

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Cincinnati, OH, Employer**

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**Docket No. 07-172
Issued: August 23, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2006 appellant filed a timely appeal of the July 17, 2006 merit decisions of the Office of Workers' Compensation Programs, denying her claims for wage-loss compensation for intermittent total disability for the period March 18 to April 20, 2006 and an October 10, 2006 nonmerit decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she was totally disabled from March 18 to 23 and April 1 to 12, 2006 due to her accepted employment injury; (2) whether she established that she was partially disabled on April 20, 2006 for two hours, due to her accepted employment injury; and (3) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 11, 2006 appellant, then a 54-year-old mail handler, filed a traumatic injury claim alleging that on December 13, 2005 she experienced a sharp pain in her right knee when she pulled an over-the-road container out of her truck. By letter dated April 10, 2006, the Office accepted her claim for aggravation of right knee osteoarthritis.

On April 13, 2006 appellant filed claims for wage-loss compensation (Form CA-7), for the periods March 18 to 23 and April 1 to 12, 2006. She submitted an April 12, 2006 disability certificate of Dr. David A. Lustig, an attending Board-certified internist, who stated that appellant was unable to work from April 1 to 13, 2006 due to her right knee injury. Dr. Lustig indicated that she could return to work on April 13, 2006.

By letter dated April 21, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual evidence appellant needed to submit to establish her claim. The Office requested that appellant submit rationalized medical evidence from an attending physician establishing her disability for work during the claimed periods.

In an April 12, 2006 medical report, Dr. Lustig noted appellant's ongoing complaints of right knee pain. On physical examination, he reported no warmth, effusion or instability of the right knee. Dr. Lustig further reported that it was tender medially. He stated that he did not know why appellant was so incapacitated. Dr. Lustig referred appellant to Dr. John P. Schwegmann, an orthopedic surgeon, for a medical evaluation.

On April 25, 2006 appellant filed a CA-7 form for wage-loss compensation for two hours of leave without pay (LWOP) to attend a medical appointment on April 20, 2006. She submitted Dr. Lustig's April 24, 2006 report. Dr. Lustig diagnosed severe patellofemoral arthritis of the right knee. In an April 24, 2006 report, Dr. Robert R. Whitten, Jr., a Board-certified physiatrist, indicated that appellant was examined on April 20, 2006. He stated that she sustained osteoarthritis of the right knee involving the medial compartment and patellofemoral joint. Appellant also had chondromalacia patella and a Baker's cyst which was complicated by deconditioning and obesity.

In an April 28, 2006 letter, appellant contended that she was totally disabled from March 18 to 23 and April 1 to 12, 2006 due to excessive swelling and pain in her right knee. She described her medical treatment.

By letter dated April 28, 2006, Dr. Lustig stated that he did not know why appellant's knee problem worsened to the point that she was incapacitated for work during the period March 18 to 23, 2006 and on April 1, 2006. Appellant had a preexisting degenerative process of the knee which was aggravated by the December 13, 2005 employment-related injury. It had since worsened and was not getting any better. Dr. Lustig stated that it was a reality that appellant's knee problem continued to be exacerbated and that she may have future periods of relapse and recovery. He concluded that he would not be surprised if she made further attempts to return to work, followed by relapse and loss of time from work in the future.

By letter dated May 4, 2006, the Office advised appellant that it was unable to process her CA-7 form for her medical appointment on April 20, 2006 because compensation was not payable for the first three days of temporary disability pursuant to 5 U.S.C. § 8117. It noted that 3 waiting days may be paid retroactively if her disability exceeded 14 days. The Office further advised that, if compensation for the period March 18 to 23 and April 1 to 12, 2006 were awarded, then her request for two hours of wage-loss compensation on April 20, 2006 would also be compensable because she would have exceeded the 14 days of disability as described.

On May 5, 2006 the Office received Dr. Whitten's April 20, 2006 report, which found that appellant suffered from joint pain in her lower right leg and chondromalacia patella and medial joint arthritis of the right knee. On April 28, 2006 Dr. Lustig opined that all residuals related to appellant's employment-related right knee injury had not resolved and the expected recovery date was unknown. He did not place her on restrictions, but noted that she was doing well with her knee. Appellant was in the process of being reevaluated by an orthopedic specialist. In a March 20, 2006 report, Dr. Lustig opined that appellant's preexisting osteoarthritis of the right knee was aggravated by her December 13, 2005 employment injury.

