

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

RONALD L. FEGGANS, Appellant

and

**U.S. POSTAL SERVICE, AIRMAIL CENTER,
Philadelphia, PA, Employer**

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**Docket No. 05-682
Issued: June 22, 2005**

Appearances:
Thomas R. Uliase, Esq., 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 24, 2005 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 22, 2004, finding that he had not established disability due to his accepted employment injury, and a November 9, 2004 decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues in this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he was totally disabled due to his accepted left knee condition for the period July 9, 2000 to February 26, 2002; and (2) whether the Office properly declined to reopen appellant's claim for reconsideration on November 9, 2004.

FACTUAL HISTORY

On May 12, 2001 appellant, then a 51-year-old retired mail handler, filed a notice of occupational disease, alleging that he sustained a torn ligament in his left knee and a right

shoulder injury due to loading trays of mail and pushing and pulling while in the performance of duty. Appellant stopped work on July 9, 2000 and retired on disability on January 22, 2001.

On July 18, 2000 Dr. Gilbert B. Tabby, an osteopath, diagnosed renal disease and degenerative joint disease of the right shoulder as well as an unstable left knee. A magnetic resonance imaging scan on July 18, 2000 found a lateral meniscal tear with a meniscal cyst and mild cartilage loss medially. In an August 10, 2000 report, Dr. Tabby indicated that appellant reported complaints of knee pain one week after he stopped work on July 9, 2000. He diagnosed a torn ligament in the left knee and stated that appellant was currently unable to work.

Dr. John J. McPhilemy, an osteopath, completed reports on August 28 and December 26, 2000. He examined appellant for his left knee condition. Dr. McPhilemy recommended surgery in August 2000, but that due to appellant's kidney disease and uncontrolled dialysis treatment, he was unable to undergo surgery at that time. Appellant had initially scheduled surgery for October 23, 2000 but cancelled.

Appellant underwent a surgical catheterization for treatment of his progressive renal failure on August 3, 2000. On August 23 and 30, 2000 appellant underwent surgical treatment due to chronic renal failure and the need for acute hemodialysis access.

In a report dated September 19, 2000, Dr. Paul M. Miller, an osteopath and Board-certified internist, noted that appellant elected to return to the hospital on August 29, 2000 for repeat placement of a dialysis catheter for treatment of his end stage renal disease. He indicated that appellant was questioning when he would be allowed to return to work.

The Office accepted appellant's claim for a tear of the left knee lateral meniscus and authorized surgery on November 20, 2001.

Appellant filed a claim for compensation on February 26, 2002 for the period July 9, 2000 to February 26, 2002. In a letter dated March 15, 2002, the Office requested a detailed medical report supporting that appellant was totally disabled due to his accepted employment injury for the period for which compensation was claimed.

On April 22, 2002 appellant underwent an arthroscopy of the left knee with partial lateral meniscectomy, partial medial meniscectomy and chondroplasty of the medial and lateral femoral condyles.

By decision dated May 13, 2002, the Office denied appellant's claim for compensation, finding that the medical evidence did not establish that his disability for work was due to his accepted left knee condition rather than to his nonemployment-related kidney disease and treatment.

Appellant requested an oral hearing on May 14, 2002. He submitted a report from Dr. McPhilemy dated August 26, 2002. The physician stated that beginning on August 28, 2000, appellant was not capable of working as a mail handler due to his left knee condition. He provided the work restrictions which he felt would have been necessary due to appellant's accepted knee condition.

Appellant testified at the August 5, 2003 oral hearing. He noted that he got sick on July 9, 2000 and that shortly thereafter he went to the hospital and was diagnosed with torn ligaments in his left knee and his kidney failure. By decision dated December 4, 2003, the hearing representative affirmed the May 13, 2002 decision, finding that appellant had not submitted the sufficient rationalized medical opinion evidence to establish that he was totally disabled as of July 9, 2000 due to his accepted employment injury.

