

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

VINCENT B. TALTY, Appellant

and

U.S. POSTAL SERVICE, NORTH STATION,
Wichita, KS, Employer

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**Docket No. 05-150
Issued: April 10, 2006**

Appearances:

Beth Regier-Foerster, Esq., for the appellant

Thomas G. Giblin, Esq., for the Director

Oral Argument March 9, 2006

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2004 appellant, through his attorney, filed a timely appeal of a July 17, 2004 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Because more than one year has lapsed between the issuance of the Office's July 10, 2003 merit decision and the filing of this appeal on October 19, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 7, 2001 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim alleging that on that date he felt sharp pains in his lower right leg and noticed red marks on his right knee as a result of carrying a heavy parcel to a customer's door. He submitted medical

reports dated May 7 and 14, 2001 from a physician whose signature is illegible. It was found that appellant sustained a right knee sprain. A March 29, 2001 note from a physician whose signature is illegible indicating that he was not seen in a physician's office on that date because appellant's visit was not authorized by the employing establishment.

In a March 27, 2001 statement, appellant related that on May 28, 1996 he experienced degenerative disc disease in his back and began to develop right knee problems. He noted that during the past five years, he received medical treatment at the employing establishment's health unit and a Wichita, Kansas clinic for right knee pain. Appellant stated that he was told that he needed his knee "scoped." He attributed his right knee pain to casing mail, carrying heavy parcels, jumping in and out of his truck to deliver mail to businesses, carrying mail on his route and walking on other routes while working overtime during most of his 20 years at the employing establishment.

The employing establishment controverted appellant's claim on the grounds that the circumstances under which his claim was reported were suspect. It submitted statements from three supervisors regarding appellant's alleged injury. Delia Berenson stated in a May 18, 2001 note, that appellant was on annual leave when he hurt his right knee on March 22, 2001 while working on his daughter's car. He told her that, when he stepped out of the trunk, he twisted his right knee. In a May 18, 2001 statement, Loret Torsch stated that appellant informed her that after delivering a parcel to a residence, his right knee began to hurt and he noticed red marks on his knee. She noted that appellant did not state that a specific incident happened such as a slip, trip or fall which caused his injury. In a March 29, 2001 statement, Ryan Knopik indicated that on March 27, 2001 appellant was offered paperwork for light-duty work for an injury he stated occurred while he was on annual leave during the prior week. Appellant informed him that he had no restrictions according to his treating physician and that he had an upcoming medical appointment. Mr. Knopik instructed appellant not to do anything that would further injure his knee. He assigned another employee to handle the delivery of appellant's mail to businesses on his route for two days. On the date of his medical appointment, appellant advised Mr. Knopik that his physician would not see him without paperwork for a claim and Mr. Knopik provided him with the name of a contact person to address this situation. When appellant returned to work, he informed Mr. Knopik that his physician instructed him to say that his knee was getting worse since his claim had not yet been approved. Appellant responded yes to Mr. Knopik's inquiry as to whether he actually experienced pain. Appellant allegedly stated that he was going on his route and injure himself so that the employing establishment would have to pay for his injury. Mr. Knopik responded that he would not be allowed to go on his route and appellant stated that he was going on his route because he had no restrictions. Mr. Knopik noted that on March 27, 2001 appellant changed his annual leave to sick leave, stating that he hurt his knee a week prior while changing a fuel pump in his daughter's car.

By letters dated May 31, 2001, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised him about the additional factual and medical evidence needed to establish his claim.

The employing establishment submitted medical records which addressed appellant's right knee problems. He responded to the Office's questions regarding his alleged injury and

submitted an undated narrative statement in which appellant addressed difficulties in obtaining medical documentation from the employing establishment.

By decision dated July 3, 2001, the Office denied the claim, finding that appellant did not establish the claimed incident at the time, place and in the manner alleged.

In a decision dated July 10, 2001, the Office denied appellant's claim on the grounds that the evidence of record was insufficient to establish that he sustained a medical condition causally related to the alleged incident.