By decision dated July 17, 2006, the Office denied appellant's claims for wage-loss compensation. It found that she failed to submit sufficient medical evidence to establish that she was totally disabled March 18 to 23 and April 1 to 12, 2006 due to her accepted employment-related right knee condition. In a second decision dated July 17, 2006, the Office denied appellant's claim for two hours of wage-loss compensation for April 20, 2006.

On August 8, 2006 the Office received Dr. Schwegmann's June 11, 2006 progress note which found that appellant sustained moderate to severe patellofemoral chondromalacia. Dr. Schwegmann found no evidence of meniscal pathology based on clinical examination, as well as, a previous magnetic resonance imaging (MRI) scan. In a June 12, 2006 progress note, he stated that appellant had osteoarthritis and right knee joint pain. An unsigned report from the Blatman Pain Clinic dated July 31, 2006 addressed to Dr. Lustig provided a history of appellant's December 13, 2005 employment-related injury. The report found that she aggravated her right knee osteoarthritis.

On August 14, 2006 the Office received appellant's July 20, 2006 letter. Appellant contended that she was totally disabled from June 6 to 10, 2006 due to her December 13, 2005 employment injury.¹ She stated that she experienced constant pain and swelling in her right knee. Appellant's movements were restricted which required her to use a cane to go the bathroom and perform other activities. She submitted Dr. Lustig's August 6, 2006 report. Dr. Lustig opined that appellant's disability during the period March 18 to 23 and April 1 to 12, 2006 seemed, by history, to be due to her current work duties.

By letter dated September 14, 2006, appellant requested reconsideration of the Office's July 17, 2006 decision denying her claim for compensation for the period March 18 to 23 and

¹ The Board notes that on June 21, 2006 appellant filed a CA-7 form for wage-loss compensation for the period June 6 to 10, 2006. The case record, however, does not contain a decision issued by the Office regarding appellant's claim.

April 1 to 12, 2006. Reports dated September 18 and October 3, 2006 from Blatman Pain Clinic in Cincinnati, Ohio found that she continued to experience pain due to her right knee injury.

On October 10, 2006 the Office issued a decision denying appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and thus, insufficient to warrant a merit review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.² For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.³ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁴ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁵ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify her disability and entitlement to compensation.⁶

ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained an employment-related aggravation of her right knee osteoarthritis on December 13, 2005. On April 13, 2006 appellant sought compensation for wage loss for total disability from March 18 to 23 and April 1 to 12, 2006. She has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and the accepted condition.⁷

Appellant submitted a disability certificate and several reports from Dr. Lustig. In an April 12, 2006 disability certificate, Dr. Lustig opined that appellant was totally disabled for work from April 1 to 13, 2006, without attributing her disability to the accepted December 13, 2005 employment injury. Similarly, in an April 28, 2006 report, he stated that residuals of appellant's right knee injury had not resolved and that the expected recovery date was unknown,

² See *Prince E. Wallace*, 52 ECAB 357 (2001).

³ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁴ *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ *Manuel Garcia*, 37 ECAB 767 (1986).

⁶ *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

but he failed to attribute her disability to the accepted employment injury. Dr. Lustig's April 12 and 28, 2006 reports found that appellant's preexisting degenerative knee condition was aggravated by the December 13, 2005 employment injury. However, he stated that he did not know why she was so incapacitated to work. As Dr. Lustig did not attribute appellant's disability during the claimed period to her December 13, 2005 employment injury, the Board finds that these reports are insufficient to establish appellant's claim of total disability.

Dr. Lustig's March 20, 2006 report found that appellant's preexisting osteoarthritis of the right knee was aggravated by the December 13, 2005 employment-related injury. In an April 24, 2006 report, he diagnosed severe patellofemoral arthritis of the right knee. Dr. Lustig, however, did not address whether appellant was totally disabled during the claimed periods due to her December 13, 2005 employment-related injury. The Board finds these reports are insufficient to establish appellant's claim.

