabled for one week, from May 15 to 21, 2001. This report might be relevant to a claim for a recurrence of total disability for that week, but it does not address the issue of whether appellant was capable of performing the duties of the modified clerk position offered to him by the employing establishment on March 19, 2001. As appellant did not submit any new evidence that addressed this issue, the Office acted properly by refusing to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The May 30, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
February 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member