United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 07-1099**
	)	**Issued: September 12, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Hartford, CT, 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 a timely appeal from the May 1, 2006 decision of an Office of Workers' Compensation Programs' hearing representative affirming the denial of his traumatic injury claim and the November 1, 2006 nonmerit decision denying his 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 established that he sustained injury in the performance of duty on November 24, 2003 as alleged; and (2) whether the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 20, 2004 appellant, then a 47-year-old electronic technician, filed a traumatic injury claim, Form CA-1, alleging that he injured his right knee on November 24, 2003. He

stated that he was kneeling on a rubber mat with knee protections and preparing to vacuum inside a delivery bar code system (DBCS) machine when he heard a crack in his right knee. Appellant stated that his knee seemed alright, but it had damages that did not show at the time.

The employing establishment controverted the claim on the grounds that appellant did not report the injury until a year after it occurred, that no medical documentation had been provided, and that he changed the date of injury three times before submitting his final CA-1 form. In a statement dated October 25, 2004, Jon Carson, appellant's supervisor, stated that appellant told him on October 18, 2004 that he had injured his knee while working on the DBCS. Appellant also told Mr. Carson that he gave notification on the date of the incident, but Mr. Carson did not remember any such notification. Mr. Carson stated that the date of injury initially provided by appellant was incorrect and that appellant needed to consult records to determine the actual date of injury.

On October 29, 2004 the Office informed appellant that he had not submitted medical or factual evidence sufficient to establish his claim. On November 17, 2004 appellant stated that on November 24, 2003 he was stationary on his knees with a vacuum nozzle in his hand, having just moved from another section of the DBCS machine when he heard a crack in his knee. He moved slowly to his feet to check that he was not hurt and then reported the incident to Mr. Carson, who replied that appellant had done the right thing in telling him. Appellant's knee began feeling stiff on November 28, 2003 so he went to a walk-in clinic, where he was examined by Dr. Iyad Al-Husein, a Board-certified family practitioner. He reported that Dr. Al-Husein found no broken bones in an x-ray he took and diagnosed an internal bruise. Appellant's pain disappeared after staying off the knee for two days and taking prescribed anti-inflammatory and muscle relaxant medicine. He indicated that he had not experienced any other knee injury prior to or following this time, but stated that the constant kneeling required by his duties had aggravated his knee condition.

On November 26, 2004 Nicole Hettrich, a physician's assistant, provided a report discussing appellant's treatment and knee condition. A magnetic resonance imaging (MRI) scan conducted on October 13, 2004 revealed chondromalacia patellae, tear of the posterior horn medial meniscus and a bone lesion on the lateral femur.

By decision dated December 9, 2004, the Office denied appellant's claim on the grounds that the evidence did not establish that the incident occurred as alleged and the medical evidence did not provide a firm diagnosis of the claimed injury. The Office found that the lateness of appellant's injury notification and discrepancies in the factual and medical evidence diminished the probative value of his statements. The Office also noted that the MRI scan did not mention the cause of injury and that Ms. Hettrich's statement was not probative under the Federal Employees' Compensation Act.

On January 5, 2005 appellant requested an oral hearing on this decision. He submitted an additional statement, postal records and medical records. Appellant indicated that the initial confusion about the date of the employment incident was due in part to the fact that his supervisor did not complete an accident form when appellant notified him on November 24, 2003. He stated that two of his coworkers also reported accidents for which Mr. Carson did not complete reports. Appellant stated that, after being treated for knee pain a

few days after the alleged incident, he did not experience pain until late May or early June 2004, when he noticed discomfort on the same area of the knee.

On February 24, 2005 Dr. Raymond Kurker, a Board-certified family practitioner, stated that appellant had been under his care for the previous eight months for worsening right knee pain and a torn medial meniscus. He reported that an MRI scan conducted on October 13, 2004 revealed a meniscus tear with chondromalacia patellae. Dr. Kurker stated that appellant had experienced one day of knee pain when he was 18 years old, but otherwise had no knee problems until November 24, 2003, when his knee cracked while he was cleaning around his work area. He stated that appellant's pain had been intermittent from this time forward, causing him to lose two to four days of work up to two times a month. Dr. Kurker stated that appellant's job required him to be on his knees frequently, which worsened the pain. He opined that appellant's pain may resolve completely with medication, physical therapy and possible surgery.