Appellant failed to submit rationalized medical evidence establishing that her total disability during the period March 18 to 23 and April 1 to 12, 2006 resulted from the residuals of her accepted aggravation of right knee osteoarthritis. The Board finds that she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8117 of the Act⁸ provides, "an employee is not entitled to compensation for the first three days of temporary disability except: (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by section 8103 and 8104 of this title." Section 8103 of the Act refers to the payment of medical expenses, while section 8104 refers to vocational rehabilitation expenses.⁹

ANALYSIS -- ISSUE 2

The Board has consistently construed section 8117(1) to require three waiting days when a period of work-related disability does not exceed the statutory period, which currently is reflected in the statute as a 14-day period. Appellant requested two hours of LWOP for April 20, 2006, indicating that she had a medical appointment. Dr. Whitten's April 20 and 24, 2006 reports stated that appellant was examined on April 20, 2006. Because appellant has not demonstrated employment-related disability prior to December 13, 2005 or for more than a 14-day period, she is not entitled to wage-loss compensation for partial disability for the claimed two hours on April 20, 2006. Accordingly, the Board finds that the Office properly applied the three-day waiting period for temporary total disability under section 8117(1) of the Act.

⁸ 5 U.S.C. § 8117.

⁹ *Id.* at §§ 8103, 8104.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Act,¹⁰ the Office regulation 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.¹¹ 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.¹² 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 -- ISSUE 3

By letter dated September 14, 2006, appellant disagreed with the Office's July 17, 2006 decision finding that she was not totally disabled from March 18 to 23 and April 1 to 12, 2006 due to her accepted December 13, 2005 employment-related right knee condition and requested reconsideration. The relevant underlying issue in this case is whether appellant has established that her disability during the claimed periods was due to her accepted employment-related condition. This issue is medical in nature.

Dr. Schwegmann's June 11, 2006 progress note found that appellant had moderate to severe patellofemoral chondromalacia. He did not find any evidence of meniscal pathology based on clinical examination or a previous MRI scan. Dr. Schwegmann's June 12, 2006 progress note found that appellant had osteoarthritis and joint pain in the right knee. In an August 7, 2006 report, Dr. Lustig stated that appellant exacerbated her employment-related right knee injury on June 5, 2006. He opined that she was totally disabled from June 6 to 10, 2006. Neither Dr. Schwegmann nor Dr. Lustig addressed the relevant issue of whether appellant was totally disabled from March 18 to 23 and April 1 to 12, 2006 due to her December 13, 2005 employment-related injury. For this reason, the Board finds that Dr. Schwegmann's progress notes and Dr. Lustig's report are irrelevant and insufficient to warrant reopening appellant's claim for further merit review.¹³

Appellant's July 20, 2006 letter which addressed her claim of total disability from June 6 to 10, 2006. However, this evidence is not relevant to the periods of disability adjudicated by the Office in the present appeal. As, the issue in this case does not involve

¹⁰ 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).

¹¹ 20 C.F.R. § 10.606(b)(1)-(2).

¹² *Id.* at § 10.607(a).

¹³ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *See Kevin M. Fatzner*, 51 ECAB 407 (2000).

disability from June 6 to 10, 2006, appellant's July 20, 2006 letter is not relevant and thus, insufficient to warrant reopening her claim for further merit review.¹⁴

The unsigned July 31, 2006 report which found that appellant aggravated her right knee osteoarthritis and unsigned reports from the Blatman Pain Clinic which stated that she continued to experience pain due to her right knee injury are not relevant as the origins of these unsigned reports are not documented.¹⁵ As such, the Board finds that these unsigned reports do not constitute a basis for reopening a case.

Dr. Lustig's August 6, 2006 report reiterated his prior opinion that appellant's disability during the period April 1 to 12, 2006 was work related. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.¹⁶ As Dr. Lustig's opinion on causal relation was substantially similar to his prior opinion, it essentially repeated evidence already of record. The Board, therefore, finds that Dr. Lustig's report is insufficient to warrant reopening appellant's claim for further merit review.

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she 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. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.¹⁷

CONCLUSION

The Board finds that appellant has failed to establish that she was totally disabled from March 18 to 23 and April 1 to 12, 2006 due to her accepted employment injury. The Board further finds that she has failed to establish an employment-related partial disability for two hours on April 20, 2006 due to her accepted employment injury. Lastly, the Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ *Kevin M. Fatzner, supra* note 13.

¹⁵ An unsigned medical report with no adequate indication that it was completed by a physician is not considered probative medical evidence. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁶ *See Patricia G. Aiken*, 57 ECAB ____ (Docket No. 06-75, issued February 17, 2006).

¹⁷ *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 10 and July 17, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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