

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mount Clemens, MI, Employer**

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**Docket No. 08-1336
Issued: December 8, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 4, 2008, which denied her request for reconsideration of the merits. Because more than one year has elapsed between the January 23, 2007 merit decision and the filing of this appeal, the Board lacks 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 case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 10, 1998 appellant, then a 31-year-old letter carrier, sustained injury to her right knee when she was struck by a car while taking mail out of a collection box. The Office accepted the claim for right tibia fracture, open wounds and right knee internal derangement. She stopped work on December 10, 1998 and returned to full-time work with restrictions on

August 9, 1999, but reduced her work hours to six on August 31, 1999. On November 2, 2000 appellant reduced her hours to four hours per day. By letter dated November 2, 2001, the Office placed appellant on the periodic rolls for partial disability for up to four hours of leave without pay per day.¹

On April 26, 2004 the Office referred appellant to Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Timothy Lukas, a treating Board-certified orthopedic surgeon, and Dr. Bruce D. Abrams, a second opinion Board-certified orthopedic surgeon, as to her current level of disability. Dr. Lukas opined that appellant was capable of only working six hours per day while Dr. Abrams opined that appellant was capable of working eight hours. On May 19, 2004 Dr. Obianwu reviewed the medical record, statement of accepted facts and provided findings on physical examination. He concluded that appellant was capable of working an eight-hour day with restrictions.

On December 1, 2004 the employing establishment offered appellant a limited-duty position as a modified full-time carrier based upon Dr. Obianwu's restrictions. Appellant accepted the position on December 1, 2004. She started working limited duty for six hours on December 11, 2004. The job offer noted that appellant was to initially start at five hours a day and gradually work up to an eight-hour day schedule.

On January 28, 2005 appellant filed a claim for a recurrence of disability beginning January 22, 2005. She experienced increased swelling and pain in her knee when she increased her work hours. Appellant alleged that working seven hours per day aggravated her accepted knee condition.

In a February 17, 2005 disability note, Dr. Lukas stated that appellant had a permanent work restriction of six hours in sedentary work.

By decision dated June 14, 2005, the Office denied appellant's recurrence of disability claim as the evidence did not establish that her condition had materially worsened or that she was unable to perform her limited-duty job.

On July 10, 2005 appellant requested a review of the written record by an Office hearing representative. By decision dated December 5, 2005, the Office hearing representative affirmed the denial of appellant's recurrence claim.

Subsequent to the hearing representative's decision, the Office received treatment records dated January 27 to August 24, 2006 from Dr. Lukas and a February 1, 2006 x-ray of appellant's right knee. Dr. Lukas provided work restrictions and noted that appellant was restricted to a six-hour workday. He diagnosed right knee sciatica and right knee patellofemoral osteoarthritis. Dr. Lukas noted that appellant attempted to work seven hours per day, but found that she functioned better working a six-hour day. He opined that appellant had a permanent work restriction of working no more than six hours per day with restrictions. On August 24, 2006

¹ On August 25, 2003 the Office issued a schedule award for a 20 percent permanent impairment of the left lower extremity.

Dr. Lukas stated that working seven hours seemed “to exacerbate her symptoms” and recommended a six-hour work shift.

On November 4, 2006 appellant requested reconsideration and resubmitted Dr. Lukas’ progress notes. She contended that Dr. Obianwu’s report should not constitute the weight of the evidence as he missed the diagnosis of osteoarthritis in her knee and failed to mention her anterior cruciate ligament instability and meniscal tear. Appellant contended that working seven hours per day aggravated and accelerated her knee condition and that she was unable to work more than six hours a day.

By decision dated January 23, 2007, the Office denied modification of the December 5, 2005 decision.

The Office received April 2, 2007 treatment records from Dr. Lukas, who diagnosed right knee triocompartmental osteoarthritis. Dr. Lukas reiterated that appellant was permanently restricted to six hours of sedentary work a day. He also diagnosed right knee patellofemoral osteoarthritis. On October 10, 2007 Dr. Lukas diagnosed severe osteoarthritis, which he attributed to appellant’s December 1998 employment injury. He reported that, on her last visit on April 2, 2007, she had related, “having daily stiffness and swelling, with symptoms related to activity.” Dr. Lukas advised that appellant continue working six hours a day.

On January 9, 2008 appellant requested reconsideration. She contended that she was unable to work more than six hours per day as established by Dr. Lukas. Appellant alleged that her condition worsened over the years based on the medical evidence.

By decision dated February 4, 2008, the Office denied appellant’s request for reconsideration without a review of the merits. It found that her request did not raise a substantial legal questions or include new and relevant evidence.²

LEGAL PRECEDENT

The Federal Employees’ Compensation Act³ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.⁴ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁵

² The Board notes that, following the February 4, 2008 nonmerit decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ 5 U.S.C. §§ 8101 *et. seq.*

⁴ 5 U.S.C. § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁵ 20 C.F.R. § 10.605.

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁷ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

The Office accepted appellant's claim for right tibia fracture, open wounds and right knee internal derangement. Appellant stopped work on December 10, 2008 and returned to full-time work with restrictions on August 9, 1999, but subsequently reduced her work hours. The Office found a conflict in medical opinion between Dr. Lukas, an attending physician, and Dr. Abrams a second opinion physician, on the issue of whether she was capable of working an eight-hour day with restrictions. It referred appellant to Dr. Obianwu for an impartial medical examination. In a report dated May 19, 2004, Dr. Obianwu found that appellant was capable of working an eight-hour day with restrictions. On December 9, 2004 appellant accepted the employing establishment's limited-duty job offer, which was based on the physical restrictions noted by Dr. Obianwu. Appellant filed a claim for a recurrence of disability beginning January 22, 2005, contending that she was unable to work more than six hours a day. On June 14, 2005 the Office denied her recurrence claim as the evidence failed to establish that her condition had materially worsened or that she was unable to perform her limited-duty job. An Office hearing representative affirmed the denial of her recurrence claim on December 5, 2005. On January 23, 2007 the Office denied modification of its prior decisions.

Appellant requested reconsideration on January 9, 2008. She contended that Dr. Lukas provided a rationalized opinion explaining why she was unable to work more than six hours a day. Appellant contends that Dr. Lukas' reports establish a recurrence of partial disability and her inability to work more than six hours a day.⁹

⁶ *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB 630 (2006).

⁷ *Id.* at § 10.607(a). See *Joseph R. Santos*, 57 ECAB 554 (2006).

⁸ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB 622 (2005).

⁹ *Elaine M. Borghini*, 57 ECAB 549 (2006).

On April 2, 2007 Dr. Lukas diagnosed right knee triocompartmental osteoarthritis. He reiterated that appellant was permanently restricted to working no more than six hours of sedentary work a day. Dr. Lukas also diagnosed right knee patellofemoral osteoarthritis and noted that appellant had permanent work restrictions. On October 10, 2007 he reported the diagnosis of severe osteoarthritis, which he attributed to appellant's December 1998 employment injury. Dr. Lukas restricted appellant to working no more than six hours per day in a sedentary position. The reports of Dr. Lukas are duplicative of his prior treatment records in stating that appellant had a permanent work restriction of six hours a day. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.¹⁰

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office or established that the Office erroneously interpreted a specific point of law. She has not met the criteria to have the Office reopen her case for further review of the merits.¹¹

CONCLUSION

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

¹⁰ See *L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007) (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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2008 is affirmed.

Issued: December 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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