

**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. 06-145
Issued: February 10, 2006**

Appearances:
Dean T. Albrecht, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 27, 2005 appellant, through his representative, filed a timely appeal from a September 8, 2005 decision of the Office of Workers' Compensation Programs, which denied appellant's request for further merit review. Because more than one year has elapsed between the last merit decision dated August 3, 2004 and the filing of this appeal on October 27, 2005, the Board lacks the 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 refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a)

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on August 3, 2004 affirming the Office's determination that appellant did not meet his burden of proof to show that

he sustained an injury in the performance of duty on May 23, 2002.¹ Appellant claimed that he injured both his elbows and knees when he lifted a flat bucket in the performance of his duties as a city carrier. The Board found that appellant failed to submit sufficient rationalized medical evidence to establish that he sustained an injury to his knees and elbows caused by his work activities on May 23, 2002. The law and the facts surrounding the appeals are set forth in the Board's prior decision and are hereby incorporated by reference.

On February 21, 2005 the Office received a January 6, 2005 report by Dr. H. Gerard Siek, Jr., a treating Board-certified orthopedic surgeon. He diagnosed right elbow lateral epicondylitis, left elbow flexor medial condyle tendinitis and bilateral chondromalacia of the patellae with bilateral knee degenerative arthritis. A physical examination revealed "full range of motion in both elbows with mild tenderness over the lateral epicondyle of the right elbow and over the medial condyle of the left humerus." Dr. Siek noted "moderate crepitus in both knees," a negative McMurray's test, no ligamentous instability and no effusion. Range of motion was 120 degrees flexion and 0 degrees extension.

In a March 3, 2005 report, Dr. Siek reported that appellant felt sudden pain in both knees and elbows after bending over to lift a 50-pound tub of magazines on May 23, 2002. He diagnosed probable bilateral chondromalacia of the patellae, mild bilateral knee genu varus deformity and bilateral knee narrowing of the medial joint space.

On July 12, 2005 the Office received an August 15, 2002 progress note by Dr. Edward N. Feldman, an orthopedic surgeon, which had previously been submitted.

In a letter dated June 15, 2005, appellant's representative requested reconsideration and submitted a July 2, 2004 report by Dr. David P. Kalin, a treating physician, an April 4, 2005 report by Dr. Siek and a September 14, 2004 psychiatric report by Dr. Raul F. Nodal, a treating Board-certified neurologist, who diagnosed mood disorder which he attributed to appellant's "chronic pain situation, which in turn is work related." Dr. Kalin noted the following on July 2, 2004: "bilateral medial and lateral epicondylitis, work-related injury May 23, 2002," bilateral post-traumatic knee pain both left and right knees joint effusion extending to the retropatellar bursa" based upon a July 12, 2002 magnetic resonance imaging (MRI) scan, "rule out degenerative arthritis, chondromalacia, reactive synovitis, internal derangement, work-related injury May 23, 2002 and "chronic dysthymia with depression secondary to chronic pain, physical limitations and restrictions, work-related injuries April 13, 1999, May 23, 2002." Dr. Siek noted an injury date of May 23, 2002 and provided an impairment rating for appellant's upper extremities.

In a July 6, 2005 nonmerit decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was irrelevant as none of the physicians provided any rationale explaining how appellant's condition was causally related to his May 23, 2002 employment injury.

¹ Docket No. 04-866 (issued August 3, 2004). The Board also found that the Office properly denied appellant's request for reconsideration of the merits.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.³

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁶

ANALYSIS

Appellant's request for reconsideration dated June 14, 2005 neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(2).⁷

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted medical evidence which was previously of record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.⁸ The medical records dated January 6, March 3 and April 5, 2005 by Dr. Siek, the July 2, 2004 report by Dr. Kalin and the September 21, 2004 report by Dr. Nodal, although new, are not relevant to the underlying issue of whether appellant's elbow and knee conditions are causally related to the

² 5 U.S.C. § 8128(a) (“[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

³ *Jeffrey M. Sagrecy*, 55 ECAB ____ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.608(b).

⁶ *Annette Louise*, 54 ECAB 783 (2003).

⁷ 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

May 23, 2002 employment incident. None of the physicians addressed whether the bilateral knee and elbow conditions or emotional condition due to chronic pain resulted from appellant's having lifted a flat tub at work on May 23, 2002. Additionally, Dr. Feldman's August 15, 2002 report was previously submitted and reviewed by the Office and this Board and therefore it is insufficient to reopen the case on the merits.

As appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).⁹

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2005 is affirmed.

Issued: February 10, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁹ 20 C.F.R. § 10.608(b)(2)(iii).