United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 07-1084**
	)	**Issued: September 11, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

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 March 19, 2007 appellant filed an appeal of a December 19, 2006 decision of the Office of Workers' Compensation Programs denying his request for a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. As the most recent merit decision of record was a November 30, 2005 decision denying his occupational disease claim, more than one year old, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review.

FACTUAL HISTORY

On February 13, 2003 appellant, then a 42-year-old modified distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained chronic left knee pain from prolonged standing and heavy pulling and pushing on or before that day. He noted that he

sustained a May 1991 occupational left knee injury.[1] Appellant stopped work on February 14, 2003.

In a February 20, 2003 note, Dr. Alexander M. Kmicikewycz, an attending Board-certified internist, stated that appellant was disabled for work from February 14 to March 31, 2004 due to a work-related left knee injury.

In a March 11, 2003 letter, the employing establishment controverted the claim, asserting that appellant's modified clerk position did not require prolonged standing or heavy pushing or pulling. A job analysis of appellant's position showed work limitations of pushing and pulling up to 20 pounds and occasional standing.

In a March 27, 2003 letter, the Office advised appellant of the type of additional evidence needed to establish his claim. The Office emphasized the importance of submitting factual evidence corroborating that his job involved heavy pushing and pulling and prolonged standing.

In an April 3, 2003 letter, appellant asserted that heavy pushing and prolonged standing at work permanently aggravated his 1991 left knee injury. He submitted additional evidence.[2]

Appellant submitted 1992 and 1994 medical records related to the 1991 left knee injury. A July 16, 2002 magnetic resonance imaging (MRI) scan of the left knee showed mild, early degenerative changes.

In an April 4, 2003 letter, Dr. Kmicikewycz related appellant's account of "prolonged standing, repetitive activity and pushing and pulling heavy mail" containers at work. He noted that appellant underwent left knee arthroscopy approximately 10 years before due to a May 21, 1991 occupational left knee injury. Dr. Kmicikewycz reviewed 1991 and 2002 imaging studies showing possible degenerative changes. He diagnosed internal derangement of the left knee with possible chondromalacia. Dr. Kmicikewycz stated that there was a "causal connection … between [appellant's] original work injury and the current aggravation of his prior injury. The pushing and pulling of heavy mail and prolonged standing attribute directly to [appellant's] chronic knee pain." Dr. Kmicikewycz released appellant to return to work as of May 1, 2003 with restrictions.

By decision dated June 12, 2003, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant did not establish that he performed prolonged standing, heavy pushing or pulling in the performance of duty.

[1] The claim presently before the Board for a left knee condition sustained on or before February 13, 2003 was assigned File No. 102019812. The May 29, 1991 left knee injury was assigned File No. A10-404218. The 1991 claim is not before the Board on the present appeal. Appellant began work as a modified distribution clerk in June 1995 due to restrictions related to the 1991 left knee injury.

[2] Appellant also submitted March and April 2003 physical therapy notes signed only by a physical therapist. The reports of a physical therapist do not constitute competent medical evidence, as a physical therapist is not a physician as defined by section 8101(2) of the Act. 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357 (2000).

In a June 28, 2003 letter, appellant requested reconsideration. He asserted that he sustained a left knee condition as he was forced to work outside of his prescribed restrictions. Appellant submitted additional evidence.

In an April 28, 1994 letter, the Office accepted that appellant sustained an internal derangement of the left knee on May 29, 1991.

A March 23, 1998 fitness-for-duty examination report indicates that appellant qualified for a distribution clerk position requiring lifting up to 70 pounds and carrying over 45 pounds.

An October 2000 employing establishment duty roster indicates that appellant was assigned to work Monday through Friday from October 14 to November 24, 2000. Appellant also submitted a January 11 to February 14, 2003 lock box callers list.

In an April 7, 2003 statement, an employing establishment supervisor stated that appellant did not appear physically or mentally disabled.

In a March 9, 2004 report, Dr. Kmicikewycz diagnosed chronic internal derangement of the left knee with thinning of the medial compartment articular cartilage.

Appellant also submitted medical records, correspondence and grievance forms regarding a June 23, 2003 workplace incident in which he alleged that he sustained a musculoskeletal strain due to stress regarding his work schedule. These documents do not address the claimed left knee condition or the identified work factors.

By decision dated November 30, 2005, the Office found that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that the additional evidence did not establish that appellant performed prolonged standing, heavy pushing or pulling in the performance of duty as alleged.

In a letter dated November 25, 2006 and postmarked November 27, 2006, appellant requested reconsideration. He submitted additional evidence.

A November 29, 2005 internet job search form indicates that appellant's skills did not match any listed positions.

In a December 7, 2005 report, Dr. Kmicikewycz reiterated his review of 1999 and 2002 left knee imaging studies. He diagnosed internal derangement of the left knee with chronic pain and possible arthritic bursitis, attributable to appellant having two weekdays off as opposed to Saturdays and Sundays. Dr. Kmicikewycz also discussed conditions unrelated to appellant's left knee.

By decision dated December 19, 2006, the Office denied appellant's request for reconsideration on the grounds that his November 25, 2006 request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[3] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.[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]

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[6] Appellant need only submit relevant, pertinent evidence not previously considered by the Office.[7] 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.[8]

ANALYSIS

Appellant claimed that he sustained a left knee condition due to heavy pushing and pulling and prolonged standing at work. The employing establishment contended that appellant did not perform these tasks and submitted a job analysis detailing his work limitations. The Office denied appellant's occupational disease claim by decision dated June 12, 2003, finding that he failed to establish that the identified work factors occurred as alleged. Following reconsideration, the Office affirmed this denial by decision dated November 30, 2005, finding that appellant submitted insufficient evidence to establish that he performed heavy pushing and pulling and prolonged standing. Appellant then requested reconsideration by a November 25, 2006 letter. He submitted a December 7, 2005 report from Dr. Kmicikewycz, an attending Board-certified internist and a November 29, 2005 job search form.

The critical issue at the time of the last merit decision in the case was whether appellant established that the identified work factors of heavy pushing and pulling and prolonged standing occurred as alleged. To be relevant, the evidence submitted in support of the November 25, 2006 request for reconsideration must address that issue. Appellant's letter is insufficient to corroborate his allegations. Dr. Kmicikewycz's December 7, 2005 report and the job search

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2) (2003).

[5] 20 C.F.R. § 10.608(b) (2003).

[6] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[7] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[8] *Annette Louise*, 54 ECAB 783 (2003).

form do not corroborate that appellant performed heavy pushing and pulling or prolonged standing in the performance of duty. Therefore, these documents are irrelevant to the claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.[9]

Appellant has not established that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act, because he did not 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 submit relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2006 is affirmed.

Issued: September 11, 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

[9] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).