United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 09-1139**
	)	**Issued: January 28, 2010**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Norton, VA, Employer	)	

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 March 24, 2009 appellant filed a timely appeal from the April 21 and October 7, 2008 merit decisions of the Office of Workers' Compensation Programs denying his recurrence claim and a nonmerit decision of January 16, 2009 denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues on appeal are: (1) whether appellant established a recurrence of his medical condition commencing July 17, 2007 as a result of his accepted employment injury; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on July 29, 1988 appellant, then a 41-year-old coal mine inspector, sustained a tear of the lateral meniscus of the left knee while crawling in coal. Appellant stopped work on August 1, 1988 but returned intermittently before he retired on

disability on July 5, 1997. The Office paid appropriate benefits and authorized arthroscopic surgery, which he underwent on August 7, 1988.[1]

On February 19, 2008 appellant filed a recurrence of disability claim commencing July 17, 2007 causally related to his July 29, 1988 employment injury. He stated that he had problems walking, bending and sitting which grew worse every year. Appellant indicated that sometimes he would fall as his knee could not hold his weight. He advised that he had no injuries since he retired, that his knee was always weak and that he was seeking additional medical care.

Medical reports dated July 17, August 16 and September 27, 2007 from Dr. Bert E. Tagert, a Board-certified orthopedic surgeon, listed findings on physical examination and diagnostic study. Dr. Tagert noted an impression of valgus knee with lateral compartment osteoarthritis. He discussed treatment opinions and appellant's progress. A magnetic resonance imaging (MRI) scan was recommended. No opinion on causal relationship was provided.

In a March 4, 2008 letter, the Office advised appellant that the medical evidence was not for any condition that was accepted as employment related. It requested that he submit additional evidence, including a rationalized report from an attending physician addressing the cause of his current condition and its relationship to his July 29, 1988 work injury. Appellant was given 30 days to provide the requested information.

By decision dated April 21, 2008, the Office found that appellant had not established an employment-related recurrence of his accepted left knee condition.

On June 30, 2008 appellant requested reconsideration. He advised that he was submitting a report from an orthopedic surgeon. Appellant stated that his belief that his current knee condition was related to the original injury because of the subsequent injuries and surgeries. He had no outside work activities or hobbies since he retired due to his disability. Appellant resubmitted Dr. Tagert's September 27, 2007 report. No other medical reports were provided.

By decision dated October 7, 2008, the Office denied modification of its April 21, 2008 decision.

On January 2, 2009 appellant again requested reconsideration. He did not submit any additional evidence.

In a January 16, 2009 decision, the Office denied appellant's reconsideration request finding that his request was insufficient to warrant a review of the prior decision.

[1] Under claim number xxxxxx328, the Office accepted that appellant sustained a fractured right elbow on June 23, 1989. It noted that he underwent a nonwork-related left knee surgery June 1988. Under claim number xxxxxx589, the Office accepted temporary aggravation of arthritis to the left knee and right shoulder, resolved July 5, 1997. These claims are doubled into the claim that is before the Board.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of her claim by the weight of the evidence.[3] For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.[4] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[5]

When an appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.[6]

Section 10.5(y) of the Office regulations states:

> "Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage."[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a tear of lateral meniscus of left knee on July 29, 1988, for which he underwent surgery on August 7, 1988. Appellant retired on July 5, 1997.

On February 19, 2008 appellant filed a recurrence of disability claim commencing July 17, 2007 due to his July 29, 1988 work injury, seeking medical treatment only. The only medical evidence submitted were progress notes from Dr. Tagert dated July 17 to September 27, 2007. Dr. Tagert provided an impression of valgus knee with lateral compartment osteoarthritis and noted that further medical treatment was required. These reports are of limited

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[2] 5 U.S.C. §§ 8101-8193.

[3] *See J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[4] *See Amelia S. Jefferson, id.*; *see also David H. Goss*, 32 ECAB 24 (1980).

[5] *See G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Edward H. Horton*, 41 ECAB 301 (1989).

[6] *Ricky S. Storms*, 52 ECAB 349 (2001).

[7] 20 C.F.R. § 10.5(y).

probative value on the issue of causal relation. Dr. Tagert did not provide any opinion on causal relationship addressing how the diagnosed conditions or need for treatment in 2007 and due to the 1988 injury, accepted for a torn meniscus of the left knee.[8] He did not provide any opinion on whether appellant sustained a recurrence of a medical condition due to his July 29, 1988 work injury or how his current left knee condition was a natural progression of the accepted meniscus tear. Appellant noted that he was not exposed to work activities since July 5, 1997.[9] While he contends that his current condition is connected to the accepted work injury and related surgeries, causal relation is a medical question that can generally be resolved only by a physician.[10]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[11] Appellant failed to submit a physician's opinion adequately addressing the cause of his current left knee condition or the need for medical treatment.[12] He failed to discharge his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

The Act[13] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[14] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[15]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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 not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[16] Where the request fails to meet at least one of these standards, the

[8] *See Jaja K. Asaramo,* 55 ECAB 200 (2004) (finding that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[9] Likewise, Dr. Tagert did not address whether appellant had a recurrence of a medical condition attributable to his left knee injury under claim number xxxxxx589 which the Office accepted for an aggravation left knee arthritis that resolved by July 5, 1997.

[10] *Robert G. Morris*, 48 ECAB 238 (1996).

[11] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[12] *Robert Broome*, 55 ECAB 339 (2004).

[13] 5 U.S.C. § 8101 *et seq*.

[14] *Id*. at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[15] 20 C.F.R. § 10.605.

[16] *Id*. at § 10.606(b). *See Susan A. Filkins*, 57 ECAB 630 (2006).

Office will deny the application for reconsideration without reopening the case for a review on the merits.[17]

ANALYSIS -- ISSUE 2

Appellant's January 2, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any additional medical evidence in connection with his January 2, 2009 reconsideration request. He submitted an appeal form indicating that he wanted reconsideration without any explanation regarding the basis of his request. Therefore, appellant has not satisfied any of the three regulatory requirements for obtaining a merit review of his claim. The Board finds that the Office properly refused to reopen his claim for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he had a recurrence of a medical condition on and after July 17, 2007 causally related to his July 29, 1988 employment injury. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated January 16, 2009 and October 7 and April 21, 2008 are affirmed.

Issued: January 28, 2010
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