United States Department of Labor
Employees' Compensation Appeals Board

EARL M. GEORGE, Appellant	)	
and	)	**Docket No. 04-1565**
	)	**Issued: November 17, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Napoleon, OH, Employer	)	

Appearances:
Earl M. George, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 4, 2004 denying his request for reconsideration pursuant to 5 U.S.C. § 8128(a). The record also contains a merit decision dated December 19, 2003, finding that he failed to establish that he sustained an injury on September 5, 2002 as alleged. Pursuant to 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on September 5, 2002; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 3, 2003 appellant, then a 53-year-old city carrier, filed a claim alleging that he fell down some steps while delivering mail on September 5, 2002 landing on his left knee and left elbow. He stated that his claim was not filed within 30 days of September 5, 2002 as the accident occurred because of his bad feet, for which he has an open workers' compensation case, and he felt a new claim form was not necessary.[1] Appellant stopped work on November 2, 2002 and has not returned.[2] A February 3, 2003 duty status report from appellant's podiatrist was submitted which diagnosed plantar fascitis.

In a letter dated February 25, 2003, the Office requested additional factual and medical information from appellant. The Office stated that it had reviewed appellant's other claim, claim number 090426543, and had found a December 23, 2002 report from Dr. D.J. McKernan, Board-certified orthopedic surgeon, which appeared to be related to the current claim, but was not sufficient to determine eligibility for benefits. In his December 23, 2002 report, Dr. McKernan noted that appellant stated he had problems with his feet since 1989 and that the pain in his foot had resulted in a trip and fall during the summer which caused him to hit his left knee and then his left elbow. Appellant also advised that, prior to this injury, he had no previous left knee or elbow problems. Dr. McKernan presented his examination findings and diagnosed left tennis elbow and left knee meniscus tear.

Appellant submitted narrative statements, which the Office received on March 19, 2003, which essentially reiterated his contention that his fall on September 5, 2002 occurred when a severe pain developed in his left foot which threw him off balance and caused him to fall and injure his left knee and left elbow.[3] Appellant submitted a March 31, 2003 excuse slip from his physician for the period March 28 to April 13, 2003 which advised that he would be undergoing heel spur procedures for both feet.[4]

By decision dated May 20, 2003, the Office denied appellant's claim finding that he had not submitted sufficient factual evidence to establish that the employment incident occurred as alleged and the medical evidence was insufficient to support his claim.

On December 8, 2003 appellant requested reconsideration of the Office's May 20, 2003 decision asserting that he had reported the September 5, 2002 fall before February 5, 2003, when the claim was filed. He also expressed his dissatisfaction with the employing establishment and the claims process. He submitted a November 24, 2003 note from Dr. McKernan which stated

[1] In a January 23, 2003 letter, the Office advised appellant that he had to submit a new claim for his injured left knee and left elbow. While appellant filed an occupational disease claim, the Office adjudicated the matter with regard to whether appellant sustained injuries due to his fall on September 5, 2002.

[2] Appellant advised that he stopped work on November 20, 2002.

[3] Appellant also submitted a series of questions which the Office addressed on June 2, 2003.

[4] Appellant also submitted progress reports from Dr. Vincent Waldron, a Board-certified orthopedic surgeon, dated 1989 and 1991, which noted an impression of bilateral heel spur syndrome, worse on right side. As these reports are not relevant as they predate the instant claim.

that appellant was treated for a medial meniscus tear on December 23, 2002 and underwent arthroscopy on August 7, 2003. Dr. McKernan also noted that appellant had informed him during his December 23, 2002 examination that he had no previous left knee or elbow problems prior to this injury and stated that there were no facts to indicate otherwise. Copies of the August 7, 2003 operation and progress notes following the operation were submitted. Appellant also submitted duplicative copies of evidence already of file, a December 10, 2002 report from Dr. Edward A. Sharrer, a podiatrist, who noted that appellant reported injuring his left knee while at work a couple months ago, and a May 12, 2003 final Equal Employment Opportunity (EEO) Commission decision reversing the agency's dismissal of his complaint for untimely EEO counselor contact and remanding the complaint to process whether management failed to respond to his request for a reasonable accommodation on September 3, 2002 for his bilateral foot disability.

