

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ADELINE T. BAHR and U.S. POSTAL SERVICE,  
BISMARCK STATION, Bismarck, ND

*Docket No. 03-118; Submitted on the Record;  
Issued February 13, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

On April 25, 2001 appellant, then a 67-year-old distribution clerk, filed a traumatic injury claim alleging that on February 26, 2001 she lifted a tray of flats from a cage and she was caught off-guard because the tray was heavier on the back end than she expected. Appellant stated that later on during her shift she experienced pain in her right knee and that she could not bear any weight on her right leg that evening. On the reverse of the claim form, appellant's supervisor, Lyn Hoffner, stated that appellant told her that she was not sure that lifting and pulling on the tray caused her injury, but that it was the only thing she could think of as the cause of her injury.

In support of her claim, appellant submitted an employing establishment light-duty work form dated April 12 and May 18, 2001 and completed by Paul V. Springer, a physician's assistant, indicating her physical restrictions. Appellant also submitted a February 27, 2001 report, of Dr. Ernest N. Godfread, a Board-certified orthopedic surgeon and her treating physician, indicating that he treated her right knee. Dr. Godfread's June 13, 2001 report, provided a history that appellant had fallen in the past and she experienced pain along the medial joint. Dr. Godfread indicated that the onset of pain occurred after appellant was working on her feet for an extended period of time on January 26, 2001. He also provided a history of appellant's social background, his findings on physical and objective examination and a diagnosis of meniscus tear.

Ms. Hoffner's April 13, 2001 letter, also accompanied appellant's claim. Ms. Hoffner stated that she spoke to appellant by telephone on February 26, 2001 when appellant called to notify the employing establishment that she was unable to work.<sup>1</sup> Ms. Hoffner asked appellant

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<sup>1</sup> The record indicates that appellant's work hours are from 11:30 p.m. until 8:00 a.m.

why and she responded that her leg was sore and that she had no idea how it happened. Appellant further stated that she could not think of an incident at work or at home that caused her injury. Ms. Hoffner stated that when appellant came into the office, she and Jeff Nordgaard, an employing establishment supervisor, advised appellant to fill out an accident report if she sustained an injury at work. They also advised appellant about the consequences of completing the form if her injury was not sustained on the job. Ms. Hoffner indicated that during an interview appellant stated that her leg started to hurt at 7:15 a.m. on February 26, 2001 while she was at work. Appellant stated that the only thing that could have caused her injury was when she lifted a three-sided flat tray from the box section cage. She noted appellant's explanation that it was a little over eye level and she could not see what was in the back of the tray. Appellant further explained that it was heavier than she expected and she did not remember twisting or hitting her knee at that time. Ms. Hoffner noted that when appellant called in sick on February 26, 2001 she never provided any of this information when she asked appellant what happened.

In a June 13, 2001 letter, Robert G. Knight, a human resource specialist, controverted appellant's claim on behalf of the employing establishment. Mr. Knight described a February 12, 2001 incident, where appellant slipped on ice in the employing establishment's parking lot while returning from a personal errand. He contended that this accident was not a condition of appellant's employment. Regarding the February 26, 2001 incident, Mr. Knight stated that appellant had not submitted any medical evidence linking her injury to a condition of her employment and thus, requested that the Office deny appellant's claim.

The Office received a request for authorization of magnetic resonance imaging (MRI) scan of appellant's right knee. The Office also received a July 2, 2001 MRI report from Dr. Matthew R. Stone, a radiologist, indicating that appellant had a tear of the posterior horn of the medial meniscus, tri-compartment degenerative changes with osteochondral defect in the anterior lateral femoral condyle, a knee joint effusion with popliteal cyst and scattered areas of soft tissue edema.

By letter dated June 19, 2001, the Office advised appellant that the evidence submitted was insufficient to establish her claim. The Office advised appellant about the type of additional factual and medical evidence she needed to submit to establish her claim.

