United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 09-282**
	)	**Issued: August 19, 2009**
DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, Fort Detrick, MD, Employer	)	

Appearances:
Richard J. Link, Esq., 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 7, 2008 appellant, through his attorney, filed a timely appeal from the September 24, 2008 nonmerit decision of the Office of Workers' Compensation Programs. Because the most recent merit decision, dated September 28, 2007, was issued more than one year from the date of the filing of this appeal, November 7, 2008, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On August 14, 2007 appellant, a 52-year-old emergency dispatcher, filed an occupational disease claim (Form CA-2) for arthritis in his left knee. He attributed his condition to an incident when, while running on a track at Fort Detrick in preparation for a mandatory physical agility

test, he experienced pain in his left knee. Appellant consulted a physician who diagnosed him with arthritis from a previous military injury that was aggravated by running and sitting.

Appellant submitted an April 21, 2006 report signed by Dr. John T. Stinson, a Board-certified orthopedic surgeon, who reported that appellant originally injured his knee in 1986 while in the National Guard. Dr. Stinson opined that the most likely cause of appellant's condition was degeneration of his medial meniscus.

In a May 25, 2006 medical report, Dr. Barry P. Boden, a Board-certified orthopedic surgeon, diagnosed mild patellofemoral pain syndrome and possible medial meniscus tear. In a separate report, also dated May 25, 2006, he reported that x-rays taken on April 21, 2006 revealed no significant acute bony abnormality. Appellant continued to submit progress notes from Dr. Boden through February 2007. In a July 20, 2006 report, Dr. Anthony Rowedder, a Board-certified diagnostic radiologist, reported that the left knee revealed no evidence of a meniscal or cruciate ligament tear. He diagnosed appellant with chondromalacia of the medial patellar facet.

Appellant submitted a September 18, 2007 personal statement, alleging that the running and exercise he engaged in to prepare for his bi-annual physical agility test and the physical special response team training as employment-related activities contributed to his condition. Appellant reported that he had injured his knee in the military in 1986. He stated that, although he had received treatment for this injury in March 2006, while running his left knee began hurting and the pain has been present ever since. Appellant reported that the pain was getting worse since receiving medical accommodation in November 2006.

By decision dated September 28, 2007, the Office denied appellant's claim because the evidence of record did not establish that he was injured in the performance of duty.

Appellant requested reconsideration. He submitted two copies of an August 28, 2008 note signed by Dr. Sridhar Durbhakula, a Board-certified orthopedic surgeon, who reported that appellant developed patellofemoral osteoarthritis that he attributed it to appellant's military injury of 1986. Dr. Durbhakula opined that appellant's original knee injury was aggravated by the intense daily exercises and intense activities he engaged in as a member of a Special Response Team (SRT) from 2003 to 2006. He opined that, within a reasonable degree of medical probability, appellant's SRT physical training exacerbated his patellofemoral arthritis.

By decision dated September 24, 2008, the Office denied reconsideration of its September 28, 2007 decision because the evidence appellant submitted in support of his reconsideration request contained evidence duplicative of evidence already of record or that was irrelevant.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that the evidence or

[1] 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).

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.[2] 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.[3] 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.[4]

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.[5] 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.[6]

ANALYSIS

Appellant's September 11, 2008 reconsideration request neither alleged nor demonstrated the Office erroneously applied or interpreted a specific point of law. Additionally, it 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 his claim based upon the first and second above-noted requirements under section 10.606(b)(2).[7]

Although appellant did submit new evidence, he did not satisfy the third requirement under section 10.606(b)(2) as this new evidence was not relevant to the issue decided by the Office. His claim was denied on the legal basis that the alleged injury while running on the track at Fort Detrick occurred in the performance of duty. It is not a medical issue. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.

To obtain merit review, appellant was required to submit evidence which was relevant to a legal finding that his injury did occur while he was in the performance of duty. With his reconsideration request, he submitted two copies of an August 28, 2008 note signed by Dr. Durbhakula. This note is not relevant and pertinent new evidence because the issue of performance of duty is a legal and factual question, but not a medical issue. Dr. Durbhakula's medical note is not relevant to the issue on appeal and furnishes no basis for reopening appellant's claim for merit review.

[2] 20 C.F.R. § 10.606(b)(2).

[3] *Id.* at § 10.607(a).

[4] *Id.* at § 10.608(b).

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

[6] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[7] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact now previously considered by the Office. Therefore, the Office did not abuse its discretion in refusing to reopen his claim for a review on the merits.

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 that the Office, in its decision dated September 24, 2008, properly denied appellant's request for reconsideration of his case on its merits.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 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