By decision dated December 19, 2003, the Office denied modification of its May 20, 2003 decision. The Office found that the medical documentation, in correlation with the factual evidence provided, established that appellant actually sustained an injury to his left elbow and left knee. The Office, however, affirmed the denial of the claim as the medical evidence failed to support that the injury was sustained as a result of his fall at work on September 5, 2002.

In a January 25, 2004 letter, appellant requested reconsideration essentially reasserting that he had timely reported the fall but did not feel as though he required medical attention right away.[5] He also reiterated his dissatisfaction with the employing establishment and the claims process.

By decision dated March 4, 2004, the Office denied appellant's request for reconsideration finding that the evidence submitted was repetitive and cumulative.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury."[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[7]

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.

[5] Appellant mistakenly dated his letter January 25, 2003.

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

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 which is alleged to have occurred.[8] In some traumatic injury cases, this component can be established by an employee's uncontroversial statement on the claim form.[9] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[10] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[11]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[12]

ANALYSIS -- ISSUE 1

In this case, appellant filed a claim for injury alleging that his feet problems caused him to lose his balance and fall on September 5, 2002 injuring his left knee and left elbow. The Office found that appellant established that he fell at work on September 5, 2002 and had injured his left elbow and left knee; however, the medical evidence failed to establish that the diagnosed conditions were sustained as a result of a work injury.

As noted above, part of the burden of proof includes the submission of rationalized medical evidence establishing that the claimed condition is causally related to employment factors. In the instant case, Dr. McKernan and Dr. Sharrer advised that appellant stated he had an injury on September 5, 2002 when he fell while delivering mail. Dr. McKernan also agreed with appellant that there were no facts to indicate that appellant had any previous left knee or elbow problems prior to his injury. However, the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[13] Both Dr. McKernan and Dr. Sharrer failed to provide a reasoned opinion regarding whether or not the injury, as described by appellant, caused the diagnosed conditions and whether such conditions were related to appellant's work factors. Although the medical

[8] *Elaine Pendleton, supra* note 6.

[9] *John J. Carlone*, 41 ECAB 354 (1989).

[10] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[11] *Id.* at 255, 256.

[12] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[13] *Edward E. Olson*, 35 ECAB 1099 (1984).

reports appellant submitted establish that he sustained an injury to his left elbow and left knee, they contain insufficient medical rationale explaining how his work duties caused his diagnosed condition(s). Thus, appellant's statement that an injury had occurred and that he had no previous problems with his left elbow or left knee prior to such injury, appellant's statement alone does not constitute a substantial, probative medical explanation under the law. Appellant was advised that submitting a rationalized statement from his physician addressing any causal relationship between his claimed injury and factors of his federal employment were crucial. As he has not submitted rationalized medical evidence establishing that the claimed condition is causally related to employment factors, appellant has not met his burden of proof in establishing his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] the Office's regulation provide that a claimant's application for reconsideration must be submitted in writing and set forth arguments or 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.[15] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.[16] 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 on the merits.[17]

ANALYSIS -- ISSUE 2

In his January 25, 2004 request for reconsideration, appellant did not submit any new evidence nor did he specify any erroneous application of law or advance a point of law or fact not previously considered by the Office. Appellant's January 25, 2004 letter merely repeated his prior assertions which the Office had considered prior to the issuance of the December 19, 2003 decision. The Board has held that the submission of material which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.[18] As the issue in this case is medical in nature, the submission of new medical evidence addressing whether employment factors caused the claimed condition is necessary to require the Office to reopen the claim for a merit review. However, appellant failed to submit any new medical evidence.

[14] 5 U.S.C. § 8128(a). Under section 8128(a) of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[15] 20 C.F.R. §§ 10.609(a) and 10.606(b).

[16] 20 C.F.R. §10.607(a).

[17] 20 C.F.R. § 10.608(b).

[18] *Dennis M. Dupor*, 51 ECAB 482 (2000).

Appellant is not entitled to a review of the merits of his claim under the three regulatory requirements at section 10.606(b)(2). The Board finds that the Office properly denied appellant's January 25, 2004 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that the Office properly denied appellant's claim as he failed to submit medical evidence explaining why his claimed condition(s) is causally related to his federal employment. Additionally, the Board finds that the Office properly denied merit review of appellant's claim on March 4, 2004.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2004 and December 19, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member