Appellant submitted several documents from Hartford Medical Group, the clinic where he was treated by Dr. Al-Husein on November 28, 2003. On October 29, 2004 Dr. Al-Husein stated that appellant was seen and treated for right knee pain on November 28, 2003. In treatment notes dated November 28, 2003, Dr. Al-Husein indicated that appellant complained of intermittent right knee pain and noted that the pain was not related to raising or lowering or going up or down stairs. He stated that appellant worked as an electrical technician. Dr. Al-Husein's physical examination revealed tenderness below the right knee medial line, but found full range of motion, stability and power. He noted that the knee x-ray he had ordered was normal. Dr. Al-Husein's diagnosis is not legible.

At appellant's oral hearing, held February 16, 2006, he testified that he had informed his supervisor that he heard his knee crack even though he did not feel any pain. Mr. Carson instructed appellant to let him know if any pain developed. A few days after the incident he felt a slight bruise on the right side of his knee and had it examined by a physician, who opined that he had bruised his meniscus. The knee pain was gone after a day of taking anti-inflammatory medication. Appellant stated that, as summer approached, and the employing establishment had fewer workers on duty, he did more work and was constantly on his knees. He began to feel pain in his knee, and went to his family physician's office, where he was treated by a physician's assistant. After learning in October 2004 that he had a torn meniscus, appellant reported the condition to his supervisor, who began the paperwork for a workers' compensation claim. He stated that it took a few days to determine exactly what day the accident occurred and that he filled in at least two CA-1 forms in the process. Appellant alleged that the employing establishment changed the form to indicate that they were controverting the claim after he signed it.

Following the hearing, appellant submitted a written statement and paperwork addressing his allegations that the employing establishment had altered the CA-1 form. He also submitted the accident report Mr. Carson created on October 25, 2004 for the November 24, 2003 incident, a letter of warning for failure to report an accident, and statements from coworkers alleging that Mr. Carson did not create timely reports for an accident of which they had notified him. In an FMLA healthcare provider certification form dated June 21, 2004, Dr. Kurker stated that appellant fell at age 18 and, since that time, has had a bad right knee. He stated that this

condition was likely to last a lifetime, but would incapacitate appellant only a few days at a time when the pain was severe.[1]

By decision dated May 1, 2006, the Office hearing representative affirmed the December 9, 2004 decision. She found that the preponderance of the evidence supported that the alleged right knee incident occurred on November 24, 2003. The Office hearing representative found, however, that the medical evidence did not establish that appellant's knee condition was caused by the employment incident. She noted that Dr. Al-Husein's reports did not relate his knee pain to his employment and that the reports of Dr. Kurker were contradictory and sparse.

Appellant filed a request for reconsideration on August 3, 2006. He challenged the Office hearing representative's interpretation of the facts and stated that he was providing a July 7, 2006 letter from Dr. Kurker to clear up the confusion regarding his medical statements. The record does not contain a copy of this letter.

By decision dated November 1, 2006, the Office denied further merit review of appellant's claim on the grounds that he had not submitted sufficient evidence or argument to warrant a review of the merits of his case.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[3]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the incident caused a personal injury, and, generally, this can be established only by medical evidence.[4]

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a

[1] The Board notes that the record also contains medical records and work release forms from March 13 to 22, 2006 which appear to address an unrelated employment incident involving his left knee.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Ellen L. Noble*, 55 ECAB 530 (2004).

physician.[5] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant,[6] and must be one of reasonable medical certainty,[7] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

ANALYSIS -- ISSUE 1

The Office has accepted that appellant heard his right knee pop on November 24, 2003 while kneeling in the performance of duty as an electronic technician. Therefore the issue to be resolved is whether this accepted employment incident caused injury to his right knee.