On July 27, 2001 appellant requested an oral hearing before an Office hearing representative. Following the May 28, 2002 hearing, his attorney submitted a June 26, 2002 letter which provided a timeline of injuries that he sustained and medical treatment he received while working at the employing establishment. Counsel cited contemporaneous medical evidence which described the alleged May 7, 2001 incident and appellant's medical treatment. She submitted medical records from a physician whose signature is illegible, Dr. Thomas J. Peters, a Board-certified internist, and Dr. Robert L. Eyster, a Board-certified orthopedic surgeon, covering the period March 22, 2001 through June 4, 2002. The records addressed appellant's back and right knee problems and his January 15, 2002 right knee surgery which was performed by Dr. Eyster. Counsel concluded that the contemporaneous medical reports established that appellant's May 7, 2001 right knee injury and resultant knee surgery were work related and not related to vacuuming the trunk of a car. In a June 4, 2002 report, Dr. Eyster opined that appellant injured his knee while working for the employing establishment in 1996 and that he sustained an anterior cruciate ligament injury that resulted in eventual attenuation and fraying which required surgical repair. He opined that the episode where appellant was vacuuming an automobile trunk and stepped out of the trunk, twisting his knee or irritating the knee, was simply a temporary aggravation of a preexisting condition and did not affect the decision to perform surgery.

By decision dated July 18, 2002, an Office hearing representative affirmed the July 3 and 10, 2001 decisions. He found that Dr. Eyster's June 4, 2002 medical report did not relate appellant's knee condition to a work-related incident that occurred on May 7, 2001, but rather to a 1996 work injury. The hearing representative found that appellant did not sustain an injury on May 7, 2001 while in the performance of duty.

In a letter dated July 7, 2003, appellant, through his attorney, requested reconsideration. Counsel argued that Dr. Eyster's accompanying report, dated October 3, 2002, was sufficient to establish appellant's claim. She reported the timeline of appellant's work-related injuries and medical treatment and her contention that the medical evidence of record was sufficient to establish that on May 7, 2001 he sustained a right knee injury that was work related and not related to vacuuming his daughter's automobile trunk.

In an October 3, 2002 report, Dr. Eyster opined that appellant had a preexisting anterior cruciate ligament instability of his knee before the work injury that involved running up and down stairs which caused a sudden onset of sharp pain in his right knee. He stated that, prior to the alleged work injury, appellant was able to cope with an anterior cruciate deficient knee and he was not able to do so after the injury. Dr. Eyster further stated that, if it had not been for the

work incident which constituted an aggravation that created recurrent swelling, irritation and instability of the knee, appellant very likely would have been able to continue to compensate and would not have required surgery to provide stability for the knee.

By decision dated July 10, 2003, the Office denied modification of the July 18, 2002 decision. The Office found that Dr. Eyster's October 3, 2002 report was insufficient to establish appellant's claim because it provided an inaccurate description of the alleged May 7, 2001 accident.

Appellant, through his attorney, requested reconsideration, by letter dated July 9, 2004. Counsel contended that the Office ignored contemporaneous medical evidence which provided an accurate history of the alleged May 7, 2001 incident. She provided the prior timeline of appellant's work-related injuries and medical treatment. Counsel reiterated that the medical evidence of record established the May 7, 2001 right knee injury and resultant surgery were work related. Additionally, she resubmitted Dr. Eyster's October 3, 2002 report.

In a July 16, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the arguments presented were cumulative in nature and the evidence submitted was previously considered.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹ the Office 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) constitute relevant and pertinent new evidence not previously considered by the Office.² 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.³ 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.

ANALYSIS

In a decision dated July 3, 2003, the Office found that the May 7, 2001 incident did not occur at the time, place and in the manner alleged. By July 10, 2003 decision, the Office found that appellant did not sustain an injury causally related to the May 7, 2001 incident. He disagreed with these decisions and requested reconsideration on July 9, 2004. Thus, the relevant underlying issue in this case is whether appellant sustained an injury on May 7, 2001 while in the performance of duty.

¹ 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).

² 20 C.F.R. § 10.606(b)(1)-(2).

³ *Id.* at § 10.607(a).

In the July 9, 2004 request for reconsideration, appellant's attorney stated her disagreement with the Office's July 3 and 10, 2003 decisions. She again provided a timeline of his work-related injuries and medical treatment. Counsel reiterated her opinion that the medical evidence was sufficient to establish that appellant's May 7, 2001 right knee injury was due to the work incident and not related to vacuuming his daughter's car trunk. Moreover, she resubmitted the October 3, 2002 medical report of Dr. Eyster, which was previously considered by the Office. Evidence that repeats or duplicates evidence already in the case record and considered by the Office has no evidentiary value and does not constitute a basis for reopening the case.⁴ As the Office previously considered these arguments and reviewed the submitted medical evidence, they are repetitive in nature and, thus, insufficient to warrant further merit review.⁵ He did not submit any relevant and pertinent new evidence with his request for reconsideration.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, he did not submit any relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.⁶

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁴ *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁵ *James A. England*, 47 ECAB 115, 119 (1995).

⁶ *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board