

**United States Department of Labor
Employees' Compensation Appeals Board**

EVAN D. HENDERSON, Appellant

and

**U.S. POSTAL SERVICE, LINCOLN ANNEX,
Clearwater, FL, Employer**

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**Docket No. 04-866
Issued: August 3, 2004**

Appearances:
Lenny V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 13, 2004 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated July 10 and September 30, 2003, which denied appellant's claim for compensation, and a January 30, 2004 nonmerit decision, which denied appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on May 23, 2002, as alleged; and (2) whether, in the January 30, 2004 decision, the Office properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 24, 2002 appellant, then a 47-year-old city carrier, filed a traumatic injury claim alleging that on May 23, 2002 he felt a pulling sensation in both of his elbows and knees when

he lifted a flat bucket. By letter dated July 8, 2002, the Office asked appellant for further information.

In support of his claim, appellant submitted a medical report dated May 23, 2002 wherein Dr. Walter E. Afield, a Board-certified psychiatrist, noted that appellant had, by history, traumatic brain injury and status post bilateral post rotator cuff surgery and carpal tunnel surgery. He also indicated that appellant had explosive personality disorder and a severe depressive reaction. He noted that appellant could not return to work for a minimum of 60 days, but that it was doubtful that he would ever be able to return to work.

Appellant also submitted a May 24, 2002 form by Dr. Edward N. Feldman, an orthopedic surgeon, wherein he indicated that appellant could not lift more than 70 pounds and was limited to intermittent standing, climbing, kneeling, bending, stooping, twisting, pushing/pulling and simple grasping. He diagnosed appellant with knee sprain and elbow sprain on both sides, and indicated this was caused when he felt a pulling separation when lifting. In a July 16, 2002 report, Dr. Freeman diagnosed internal derangement, both knees; synovitis, both knees; and synovitis, both elbows.

By decision dated August 23, 2002, the Office denied appellant's claim for compensation as it found that the evidence was not sufficient to establish that appellant sustained an injury as alleged. The Office noted that none of the medical evidence referred to the May 23, 2002 incident when appellant claimed he injured himself lifting a bucket.

On September 17, 2002 appellant submitted an August 15, 2002 report by Dr. Feldman wherein he added traumatic effusion in both knees and bilateral retropatellar bursitis to his diagnoses. He further indicated that these "objective findings and subjective complaints are casually related to his accident of [May 22, 2002]." He noted:

"[Appellant] was lifting a flat bucket and injured both elbows. He was kneeling at the time and he injured his knees as well. This is in the realm of medical probability as the injury resulted in bilateral lateral epicondylitis and the knees are very susceptible to injury when flexed. His injuries were objectified by the [magnetic resonance imaging] scans."

Dr. Feldman noted that appellant was never taken off work because of his orthopedic injuries. He noted that appellant was working limited duty before the most recent injury and that this injury only compounded what he had previously. He also noted that there was a psychiatric component involved.

Appellant also submitted the results of further examinations and tests by Dr. Afield. In an August 6, 2002 report, Dr. Afield opined:

"There is no doubt that this man's current emotional condition is directly related to his medical condition as a result of the chronic pain, multiple surgeries and procedures he has had to endure due to the repetitive injuries he sustained at work. He is unable to return to work at the present time."

On June 2, 2003 appellant requested reconsideration. In support thereof, appellant submitted a statement indicating that at approximately 9:15 am on May 23, 2002, he injured both knees and elbows when he squatted to lift a tub of mail that weighted 20 to 25 pounds.

By decision dated July 10, 2003, the Office denied appellant's claim after reviewing the case on the merits. The Office noted that the fact that appellant did not report his injury to Dr. Afield on the day that it happened and did not report it to Dr. Feldman until nearly three months later cast doubt on the validity of the claim. The Office also noted that Dr. Feldman refers to the injury as occurring on May 22, 2002 not May 23, 2002.

By letters dated August 13 and 20, 2003, appellant again requested reconsideration. In support thereof, appellant submitted an affidavit by his shop steward wherein he indicated that he worked with appellant and that on May 23, 2002 appellant told him that he injured his knees and elbows while lifting a tub of mail. Appellant also submitted a statement dated July 24, 2003 by Dr. Feldman wherein he indicated that he incorrectly noted appellant's date of injury and that the correct date of injury is May 23, 2002.

By decision dated September 30, 2003, the Office reviewed appellant's case on the merits, but denied modification of the decision. The Office determined that appellant had not submitted a rationalized medical opinion supporting a causal relationship between the claimed conditions and the implicated work incident.