The Board finds that the medical evidence of record is insufficient to establish that appellant's right medial torn meniscus was caused by the November 24, 2003 incident. The medical evidence includes treatment notes from Dr. Al-Husein dated November 28, 2003. Appellant sought medical treatment on November 28, 2003 for intermittent right knee pain. Dr. Al-Husein found tenderness below the right knee, but no diminishment of motion, stability or power and no abnormality visible on an x-ray. He noted that appellant was an electrical technician, but did not indicate that appellant's employment had caused or contributed to his right knee condition. An October 13, 2004 MRI scan report established that appellant had a torn meniscus, chondromalacia patellae and a bone lesion, but made no reference to the cause of these conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship. Dr. Al-Husein's treatment notes and the MRI scan reports are insufficient to establish that appellant's condition is work related.[9]

In a February 24, 2005 report, Dr. Kurker, a Board-certified family physician, stated that he had been treating appellant for approximately eight months for worsening right knee pain, which he diagnosed as a torn medial meniscus. He opined that appellant's duties, which required him to be on his knees frequently, worsened his pain. Dr. Kurker noted that, since the employment incident, appellant's right knee pain had incapacitated him for two to four days up to two times per month. Prior to the November 24, 2003 incident, appellant had not had any knee problems since a one-day injury that occurred when he was 18 years old. This statement conflicts with a form Dr. Kurker submitted on June 21, 2004, in which he indicated that appellant had experienced problems with his right knee since he was 18. The Board has held that a medical opinion that is not fortified by medical rationale is of limited probative value.[10] It has also held that medical conclusions based on inaccurate or incomplete histories are of little

[5] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[7] *John W. Montoya*, 54 ECAB 306 (2003).

[8] *Judy C. Rogers*, 54 ECAB 693 (2003).

[9] *Robert Broome*, 55 ECAB 339 (2004).

[10] *Brenda DuBuque*, 55 ECAB 212 (2004).

probative value.[11] Given Dr. Kurker's apparent uncertainty regarding appellant's medical history, his lack of objective findings and his lack of medical rationale, his conclusions are of limited probative value. He failed to provide any explanation as to how appellant's preexisting right knee condition was aggravated by the accepted incident. The Board therefore finds that Dr. Kurker's reports are insufficient to establish a causal relationship between appellant's torn meniscus and an event that occurred nearly a year previously.

The Board notes that the November 26, 2004 report from Ms. Hettrich is not probative because the Board has held that a physician's assistant is not a physician as defined under the Act and is therefore not competent to provide a medical opinion.[12]

The Board finds that appellant has failed to establish that his current knee condition was caused by the accepted employment incident of November 24, 2003.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[13] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) provides that, when an application for reconsideration 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.[15]

When reviewing an Office decision denying 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.[16]

ANALYSIS -- ISSUE 2

The Board finds that appellant met none of the regulatory requirement for a review of the merits of the Office's May 1, 2006 decision. His August 3, 2006 request for reconsideration stated several points of disagreement with the merit decision, but did not raise new arguments or present evidence that the Office erroneously applied or interpreted a specific point of law.

[11] *John W. Montoya, supra* note 7.

[12] 5 U.S.C. § 8101(2); *see Ricky S. Storms*, 52 ECAB 349 (2001).

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(2).

[15] 20 C.F.R. § 10.608(b).

[16] *Leslie M. Mahin*, 55 ECAB 311 (2004).

Appellant also did not advance any relevant legal arguments not previously considered by the Office. He is thus not entitled to further review on the merits of his case under the first two subsections of section 10.606(b)(2).[17]

Appellant stated that he had included a new report from Dr. Kurker with his reconsideration request, but the record does not contain this document. As there was no relevant and pertinent new evidence for the Office to consider, appellant was not entitled to review under the third section of 10.606(b)(2).[18]

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied the August 3, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained injury in the performance of duty on November 24, 2003 as alleged. The Board also finds that the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 1 and May 1, 2006 are affirmed.

Issued: September 12, 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

[17] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

[18] 20 C.F.R. § 10.606(b)(2)(iii).