

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

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S.M., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Cleveland, OH, Employer )

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**Docket No. 09-498  
Issued: July 14, 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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 10, 2008 appellant filed a timely appeal from an August 6, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for an employment-related injury and a September 25, 2008 decision denying further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant established that he sustained a left knee injury in the performance of duty; and (2) whether the Office properly denied his request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). On appeal appellant contends that his pain worsened and his range of motion decreased during his workweek.

**FACTUAL HISTORY**

On June 23, 2008 appellant, then a 53-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a left knee degenerative condition and a torn

meniscus. He claimed that he worked on a concrete reinforced industrial tile floor for over 26 years and that his duties required repetitive bending. Appellant became aware of his knee condition in June 2006 and realized it was related to his employment in July 2006. The employing establishment controverted the claim.

Appellant submitted medical records dated July 16, 2006 through March 13, 2008 from his treating physician, Dr. Roger G. Wilber, a Board-certified orthopedic surgeon. On July 27, 2006 Dr. Wilber relayed appellant's statements that he had experienced left knee pain for approximately two weeks, with some stiffness, cracking and tightness in the knee. Physical examination revealed fairly marked crepitus associated with patellofemoral motion on the left side, tightness in the posterior aspect of his knee and a range of motion from 0 to 125 to 130 degrees. X-rays demonstrated mild degenerative changes and a small osteophyte on the lateral femoral condyle. Dr. Wilber opined that appellant had early degenerative changes in the knee and more than likely a standard degenerative meniscus tear and a Baker's cyst. Appellant underwent left knee arthroscopy in September 2006.

In a November 9, 2006 medical report, Dr. Wilber stated that appellant was status post left knee arthroscopy and noted appellant's reports of occasional flare-ups that prevented him from actively fulfilling his job duties. On March 13, 2008 he diagnosed chondromalacia of the patella and early osteoarthritic changes in appellant's left knee. Dr. Wilber noted appellant's belief that his conditions were aggravated by work. He opined that there was not much that could be done as appellant was not yet a surgical candidate.

In a medical report dated August 9, 2007, Dr. Wilber's brother, Dr. John H. Wilber, a Board-certified orthopedic surgeon, stated that appellant was almost a year out from his arthroscopic surgery. The procedure noted a meniscal tear and some arthritis involving the patellofemoral joint and medial joint line. Dr. John H. Wilber opined that appellant's current symptoms were more related to those conditions than to a new incident.

By letter dated July 1, 2008, the Office notified appellant of the deficiencies in his claim and requested he submit additional medical evidence.

Appellant resubmitted the July 27, 2006 report of Dr. Roger Wilber and a contemporaneous magnetic resonance imaging (MRI) scan of the left knee revealing a tear of the posterior horn and body of the medial meniscus, patellofemoral and medial compartment osteoarthritic changes and a Baker's cyst with partial rupture. In a September 28, 2006 report, Dr. Wilber stated that appellant was seen for an evaluation of his knee status post arthroscopy. He stated that he had two large grooves in the patellofemoral cartilage on the trachlear side in addition to the condylar changes and meniscal tear. Dr. Wilber advised that appellant would take three weeks off from work before returning to full duties.

By decision dated August 6, 2008, the Office denied appellant's claim. It accepted that appellant's employment required him to walk on concrete floors and bend repetitively and that he was diagnosed with osteoarthritis and meniscal tears of the left knee. However, the Office found that he did not establish a causal relationship between his employment and his left knee condition.

On September 15, 2008 appellant filed a request for reconsideration of the merits. He did not submit any evidence or argument in support of his request.

By decision dated September 25, 2008, the Office denied appellant's request for reconsideration finding that he did not submit any additional relevant evidence or advance a new legal argument.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>2</sup> including that he is an "employee" within the meaning of the Act<sup>3</sup> and that he filed his claim within the applicable time limitation.<sup>4</sup> The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.<sup>5</sup>

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.<sup>6</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.<sup>7</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *J.P.*, 59 ECAB \_\_\_ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>3</sup> *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).

<sup>4</sup> *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.

<sup>5</sup> *G.T.*, 59 ECAB \_\_\_ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>7</sup> *I.J.*, 59 ECAB \_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

## ANALYSIS -- ISSUE 1

The Office accepted that appellant's employment duties included walking on concrete floors and repetitive bending. The issue is whether appellant established that he sustained a left knee injury causally related to these work factors. The Board finds that he has not met his burden of proof.

Appellant submitted treatment records from Dr. Roger Wilber dated July 16, 2006 through March 13, 2008. Dr. Wilber diagnosed degenerative changes and a meniscal tear in the left knee. However, he did not provide any opinion on causal relationship. On March 13, 2008 Dr. Wilber noted appellant's belief that his condition was aggravated by work.<sup>8</sup> He did not address how working on concrete floors or bending would have cause or contribute to the degenerative changes found on examination or the need for surgery. Because Dr. Wilber never provided a rationalized medical opinion explaining how appellant's left knee condition was related to his employment, the Board finds that his medical reports are insufficient to establish that appellant sustained an injury causally related to his employment.<sup>9</sup>

The July 27, 2006 MRI scan report and an August 9, 2007 medical report from Dr. John H. Wilber are similarly deficient as they do not address causation.<sup>10</sup> He stated that appellant's current symptoms were more related to his previous meniscal tear and patellofemoral and medial joint disease than to a new incident. Dr. Wilber did not address how walking on concrete floors at work would cause or contribute to the diagnosed degenerative changes found on examination.<sup>11</sup>

On appeal, appellant noted that his symptoms decreased if he took two or more days off work but immediately returned once he began to work. In order to establish a compensable injury, he is required to provide medical evidence addressing the causal relationship between his left knee condition and his employment.<sup>12</sup>

Absent rationalized medical evidence from a physician, appellant has not met his burden of proof to establish that his left knee condition is causally related to factors of his federal employment.

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<sup>8</sup> See *Edgar G. Maiscott*, 4 ECAB 558 (1952) (appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature to establish the fact of injury as alleged).

<sup>9</sup> See *Victor J. Woodhams*, *supra* note 7.

<sup>10</sup> See *Donald T. Pippin*, 54 ECAB 631 (2003).

<sup>11</sup> See *Robert Broome*, 55 ECAB 339 (2004); *Linda I. Sprague*, 48 ECAB 386 (1997).

<sup>12</sup> See *Victor J. Woodhams*, *supra* note 7.

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act<sup>13</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>14</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>15</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

## ANALYSIS -- ISSUE 2

Appellant did not submit any evidence with his reconsideration request, nor did he advance a legal argument not previously considered or show that the Office erroneously interpreted or applied a specific point of law. Because appellant did not meet the requirements set forth under section 8128(a) of the Act,<sup>20</sup> the Board finds that the Office properly denied further merit review.

## CONCLUSION

The Board finds that appellant did not establish that he sustained a left knee condition in the performance of duty. The Board also finds that the Office properly denied appellant's request for reconsideration of the merits under section 5 U.S.C. § 8128(a).

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<sup>13</sup> 5 U.S.C. §§ 8101-8193.

<sup>14</sup> *Id.* at § 8128(a).

<sup>15</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>16</sup> 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).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(b).

<sup>20</sup> 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 25 and August 6, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 14, 2009  
Washington, DC

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

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

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