In response to the Office's letter, appellant explained that she reported the injury to her supervisor on February 27, 2001 after seeing Dr. Godfreed. Appellant further explained that she stated that she did not know when her injury occurred because she did not feel any pain until the last 30 to 45 minutes at work on February 26, 2001. She stated that she asked the supervisor if there was a deadline and she was assured that there was plenty of time. Appellant provided a description of the February 12 and 26, 2001 incidents. Regarding the February 26, 2001 incident appellant stated that she reached up about 18 to 24 inches above her shoulder level to lift out a tray of flats weighing 20 to 25 pounds. Appellant stated that the trays were heavier than she expected and that this was the only incident that she could remember as being different on the alleged date of injury. She provided the name of a coworker who witnessed the February 12, 2001 incident and noted that without providing specific names that coworkers were in the area of the February 26, 2001 incident. Appellant stated that she did not experience any immediate effects after her injury on February 12 and 26, 2001. Regarding the latter incident, appellant

stated that she went home after work and slept. Appellant further stated that she did not become aware of her inability to bear weight on her right leg until she got up and could not mobilize normally. She indicated that Dr. Godfread treated her on February 27, 2001 and she had never been treated for a similar disability or symptoms before and she had never filed a workers' compensation claim from any source.

The Office received a medical record indicating that appellant was scheduled for surgery on August 3, 2001 with Dr. Godfread, but that it was cancelled for medical reasons. The Office also received a July 25, 2001 preoperative report from Dr. Steven J. Scherr, a Board-certified family practitioner, regarding appellant's right knee arthroscopy surgery. Dr. Scherr noted a history of appellant's family, social and medical background and his findings on physical examination. He stated that preoperative laboratory test results were pending and there were no restrictions for surgery at that time. The Office received a July 25, 2001 x-ray report, of Dr. Shelby Katz, a radiologist, revealed mild cardiomegaly without failure and the results of laboratory tests performed on July 25, 2001.

By decision dated October 2, 2001, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office found the evidence insufficient to establish that appellant sustained an injury as alleged and a medical condition caused by the alleged injury.

By letter dated October 29, 2001, appellant requested an oral hearing before an Office representative. The Office received Dr. Scherr's July 25, 2001 preoperative report and the July 25, 2001, laboratory test results. The Office received additional laboratory results from tests performed on September 4 and October 30, 2001.

Dr. Godfread's November 23, 2001 operative report, described appellant's right knee arthroscopy surgery and the removal of her left great toenail. He provided a preoperative and postoperative diagnosis of medial meniscus tear of the right knee and onychomycosis of the left great toenail.

In a January 18, 2002 letter, appellant requested reconsideration of the Office's decision. In support of her request, appellant submitted Mr. Springer's January 2, 2002 letter, indicating that she underwent arthroscopy knee surgery approximately seven weeks ago, which revealed a meniscal tear. He stated that there were arthritic changes of appellant's knee, which were probably normal degenerative changes. He also stated that the acute small meniscal tear was work related. Appellant also submitted a copy of Dr. Godfread's November 23, 2001 operative report.

In an undated letter received by the Office on March 19, 2002 appellant advised the Office that she wished to withdraw her request for a hearing.

Subsequently, the Office received treatment notes from Colleen Leingang, a physical therapist, dated January 1 and 22, February 21 and December 11, 2001.

On June 21, 2002 appellant resubmitted her January 18, 2002 request for reconsideration.

By decision dated August 9, 2002, the Office denied appellant's request for a merit review of her claim.

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty.

A person who claims benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of her claim, including that she sustained an injury while in the performance of duty and that she had disability as a result.<sup>3</sup> In accordance with the Federal (FECA) Procedure Manual, to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components, which must be considered, in conjunction with the other.

The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred.<sup>4</sup> In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>5</sup> The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>6</sup> The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.<sup>7</sup>

Regarding the first component, the Office found the evidence of record insufficient to establish that appellant sustained an injury as alleged. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment, may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Charles E. Evans*, 48 ECAB 692 (1997); see 20 C.F.R. § 10.110(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

<sup>5</sup> *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

<sup>6</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>7</sup> *Charles E. Evans*, *supra* note 3.

and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>8</sup>

In controverting appellant's claim, Ms. Hoffner, appellant's supervisor, contended that the cause of appellant's right knee injury was uncertain according to appellant. She further contended that appellant did not describe the February 26, 2001 incident as the lifting of a flat tray from the box section cage resulting in her right knee injury when she called in sick on February 26, 2001.