Appellant requested reconsideration on March 24, 2004 and submitted a report from Dr. McPhilemy dated August 11, 2003. Dr. McPhilemy stated that he had reviewed the position description for mail handler and that appellant was not able to perform these duties. By decision dated April 22, 2004, the Office denied modification of the December 4, 2003 decision on this basis that the medical evidence did not address appellant's disability for work beginning on July 9, 2000.

Appellant again requested reconsideration on August 23, 2004. In support of this request, he submitted a report from Dr. McPhilemy dated July 12, 2004. Dr. McPhilemy stated that appellant reported recurrent left knee pain on July 12, 2004 and the physician diagnosed degenerative joint disease of the left knee. By decision dated November 9, 2004, the Office denied reconsideration of the merits on the grounds that he failed to support his request for reconsideration with relevant new evidence.¹

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,² the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.³ Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.⁴ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁵

ANALYSIS -- ISSUE 1

Appellant has not submitted the necessary medical evidence to establish that his disability for work commencing on July 9, 2000 to February 26, 2002, was due to his accepted tear of the

¹ On January 31, 2005 the Office granted appellant a schedule award for 13 percent impairment of his left lower extremity. As this decision was issued after the date of the appeal to the Board on January 24, 2005, it is not an issue in this appeal. 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.5(f).

⁴ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

⁵ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

lateral meniscus of the left knee, for which he underwent surgery. On July 18 and August 10, 2000 Dr. Tabby, diagnosed renal disease and degenerative disease of the right shoulder. The physician made findings relative to appellants left knee condition, but did not provide any opinion relating appellant's disability commencing July 9, 2000 to the accepted injury. This medical evidence fails to distinguish between appellant's accepted employment injury and his nonemployment-related renal failure and any disability due to this condition. Dr. Tabby indicated that appellant did not report knee pain until one week after his work stoppage and initially included both diagnoses when finding that appellant was unable to work.

Dr. McPhilemy, an osteopath, reported on August 28, 2000 that appellant had uncontrolled dialysis treatment for his kidney disease. Appellant was also hospitalized repeatedly for surgeries throughout August 2000, for treatment of his kidney disease.

Dr. Miller indicated in his September 19, 2000 report regarding appellant's dialysis treatment and kidney disease that appellant queried when he could return to work, suggesting that appellant believed that his disability was due to his kidney disease and treatment.

These medical reports do not provide a clear opinion that appellant became totally disabled as of July 9, 2000 due to his accepted knee condition and suggest that both appellant and his physicians believed that his disability was, in fact, due to his nonemployment-related kidney disease and treatment.

In an August 26, 2002 report, Dr. McPhilemy stated that appellant was unable to return to his date-of-injury position due to his left knee condition beginning on August 28, 2000. While this report indicates that appellant was partially disabled due to his accepted employment injury, Dr. McPhilemy did not fully address appellant's total disability for work as of July 9, 2000. The physician provided retroactive work restrictions indicating that appellant could have performed limit-duty work with the accepted knee condition. This report is not sufficient to meet appellant's burden of proof in establishing total disability for work as Dr. McPhilemy did not find that appellant was totally disabled. Moreover, he did not address whether appellant was totally disabled due to his kidney condition and did not provide any medical reasoning in support of his stated opinion.

Appellant has not submitted any rationalized medical opinion evidence establishing that his disability for work beginning on July 9, 2000 was due to his accepted employment injury and the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ When a claimant fails to meet

⁶ *Supra* note 2, § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS -- ISSUE 2

In this case, the evidence submitted in support of appellant's August 23, 2004 reconsideration request was not relevant to the underlying issue in the case, whether appellant was totally disabled from July 9, 2000 to February 26, 2002 due to his accepted employment injury. The July 12, 2004 report of Dr. McPhilemy addressed the issue of whether appellant had sustained an additional left knee condition of degenerative joint disease or recurrent meniscal tear. As this report does not address the issue of appellant's disability for the period in question, July 9, 2000 to February 26, 2002, the Office properly found that it was not relevant and insufficient to require further review of the merits of appellant's claim.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish a causal relationship between his diagnosed condition and his alleged period of disability. The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on November 9, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 9 and April 22, 2004 are affirmed.

Issued: June 22, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ 20 C.F.R. § 10.608(b).