United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 09-509**
	)	**Issued: September 18, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Mount Clemens, MI, Employer	)	

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 12, 2008 appellant filed a timely appeal from the October 15, 2008 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration, and from a September 11, 2008 decision finding that he failed to establish his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on April 24, 2008; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 28, 2008 appellant, then a 57-year-old mail handler, filed a recurrence of disability claim, alleging that he sustained a recurrence of his previously accepted left knee condition. He alleged that he had a total left knee replacement and was on permanent light duty since November 1, 2005. On April 24, 2008 appellant was sitting while on a coffee break and,

when he rose to continue working, his right knee gave out under his weight. He stopped work on June 10, 2008.[1] The Office determined that the claim should be adjudicated as a new traumatic injury claim.[2]

In a June 9, 2008 report, Dr. Wayne Gunckle, a Board-certified orthopedic surgeon, saw appellant for his right knee, following a June 21, 2005 twisting injury at work. He examined appellant and found internal derangement to the right knee and a probable tear of the medial meniscus. Dr. Gunckle noted that x-rays of the right knee revealed some mild medial joint space narrowing but there was still good preservation of the lateral and patellofemoral joint space. There was no abnormal calcification or loose bodies present. Dr. Gunckle recommended a magnetic resonance imaging (MRI) scan. He placed appellant off work because his pain significantly increased when he performed any type of standing or twisting. The Office also received May 23, 2008 physical therapy notes.

A June 12, 2008 MRI scan of the right knee read by Dr. Jerald Henry, a Board-certified diagnostic radiologist, revealed an articular surface tear through the posterior horn of the medial meniscus, degenerative changes of the anterior horn of the medial meniscus and the lateral meniscus. Dr. Henry noted moderate tricompartmental osteoarthrosis, moderate-sized joint effusion and a small loose body.

In a June 18, 2008 report, Dr. Gunckle confirmed that appellant had evidence of a torn medial meniscus of the right knee. He recommended an arthroscopic evaluation and placed appellant off work pending approval of surgery.

By letter dated August 6, 2008, the Office informed appellant of the evidence needed to support his claim. It requested that he submit additional evidence within 30 days.

By decision dated September 11, 2008, the Office denied the claim. It found that the medical evidence did not establish that his right knee condition was causally related to the April 24, 2008 work incident.

On September 30, 2008 appellant requested reconsideration. He did not submit any additional evidence.

By decision dated October 15, 2008, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that it neither raised a substantial legal question nor included new and relevant evidence.

[1] The record contains two recurrence claim forms. The second claim form indicates that appellant stopped work on June 10, 2008.

[2] In a May 2, 2008 memorandum, the Office noted that appellant had a prior no time loss claim for an injury to the right knee on June 21, 2005, accepted for right knee sprain. Appellant had a separate claim for an injury to the left knee under claim, File No. xxxxxx025 which was accepted for a medial meniscus tear, left knee villonodular synovitis and a left knee sprain. The Office noted that appellant had a left knee replacement on November 1, 2005 and returned to full-time limited duty on May 31, 2006. These other claims are not presently before the Board.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4]

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. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition related to the employment incident.

An employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[7] An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[8] Neither the fact that the condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that on April 24, 2008 he sustained a right knee injury when he rose after sitting during a coffee break. By decision dated September 11, 2008, the Office denied his claim on the grounds that the medical evidence did not establish that his knee condition was causally related to the accepted work incident. The evidence supports that appellant stood up on April 28, 2008, as alleged.

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[3] 5 U.S.C. §§ 8101-8193.

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[6] *Shirley A. Temple*, 48 ECAB 404 (1997).

[7] *Gary L. Fowler*, 45 ECAB 365 (1994).

[8] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 567 (1979).

[9] *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

The Board finds that the medical evidence of record is insufficient to establish that the employment incident caused an injury. The medical reports of record do not establish that the incident at work caused his right knee condition. The medical evidence provides no reasoned opinion by a physician explaining how the employment incident of April 24, 2008 caused or aggravated the diagnoses torn medial meniscus.[10]

Dr. Gunckle, a treating Board-certified orthopedic surgeon, noted on June 9, 2008 that he had treated appellant for a prior left knee condition. He noted a history that on June 21, 2005 appellant twisted his right knee while at work for which he saw appellant intermittently. Dr. Gunckle noted internal derangement of the right knee and a probable tear of the medial meniscus. He also noted that there was some mild medial joint space narrowing and placed appellant off work. On June 18, 2008 Dr. Gunckle recommended arthroscopic surgery. The June 12, 2008 MRI scan from Dr. Henry, showed articular surface tear through the posterior horn of the medial meniscus and degenerative changes of the anterior horn of the medial and lateral meniscus. The Board notes that Dr. Gunckle did not provide a report addressing how appellant's right knee condition was related to the April 24, 2008 incident. Neither Dr. Gunckle nor Dr. Henry provided any opinion on the cause of appellant's right knee condition.[11] This renders the medical evidence of reduced probative value.

Appellant also submitted a report from a physical therapist; however, health care providers such as physical therapists are not physicians as defined under the Act. This does not constitute probative medical evidence.[12] In the absence of a medical report providing a reasoned medical opinion on causal relationship between a diagnosed condition and the rising incident on April 24, 2008, appellant did not meet his burden of proof. The mere fact that appellant's right knee condition manifest itself during a period of employment is not sufficient to establish causal relation.[13]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[14] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written

[10] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[11] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[12] *See Jane A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[13] *See Donald W. Wenzel*, 56 ECAB 390 (2005).

[14] 5 U.S.C. § 8128(a).

application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[15]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[16]

ANALYSIS -- ISSUE 2

Appellant's September 30, 2008 request for reconsideration did not allege or demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant 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).

Furthermore, appellant did not submit any relevant or pertinent evidence to support whether he sustained an injury on April 24, 2008 based on the third above-noted requirements under section 10.606(b)(2). The Board notes that the underlying issue is medical in nature. Appellant did not submit any physician's opinion addressing the April 24, 2008 incident in which he rose to return to work after a coffee break.

Since appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), he is not entitled to a merit review of his claim. The Office properly denied his request for reconsideration.

On appeal, appellant asserts that his condition is a recurrence and not a new injury. He specifically alleges that his duties at work for the past 27 years are the primary reason for his current knee condition. The Board notes that the current claim before the Board is for a traumatic injury on April 24, 2008. Appellant may file a separate claim for an occupational injury, defined by 20 C.F.R. § 10.5(q) as a condition produced by the work environment over a period longer than a single workday or shift.

[15] 20 C.F.R. § 10.606(b).

[16] *Id.* at § 10.608(b).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty on April 24, 2008. The Board also finds that the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).[17]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 15 and September 11, 2008 are affirmed.

Issued: September 18, 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

[17] Appellant submitted additional evidence with his appeal. However, the Board may not consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).