In response to the Office's June 19, 2001 letter, requesting additional evidence, appellant explained that she reported the injury to her supervisor on February 27, 2001 after seeing Dr. Godfreed. Appellant indicated that she stated that she did not know when her injury occurred because she did not feel any pain until the last 30 to 45 minutes at work on February 26, 2001. She also stated that she asked the supervisor if there was a deadline and she was assured that there was plenty of time. Appellant provided a description of the February 26, 2001 incident consistent with that provided on her claim form.

Appellant submitted a February 27, 2001 report from Dr. Godfreed, a Board-certified orthopedic surgeon and her treating physician, indicating that she was treated for right knee condition.

The Board finds that appellant's statements provide a consistent history of injury and Dr. Godfreed's February 27, 2001 report is contemporaneous to the February 26, 2001 incident. Accordingly, the Board finds that the contemporaneous evidence of record supports that the incident occurred at the time, place and in the manner alleged.<sup>9</sup>

The Board, however, finds that the medical evidence of record fails to establish that appellant's right knee injury was caused by the February 26, 2001 employment incident. The April 12 and May 18, 2001 form reports from Mr. Springer, a physician's assistant, providing appellant's physical restrictions fail to satisfy appellant's burden. This evidence has no probative value because a physician's assistant is not considered to be a physician under the Act.<sup>10</sup> Lay individuals such as physician's assistants are not competent to render a medical opinion.<sup>11</sup>

Dr. Godfreed's June 13, 2001 report finding that appellant had a meniscus tear failed to address the cause of appellant's condition. Further, he provided an inaccurate history of appellant's injury in noting that appellant experienced an onset of pain after working on her feet for an extended period of time on January 26, 2001 rather than February 26, 2001.

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<sup>8</sup> *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

<sup>9</sup> *Louise F. Garnett*, 47 ECAB 639, 643-44 (1996); *Constance G. Patterson*, 41 ECAB 206 (1989); *Julie B. Hawkins*, 38 ECAB 393 (1987).

<sup>10</sup> 5 U.S.C. § 8101(2).

<sup>11</sup> *See Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

The requests for an MRI scan, the July 2, 2001 MRI report of Dr. Stone, a radiologist, the notice of appellant's scheduled surgery, the July 25, 2001 preoperative report of Dr. Scherr, a Board-certified family practitioner and the July 25, 2001 x-ray report of Dr. Katz, a radiologist, are insufficient to establish appellant's burden. They failed to address whether appellant's right knee conditions were caused by the February 26, 2001 employment incident.

Although the Office advised appellant of the type of medical evidence needed to establish her claim, appellant failed to submit medical evidence responsive to the request. Consequently, appellant has not established that her right knee injury was caused by the February 26, 2001 employment incident.

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

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.<sup>15</sup>

In support of her request for reconsideration, appellant submitted Dr. Scherr's July 25, 2001 preoperative report and the July 25, 2001 laboratory results, which were previously of record and considered by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.<sup>16</sup> As the Office previously considered the above evidence submitted by appellant on reconsideration, it is repetitive in nature and thus, insufficient to warrant reopening appellant's claim on the merits.

The September 4 and October 30, 2001, laboratory test results are irrelevant to the issue in this case of whether appellant has established an injury caused by the February 26, 2001 employment incident as they do not address causal relation. Similarly, Dr. Godfreed's November 23, 2001 operative report providing a diagnosis of medial meniscus tear of the right

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<sup>12</sup> 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).

<sup>13</sup> 20 C.F.R. § 10.606(b)(1), (2).

<sup>14</sup> *Id.* at § 10.607(a).

<sup>15</sup> *Id.* at § 10.608(b).

<sup>16</sup> *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

knee and onychomycosis of the left great toenail is irrelevant because he failed to discuss a causal relationship between appellant's conditions and the February 26, 2001 employment incident.

The January 18, 2002 letter of Mr. Springer, a physician's assistant, finding that appellant's acute small meniscal tear was work related and the treatment notes of Ms. Leingang, a physical therapist, are of no probative value because a physician's assistant and a physical therapist are not considered physicians under the Act.<sup>17</sup>

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 merit review under section 8128(a) of the Act.

The August 9, 2002 and October 2, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed as modified.

Dated, Washington, DC  
February 13, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>17</sup> 5 U.S.C. § 8101(2); *see also* *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).