United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 06-1767**
	)	**Issued: November 2, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 26, 2005 merit decision denying his claim for an employment-related left knee injury and the Office's February 28, 2006 nonmerit decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a left knee condition in the performance of duty; and (2) 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 November 18, 2004 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a left knee injury at work when he stepped off a curb and his knee "popped and twisted" on November 5, 2004. He did not stop work.[1]

In a note dated November 19, 2004, Dr. John L. Nehil, an attending Board-certified orthopedic surgeon, stated that appellant reported injuring his left knee at work when he "was carrying mail, and he stepped off of a curb when his left knee popped." He indicated that on examination appellant exhibited good range of motion of the left knee without crepitus or instability.[2] Dr. Nehil reported increased pain upon testing and diagnosed "torn meniscus of the left knee." It was recommended that appellant undergo magnetic resonance imaging (MRI) scan testing.

The findings of MRI scan testing of appellant's left knee obtained on November 30, 2004 revealed an oblique horizontal tear of the posterior horn of the medial meniscus extending into the inferior articular surface, probable medial cruciate ligament strain, attenuation of the anterior cruciate ligament possibly representing a tear, early medial compartment arthropathic changes, small joint effusion and small Baker's cyst.

In a note dated December 3, 2004, Dr. Nehil discussed appellant's MRI scan results and indicated that most of his reported pain was in the medial aspect of his left knee. He stated that appellant reported having an injury about four weeks prior and noted, "With his work he states he is driving the mail truck most of the time, but does have to get out and deliver the mail at different office buildings. Recently, he did have a sensation of giving way, but he has not actually had true giving way where he fell."

In a note dated December 17, 2004, Dr. Nehil stated that appellant reported that his left knee condition was generally improved although he had some increased pain when he worked a walking delivery route during the past week. On examination, appellant exhibited less swelling in his left knee and maintained that his overall condition seemed improved. Dr. Nehil stated that appellant was given a note restricting him so that he would not have to "work a walking route."[3] In notes dated January 7, February 4 and March 18, 2005, he provided findings on examination and indicated that appellant's left knee condition continued to improve.[4] In a note dated May 4, 2005, Dr. Nehil stated that appellant reported that he was "pretty much at his normal routine" and noted that on examination his left knee did not exhibit any effusion and his McMurray's testing was negative.

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[1] Appellant claimed entitlement to compensation for wage loss on days that he sought medical treatment, including May 4, 2005.

[2] Dr. Nehil stated that appellant had neutral extension and 140 degrees of flexion.

[3] The record contains a December 17, 2004 note in which Dr. Nehil diagnosed "knee strain" and indicated that appellant should not work a walking route.

[4] Appellant reported experiencing increased pain in early February 2005.

By letter dated September 22, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim. Appellant resubmitted copies of several notes of Dr. Nehil.

By decision dated October 26, 2005, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a left knee injury due to the accepted employment incident of stepping off a curb on November 5, 2004.

In a letter dated January 30, 2006, appellant requested reconsideration of his claim and argued that the time he took off for medical treatment was directly related to an employment injury he sustained on November 5, 2004. He resubmitted a copy of a page containing Dr. Nehil's March 18 and May 4, 2005 notes and a portion of his February 4, 2005 note.

By decision dated February 28, 2006, the Office denied appellant's reconsideration request.[5]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period 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.[7] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[10] The term "injury" as defined by the Act, refers to some physical or

[5] Appellant submitted additional evidence after the Office's February 28, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[6] 5 U.S.C. §§ 8101-8193.

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

[8] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[9] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[10] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[11]

ANALYSIS -- ISSUE 1

Appellant established that an employment incident occurred on November 5, 2004 when he twisted his left knee while stepping off a curb at work. However, he did not submit sufficient medical evidence to show that he sustained an injury due to this employment incident.

Appellant submitted a November 19, 2004 note in which Dr. Nehil, an attending Board-certified orthopedic surgeon, stated that appellant reported injuring his left knee at work when he "was carrying mail, and he stepped off of a curb when his left knee popped." Dr. Nehil indicated that on examination appellant complained of left knee pain and exhibited good range of motion of the left knee without crepitus or instability. He provided a diagnosis of "torn meniscus of the left knee." This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain an opinion on causal relationship.[12] Dr. Nehil did not provide any indication that the diagnosed left knee condition was due to the reported November 5, 2004 employment incident. Moreover, he did not provide any notable discussion of appellant's past medical history pertaining to the left knee or explain the medical process through which the reported employment incident could have caused injury.[13]

Appellant submitted several other notes of Dr. Nehil, dated between December 2004 and May 2005, which contained findings on examination and generally indicated that his left knee condition was improving. Dr. Nehil did not provide any opinion in these notes that appellant sustained an injury due to the November 5, 2004 employment incident. He recommended in December 2004 that appellant not deliver mail on a "walking route" at work, but he did not identify an employment-related cause for this restriction.[14]

[11] *Elaine Pendleton, supra* note 7; 20 C.F.R. § 10.5(a)(14).

[12] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[13] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history). The record contains the results of November 30, 2004 diagnostic testing which shows an oblique horizontal tear of the posterior horn of the medial meniscus extending into the inferior articular surface, probable medial cruciate ligament strain, attenuation of the anterior cruciate ligament possibly representing a tear, early medial compartment arthropathic changes, small joint effusion, and small Baker's cyst. The report does not contain any opinion on the cause of these left knee conditions.

[14] In a December 3, 2004 report, Dr. Nehil indicated that appellant recently experienced a sensation of his left knee giving way, but he did not further discuss this incident or otherwise conclude that an employment injury occurred.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, 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.[15] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his 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 support of his January 30, 2006 reconsideration request, appellant resubmitted a copy of a page containing Dr. Nehil's March 18 and May 4, 2005 notes and a portion of his February 4, 2005 note. The submission of this evidence would not require reopening of appellant's claim for further review of the merits, because 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 a case.[18] Appellant argued that the time he took off for medical treatment was directly related to an employment injury he sustained on November 5, 2004, but this argument would not be relevant as the main issue of the present claim is medical and must be resolved by the submission of probative medical evidence.[19] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

Appellant has not established that the Office improperly denied his request for further review of the merits of its October 26, 2005 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

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[15] 20 C.F.R. § 10.606(b)(2).

[16] 20 C.F.R. § 10.607(a).

[17] 20 C.F.R. § 10.608(b).

[18] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[19] The reports of a nonphysician cannot be considered by the Board in adjudicating medical matters. *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

[20] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a left knee condition in the performance of duty. The Board further 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).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 28, 2006 and October 26, 2005 decisions are affirmed.

Issued: November 2, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board