By letter dated November 7, 2003, appellant again requested reconsideration. In support thereof, appellant submitted notes dated May 7, 2003 by Dr. Afield and April 3, 2003 by Dr. Feldman wherein they indicated that appellant was totally and permanently disabled. Appellant also submitted copies of correspondence from his attorney and other advocate. Finally, he submitted a copy of the affidavit of the shop steward and copies of reports by Dr. Feldman that had been previously submitted. By decision dated January 30, 2004, the Office denied reconsideration without reviewing the case on the merits.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that he or she sustained an injury while in the performance of duty.² In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the

¹ 5 U.S.C. §§ 8101-8193.

² *Deborah L. Beatty*, 54 ECAB ____ (Docket No. 02-2294, issued January 15, 2003); *Melinda C. Epperly*, 45 ECAB 196, 198 (1993).

employment incident caused a personal injury and generally this can be established only by medical evidence.³

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.⁴ To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified as causing his condition and, taking these factors into consideration as well as findings upon physical examination and the medical history, state whether these employment factors caused or aggravated appellant's diagnosed condition.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office properly denied appellant's claim as he failed to submit rationalized medical evidence to establish that he sustained an injury to his elbows or knees that was caused by his work activities on May 23, 2002. Dr. Afield's opinions are, in large part, not relevant to the issue of appellant's physical condition as Dr. Afield is a psychiatrist who discussed appellant's emotional condition. The Board notes that appellant has not filed a claim for an emotional condition; rather he claimed compensation for injury to his elbows and knees. The Board also notes that although appellant saw Dr. Afield on May 23, 2002, the date of the alleged injury, there is no notation in Dr. Afield's report that appellant complained that he was injured at work on that date.

Although Dr. Feldman's reports of May 24 and July 15, 2002 indicate that appellant had internal derangement in both knees and synovitis in both his knees and elbows, he did not link appellant's condition to his work injury until his report dated August 15, 2002, when he indicated that appellant also had a traumatic effusion in both knees and bilateral retropatellar bursitis. He indicated at that time that these conditions were causally related to his accident of May 22, 2002. Specifically, he noted that appellant was lifting a flat bucket on that date when he injured his knees and elbows. He indicated that it was within "the realm of medical probability" that this injury caused appellant's injury. However, this opinion, made three months after appellant's alleged injury, is too speculative to constitute a rationalized medical opinion. Dr. Feldman also mistakenly indicated that appellant was never off work due to his orthopedic injuries. He also indicated that appellant was injured while kneeling whereas appellant stated that he was squatting. Furthermore, as the Office properly noted, Dr. Feldman erred in stating that the injury occurred on May 22, 2002, whereas appellant alleged that the injury occurred on May 23, 2002. Although Dr. Feldman later corrected that date of the alleged injury, this still does not correct the fact that Dr. Feldman's speculative opinion, stated three months after appellant's alleged injury, does not constitute a rationalized opinion that his injury was causally related to the work incident. Accordingly, the Office properly determined that appellant had not

³ See *John J. Carlone*, 41 ECAB 354, 357 (1989).

⁴ *Calvin E. King*, 51 ECAB 394, 401 (2000).

⁵ *Id.*

established that he sustained an injury to his elbows or knees causally related to his federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a) of the Act, the Office's federal 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.⁶

ANALYSIS -- ISSUE 2

The Office did not review appellant's claim on the merits in its January 30, 2004 decision. When requesting reconsideration on November 7, 2003, appellant did not offer any argument contending that the Office erroneously applied or interpreted a specific point of law, nor did appellant advance any relevant legal argument not previously considered by the Office. With regard to the evidence submitted with appellant's November 7, 2003 request, the affidavit by the shop steward and copies of Dr. Feldman's reports had already been reviewed by the Office and therefore are repetitive and not sufficient to require review on the merits.⁷ The letters by appellant's attorney and advocate are also irrelevant as they do not constitute medical evidence establishing a causal relationship between appellant's injury and the alleged work incident of May 23, 2002. Finally, the brief statements of Drs. Afield and Feldman indicating that appellant was totally disabled do not address why appellant was totally disabled, or provide any medical rationale whatsoever for this conclusion. Accordingly, the Office properly denied further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for compensation on the grounds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty on May 23, 2002, as alleged, and properly denied appellant's September 30, 2003 request for reconsideration.

⁶ 20 C.F.R. § 10.606(b)(2)(i-iii).

⁷ The Board has held that material that 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. *James A. England*, 47 ECAB 115 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 30, 2004 and September 30 and July 10, 2003 are hereby affirmed.

Issued: August 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member