United States Department of Labor
Employees' Compensation Appeals Board

E.D., Appellant	)	
and	)	**Docket No. 09-257**
	)	**Issued: August 25, 2009**
U.S. POSTAL SERVICE, POST OFFICE, BUSHWICK STATION, Brooklyn, NY, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 4, 2008 appellant filed a timely appeal from a September 22, 2008 nonmerit decision of the Office of Workers' Compensation Programs. The Board also has jurisdiction over the Office's February 27, 2008 nonmerit decision. As over a year has passed since the date of the last merit decision, dated September 18, 2007, and the filing of this appeal, on November 4, 2008, the Board lacks jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 1, 2007 appellant, a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a right knee injury. She attributed her injury to a July 26, 2007 incident when, while standing at her route, she felt a sharp pain in her right knee.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

By decision dated September 18, 2007, the Office denied appellant's claim because the evidence of record did not establish that she sustained an injury in the performance of duty. Specifically, the Office noted that she had not established the factual basis underlying her claim.

On October 13, 2007 appellant requested reconsideration submitting an October 25, 2007 medical note signed by Dr. Robert Meyerson, a Board-certified orthopedic surgeon, who reported that he was treating appellant and diagnosed her with right knee post-traumatic arthritis. Dr. Meyerson noted that she was temporarily totally disabled.

Appellant submitted a handwritten note in which she reported that on April 28, 2007 while she was delivering mail, she felt a sharp pain in her knee, her knee gave way and she fell. She stated that a man on her route witnessed her fall and helped her get up. In a separate handwritten statement, appellant reported that on July 26, 2007 she experienced severe pain in her right knee and could not walk. She stated that the employing establishment sent her to the emergency room.

By decision dated February 27, 2008, the Office denied reconsideration of its prior decision.

Appellant disagreed and on June 30, 2008 requested reconsideration. In support of her reconsideration request, she submitted an October 25, 2007 report in which Dr. Meyerson noted that x-rays revealed that appellant had severe bi-compartmental changes in her right knee with loss of medial joint space, osteophyte formation and loss of joint space in the patellofemoral joint. Dr. Meyerson reported that appellant's work-related injury occurred after her right knee buckled and she fell forward onto her knees. He diagnosed appellant with right knee post-traumatic arthritis, superimposed on osteoarthritis. In a subsequent medical note dated November 1, 2007, Dr. Meyerson reported that appellant was evaluated on October 25, 2007 for a work-related right knee injury and that physical examination was significant for swelling and restricted range of motion. He noted that appellant's x-rays were positive for post-traumatic arthritis and that she was recommended to have a right total knee arthroplasty.

In a June 19, 2008 report, Dr. Meyerson reported that he had been treating appellant since October 25, 2007 for injury to her right knee. He noted that appellant was a letter carrier who sustained a knee injury when she fell on April 28, 2007 while delivering mail. Dr. Meyerson noted that, while she has a preexisting condition in her right knee, the April 28, 2007 injury superimposed on her preexisting condition such that she is now unable to perform her duties as a letter carrier. He opined, with a reasonable degree of medical certainty, that the April 28, 2007 trauma caused additional damage to her right knee and is the competent producing cause of her overall state of disability. Dr. Meyerson reported that appellant was a candidate for a right knee arthroplasty.

Appellant also submitted an unsigned treatment report concerning an appointment on February 28, 2008.

By decision dated September 22, 2008, the Office denied reconsideration because the evidence submitted was immaterial and not sufficient to warrant review of its prior decisions.[2]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5] 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.[6]

The Board also has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[7] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.

ANALYSIS

Appellant's October 13, 2007 and June 30, 2008 reconsideration requests neither alleged nor demonstrated the Office erroneously applied or interpreted a specific point of law. Additionally, they did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of her claim based upon the first and second above-noted requirements under section 10.606(b)(2).[8]

As to the third requirement under section 10.606(b)(2), she also did not submit relevant and pertinent new evidence not previously considered by the Office. With her reconsideration requests, appellant submitted two handwritten personnel notes. She also submitted October 25,

[2] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.) As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

[3] 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).

[4] 20 C.F.R. § 10.606(b)(2).

[5] *Id*. at § 10.607(a).

[6] *Id*. at § 10.608(b).

[7] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[8] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

2007 and June 19, 2008 reports as well as a November 1, 2007 note, all of which were signed by Dr. Meyerson. But this evidence does not relate to the main issue of the present case, *i.e.*, whether she sustained an employment incident that occurred in the performance of her duties as a letter carrier.

The recently submitted evidence, while new, does not establish that appellant experienced an employment incident at a specific time, place and manner.[9] When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.[10]

Appellant has not provided any consistent detail regarding how a specific employment incident or event caused her alleged injury. She has merely stated that she felt a sharp pain and her knee buckled. None of the evidence appellant submitted with her requests for reconsideration demonstrated the existence of an employment factor involved in the identified employment incident which produced the alleged injury and, therefore, her claim lacks specificity regarding the claimed mechanism of injury.[11] While in his October 25, 2007 report and his November 1, 2007 note Dr. Meyerson reported treating appellant for a work-related injury that occurred on July 26, 2007 after her right knee buckled and she fell forward onto her knees, none of this evidence demonstrates that her alleged injury was the result of an employment incident involving an identified employment factor. A buckled knee, by itself, is not an employment factor.[12] The Board has held that submission of evidence which does not address the particular issue involved does not constitute a basis for reopening as case.[13] As none of the evidence is either relevant or pertinent to the requisite factual component of her claim, they furnish no grounds for reopening her claim for further merit review.

Furthermore, the Board notes that, while appellant alleged that her injury occurred on July 26, 2007, her recently submitted note alleged that she injured her knee on April 28, 2007. In his June 19, 2008 medical report, Dr. Meyerson also noted her knee injury occurred on April 28, 2007, two months prior to the date of injury claimed by appellant. Therefore this evidence is not

[9] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990). 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. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury. *See John J. Carlone*, 41 ECAB 354, 356-57 (1989); *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[10] *See E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Arthur C. Hamer*, 1 ECAB 62 (1947).

[11] *Kathryn A. Tuel-Gillem*, 52 ECAB 451, 452-53 (2001). In addressing this issue, the Board has stated that to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. *See id.*

[12] *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[13] *Edward Mathew Diekemper*, 31 ECAB 224, 225 (1979).

relevant or pertinent as it pertains to an injury occurring on April 28, 2007 and provides no grounds for reopening her claim for further merit review.

Appellant has not established that the Office improperly denied her request for further review of the merits of its September 18, 2007 decision under section 8128(a) of the Act, because the evidence she submitted 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 constitute relevant and pertinent new evidence not previously considered by the Office.

Therefore, the Office properly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.

CONCLUSION

The Board finds the Office properly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the September 22 and February 27, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 25, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board