

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

BEVERLY PEARSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 04-1861
Issued: November 9, 2004**

Appearances:
Beverly Pearson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 20, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decisions dated December 31, 2003 and April 1, 2004 finding that she did not establish an injury to her right knee causally related to her federal employment, and a May 13, 2004 decision denying her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the nonmerit issue concerning the denial of the review of the written record.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she developed a right knee condition due to her federal employment; and (2) whether the Branch of Hearings and Review properly denied appellant's request for a review of the written record on the grounds that she had previously requested and received reconsideration of her claim before the Office.

FACTUAL HISTORY

On November 12, 2003 appellant, then a 47-year-old carrier, filed an occupational disease claim alleging swelling in her right knee due to a special brace, favoring the left knee and work duties. She first became aware of this condition and attributed it to her employment in July 2003.

In a letter dated November 19, 2003, the Office requested additional factual and medical information from appellant, who submitted a letter dated October 31, 2003 asserting that she underwent left knee surgery on February 21, 2001 and as a result she wore a knee brace which resulted in extra weight bearing on her right leg. Appellant stated that she developed a right knee condition with swelling, popping and pain. On November 22, 2003 appellant alleged pain and swelling in her right knee.

On December 16, 2003 Rodney D. Stewart, a supervisor, stated that appellant worked regular duty from June 2002 until October 7, 2003 with no discussion of a knee condition. Beginning October 7, 2003 appellant asked that her regular schedule be maintained for the month of October due to unidentified medical reasons. Mack Shepard, a manager, stated that appellant did not mention any problems with her knees or her regular duty.

By decision dated December 31, 2003, the Office denied appellant's claim finding that the evidence was insufficient to establish that the event(s) occurred and that there was no medical evidence of a diagnosed condition.

Appellant requested reconsideration on January 23, 2004 and submitted a December 5, 2003 note from Dr. Gregory P. Harvey, a Board-certified orthopedic surgeon, stating that a magnetic resonance imaging (MRI) scan was consistent with a medial meniscus tear and a bone bruise in the tibial plateau. He stated that arthroscopic surgery would be necessary.

By decision dated April 1, 2004, the Office reviewed appellant's claim on the merits and denied modification of the December 31, 2003 decision, finding that Dr. Harvey's report did not identify the lower extremity involved and did not offer an opinion on the causal relationship between appellant's condition and her accepted employment factors.

On April 3, 2004 appellant addressed a letter to the Branch of Hearings and Review. She noted that she had included additional medical evidence¹ and stated:

“I have submitted a claim for an appeal in previous months. I recently received this documentation after the fact. Please forward or provide me with an address to the Review and Appeal Board.”

By decision dated May 13, 2004, the Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that she had previously requested reconsideration and was not as a matter of right entitled to a review of the written record. The Branch of Hearings and Review exercised its discretion in further reviewing appellant's request

¹ As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

and found that her case could equally well be addressed by again requesting reconsideration from the Office and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence of existence of a the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.³ An employee has the burden of establishing that any specific condition for which compensation is claimed is causally related to the employment injury.⁴

ANALYSIS -- ISSUE 1

Appellant filed a notice of occupational disease and alleged that she developed a right knee condition as a result of additional weight bearing due to a previous employment-related left knee condition and to excessive walking in the performance of duty.

In support of her claim, appellant submitted a December 5, 2003 report from Dr. Harvey, a Board-certified orthopedic surgeon, who obtained an MRI scan consistent with a medial meniscus tear and a bone bruise in the tibial plateau. He stated that arthroscopic surgery would be necessary. Dr. Harvey did not identify the leg involved and did not offer any opinion on the cause of the diagnosed conditions. His report is not sufficient to establish that these conditions arose from excessive walking in appellant's employment. As appellant has not submitted any medical evidence establishing a causal relationship between her diagnosed condition and her implicated employment duties she has not established that she developed a leg condition in the performance of duty.

² *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

³ *Albert F. Ranieri*, 55 ECAB ____ (Docket No. 04-22, issued July 6, 2004); A. Larson, *The Law of Workers' Compensation* § 10.01(2000).

⁴ *William F. Gay*, 50 ECAB 276, 277 (1999).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁵

The claimant can choose between two formats: an oral hearing or a review of the written record.⁶ The requirements are the same for either choice.⁷ The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days⁸ and before the claimant has requested reconsideration.⁹ However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.¹⁰

ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined appellant's April 4, 2004 request for a review of the written record was timely filed as it was made within 30 days after the issuance of the Office's April 1, 2004 decision. The Office also properly noted that appellant had requested reconsideration on January 23, 2004 and the Office had issued a decision regarding this request on April 1, 2004. The Office, therefore, properly denied appellant's request for a review of the written record as a matter of right.

The Office proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a review of the written record in this case. The Office determined that a review of the written record was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a review of the written record as a matter of right as she had previously requested reconsideration and properly exercised its discretion in determining to deny appellant's request for a review of the written record as she had other review options available.

⁵ 5 U.S.C. §§ 8101-8193, 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

⁸ 20 C.F.R. § 10.616. *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁹ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

¹⁰ *Id.*

CONCLUSION

The Board finds that appellant has not submitted sufficient medical opinion evidence to establish that she developed a right knee condition due to factors of her federal employment. The Board further finds that the Office properly denied appellant's request for a review of the written record as a matter of right and properly exercised its discretion regarding this issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 13 and April 1, 2004 and December 31, 2003 are affirmed.

Issued: November 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member