

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

N.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Indianapolis, IN, Employer**

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**Docket No. 08-2370
Issued: July 21, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from a February 4, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for merit review. Because more than one year has elapsed between the most recent merit decision of the Office dated January 24, 2007 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(d)(2).

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 1, 2004, the Board set aside an Office decision dated January 28, 2003 pertaining to a claim for a recurrence of total disability from February 4 to 18, 2002 causally related to a July 1, 1995 work-related

knee injury. The case was remanded for further development.¹ The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By decision dated July 29, 2004, the Office accepted appellant's claim for a recurrence of disability beginning July 17, 2002. By decision dated January 7, 2005, it also accepted appellant's recurrence claim of November 22, 2004. By decision dated June 8, 2006, the Office found that appellant's actual earnings as a part-time modified letter carrier effective April 29, 2006 fairly and reasonably represented his wage-earning capacity.

On October 17, 2006 appellant claimed a recurrence of disability beginning September 21, 2006 causally related to his work-related July 1, 1995 knee injury. He indicated that he had ongoing knee pain for which he took prescribed medication. Appellant stated that his recurrence was due to the withdrawal of his pain medicine prior to scheduled left knee surgery.

In an October 20, 2006 attending physician report, Dr. Robert Arthur, a Board-certified family practitioner, advised that appellant was totally disabled from September 4, 2006 due to drug withdrawal before surgery. In an October 20, 2006 report, he stated that appellant was initially diagnosed with arthritis in both knees as a work-related injury on July 1, 1995 and was limited to working four hours per day. Dr. Arthur advised that appellant did well until September 21, 2006 when he had a recurrence of pain. He noted that appellant had a left total knee replacement scheduled for December 14, 2006 and that he needed to be off all pain medication before that time. Appellant was on increasing amounts of prescription pain medicine for four years and Dr. Arthur was in the process of weaning him from the medicine. He stated that appellant could not work because of withdrawal symptoms. In a November 16, 2006 addendum, Dr. Arthur stated that appellant had been off work for drug-withdrawal symptoms, which included dilated pupils, agitation and insomnia. He noted that, with the reduction of pain medication, appellant's knee pain was intolerable and he was unable to work. Dr. Arthur also reported that appellant's knee was swollen with painful range of motion.

In a January 31, 2006 report, Dr. Robert Czarkowski, a Board-certified orthopedic surgeon, noted the history of injury and provided findings on examination. He diagnosed bilateral degenerative joint disease and advised that appellant has not improved despite multiple arthroscopies, Cortisone injections, anti-inflammatories and narcotic utilization. In a September 22, 2006 report, Dr. Czarkowski advised that appellant was scheduled for knee replacement surgery and was to be off all narcotic pain medication at least three to four weeks prior to his surgery.

By decision dated January 24, 2007, the Office denied appellant's recurrence claim on the grounds that the evidence did not establish any increase in disability for work due to the accepted injury. It noted that appellant did not have the approved surgery and that another physician, Dr. John Garber, a Board-certified orthopedic surgeon, was recommending a different

¹ Docket No. 03-1663 (issued April 1, 2004). The record reflects that the Office initially accepted appellant's claim for right knee sprain and chondromalacia and later accepted left knee strain, temporary aggravation of the medial femoral condyle and chondromalacia for the left knee. The Office also authorized appellant's knee surgeries. The record reflects that appellant returned to work on May 7, 2003 for four hours per day following an August 12, 2002 work stoppage.

procedure than what was authorized. In a December 19, 2006 report, Dr. Garber advised that appellant had osteoarthritis of the lower leg and that he was a surgical candidate for a unicondylar arthroplasty.

The record reflects appellant underwent a left knee arthrotomy and medial compartment arthroplasty on March 19, 2007. Copies of hospital reports and diagnostic tests related to the surgery were received together with material related to home care visits for nursing and physical therapy.

Dr. Garber submitted progress reports following appellant's surgery. On July 17, 2007 he advised that appellant could return to light duty under the permanent restrictions he had prior to his knee surgery.

On January 18, 2008 appellant requested reconsideration of the Office's January 24, 2007 decision. In a January 18, 2008 report, Dr. Arthur advised that appellant had been using large doses of prescription narcotics to control the pain in his left knee so that he could work. Appellant underwent a partial knee replacement on March 19, 2007 because of his pain and that one of the conditions of surgery was that he be off pain medication prior to the surgery. Dr. Arthur stated that appellant was unable to work because of the pain in his left knee and his drug detoxification.

By decision dated February 4, 2008, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.² Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.³ 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.⁴ The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.⁵ Likewise,

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b).

⁵ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

it is well established that evidence which repeats or duplicates that already of record does not constitute a basis for reopening a case for merit review.⁶

ANALYSIS

In requesting reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by the Office. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).⁷

Concerning the third of the above-noted requirements under section 10.606(b)(2), appellant did not submit any pertinent new and relevant evidence. Dr. Arthur's January 18, 2008 report, while new, does not address the underlying issue in this case which is whether appellant established disability for work due to the accepted injury. He noted only that appellant underwent a partial knee replacement on March 19, 2007 due to knee pain. Dr. Arthur stated that appellant was unable to work because of pain in his left knee and drug detoxification, which was a prerequisite prior to surgery. This report is essentially repetitive of his October 20 and November 16, 2006 reports which were of record and previously considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸ The reports from Dr. Garber and the materials relating to appellant's recovery are not relevant to the underlying issue in this case. They do not address whether appellant's claimed recurrence of disability was causally related to the accepted injury.

Accordingly, the Board finds that appellant did not meet any of the three criteria warranting a merit review. The Office properly denied his January 18, 2008 request for reconsideration without conducting further merit review.⁹

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

⁶ See *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

⁹ Appellant submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. 20 C.F.R. § 501.2(c).

ORDER

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

Issued: July 21, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board