

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

N.R., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, ROBINS)
AIR FORCE BASE, GA, Employer)

**Docket No. 09-374
Issued: August 11, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 20, 2008 appellant filed a timely appeal of a December 17, 2007 decision of the Office of Workers' Compensation Programs denying his claim for compensation, and a January 23, 2008 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has established an injury in the performance of duty causally related to factors of his federal employment; and (2) whether the Office properly denied appellant's request for further merit review.

On appeal, appellant described his work duties and contends that his medical condition was related to the duties of his federal employment and that he required surgery.

FACTUAL HISTORY

On October 1, 2007 appellant, then a 59-year-old aircraft mechanic, filed an occupational disease claim alleging that he experienced severe pain in his right knee that spread into his calf.

He noted that he worked on a concrete floor and crawled in fuel tanks in awkward and strained positions.

By letter to appellant dated October 3, 2007, the Office informed him that the material he submitted was not sufficient to determine whether he was eligible for benefits. It provided him 30 days to submit additional evidence, including a comprehensive medical report from a treating physician giving a diagnosis and explaining how any condition was causally related to his employment.

On October 24, 2007 appellant submitted a statement describing right knee pain after squatting for periods of 15 to 30 minutes or standing for 15 to 30 minutes. When he worked on concrete, asphalt or metal, the pain increased. He tried to control the pain by manipulating his leg.

On September 12, 2007 Dr. Robert M. Thornsberry, a Board-certified orthopedic surgeon, indicated that appellant had several orthopedic-related problems. He noted that appellant had pain in his shoulder and on January 7, 2007 underwent a diagnostic arthroscopy of the shoulder which indicated subacromial decompression, distal clavicle excision and debridement of the glenohumeral joint. Dr. Thornsberry also noted that appellant had knee pain and a medial meniscus tear of the right knee. He diagnosed degenerative arthritis in appellant's shoulder. Dr. Thornsberry indicated that appellant can work within his shoulder range of motion and strengthening, and indicated that he will schedule him for a partial medial menisectomy of the right knee sometime in the near future. On November 18, 2007 he released appellant to return to work regular duty.

In a decision dated December 17, 2007, the Office denied appellant's claim finding that the medical evidence did not establish that his right knee was related to the accepted work events.

By form dated January 13, 2008, appellant requested reconsideration. By decision dated January 23, 2008, the Office denied appellant's request as he did not identify the grounds upon which reconsideration was being sought, raise any new legal argument, or submit relevant evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he is an "employee" within the meaning of the Act³ and that he filed his claim

¹ 5 U.S.C. §§ 8101-8193.

² *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

within the applicable time limitation.⁴ To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵ The medical evidence must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet his burden of proof to establish a *prima facie* claim for compensation.⁷ Appellant submitted a statement which identified the factors of employment that he believed caused his condition. The Office accepted this as factual. However, appellant failed to submit medical evidence sufficient to show that his right knee condition is causally related to these employment factors. It informed appellant of the need to submit a physician's opinion which explained how his knee condition was related to the implicated employment factors. The only medical evidence of record is the September 12, 2007 note of Dr. Thornsberry listing appellant's shoulder and right knee condition. In a November 8, 2007 work status report, Dr. Thornsberry noted only that appellant was released to regular duty. He did not address whether appellant's orthopedic problems were causally related to federal employment. Dr. Thornsberry did not provide any explanation of causal relationship. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁸ As appellant failed to provide medical evidence establishing the causal relationship between his right knee condition and his federal employment factors, the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, 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

⁴ R.C., 59 ECAB ____ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁵ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ *Solomon Polen*, 51 ECAB 441 (2000); *see also Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *See Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁹

ANALYSIS -- ISSUE 2

In requesting reconsideration, appellant did not submit any new relevant legal argument not previously considered by the Office or allege that the Office erroneously applied or interpreted a specific point of law. Consequently, he is not entitled to a review of the merits of the claim based on the first and second requirements of 10.606(b)(2). In addition, appellant did not submit any new relevant and pertinent medical evidence. He did not meet the third requirement for granting reconsideration. Accordingly, the Office properly denied reconsideration.¹⁰

CONCLUSION

The Board finds that appellant has not established an injury in the performance of duty, as alleged. The Board further finds that the Office properly denied appellant's request for further merit review.¹¹

⁹ 20 C.F.R. § 10.606(b)(2)(iii).

¹⁰ *Id.*

¹¹ The Board notes that appellant submitted new evidence for the first time on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 23, 2008 and December 17, 2007 are affirmed.

Issued: August 11, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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