



## ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On January 4, 2008 appellant, then a 61-year-old data technician, filed an occupational disease claim alleging that on July 2, 2002 he sustained severe arthritic deterioration of both knees. On July 2, 2004 he first realized that his condition was caused by working in awkward positions and on various surfaces at the employing establishment. Appellant's conditions caused his falls, twists, bumps and bangs. He first reported his condition to the employing establishment on July 2, 2002. Appellant delayed filing his claim within 30 days of the date of injury as he was advised to do so by physicians as long as he was able to function without severe difficulties. At the time he filed his claim, appellant experienced great difficulty with walking long distance and standing for extended periods of time.

By letter dated January 10, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit factual and medical evidence. On January 10, 2008 the Office requested that the employing establishment submit factual evidence in response to appellant's claim. It received a notification of personnel action which listed his pay increases effective November 18, 2001 and January 6, 2008.

In medical reports dated September 27 and October 4, 2007 Dr. Gregory P. Duff, a Board-certified orthopedic surgeon, addressed the treatment of appellant's left shoulder and neck pain.

By decision dated February 12, 2008, the Office denied appellant's claim, finding that as the evidence was insufficient to establish that the claimed exposures occurred as alleged. Appellant sustained a medical condition causally related to the claimed work-related events.

In a February 15, 2008 letter, appellant requested a review of the written record by an Office hearing representative. He submitted a January 16, 2008 letter and undated narrative statements. Appellant described his work duties while in several positions at the employing establishment from 1987 to 2002. His exposure to the alleged employment factors ended on July 2, 2002. Appellant became aware of his knee problems in 1994 or 1995. He was placed on permanent light-duty work in 1996 or 1997. A February 12, 1996 dispensary permit from a supervisor stated that he performed limited-duty work due to his bilateral knee conditions. Appellant submitted medical records from the employing establishment health unit and a navy hospital which noted treatment for his bilateral knee conditions as early as 1990. A September 14, 1995 report stated that a work-related injury exacerbated appellant's bilateral knee degenerative joint disease. A September 2005 report stated that he had employment-related severe bilateral joint disease. In an October 2, 2007 report, Dr. Marc I. Suffis, an attending physician Board-certified in emergency medicine, obtained a history that appellant had experienced bilateral knee pain since 1988. He advised that appellant had severe bilateral knee degenerative arthritis secondary to his employment.

On February 19, 2008 the employing establishment concurred with appellant's description of his work duties.

In a May 14, 2008 decision, an Office hearing representative set aside the February 12, 2008 decision and remanded the case for further development on whether appellant's occupational disease claim was timely filed. The hearing representative found that the factual evidence appeared to establish that appellant's last exposure to the accepted work duties ended in 2002 and he did not file his occupational disease claim within three years of that date.

By letter dated May 30, 2008, the Office requested that appellant submit factual evidence regarding the date he first became aware of his bilateral knee condition and realized it was caused by his employment, whether he was part of a health surveillance program, test results and when he notified an immediate supervisor about his alleged employment-related condition.

In a June 23, 2008 letter, appellant stated that his knee problems developed over a period of time. He initially experienced problems with one knee and later with the other knee. In 1994 or 1995 appellant was assigned limited-duty work which he performed until July 2002. He underwent yearly physical examinations at the employing establishment. Dr. Suffis advised appellant that replacement of both knees was necessary. He notified most of appellant's supervisors that his work duties aggravated his knee condition.

During a July 21, 2008 telephone conference, an employing establishment supervisor advised the Office that he was never notified that appellant's knee problems were work related.

In an undated letter, appellant stated that he notified his supervisor that his bilateral knee condition was caused by his employment in late 2002 or early 2003. He was unaware of the time limitations for filing a claim. Appellant submitted additional medical records from the employing establishment health unit and navy hospital dated June 14, 1984 to June 30, 2008. This material addressed treatment of his bilateral knee conditions, disability for work and physical restrictions.

In a decision dated August 12, 2008, the Office denied appellant's claim, finding that it was not timely filed under the three-year time limitation of section 8122 of the Federal Employees' Compensation Act. It found that he first became aware of his bilateral knee condition and the relationship between the claimed condition and his employment in 1994. Appellant's exposure to the claimed employment factors ceased on July 31, 2002 but he did not file his claim within three years of that date. The Office found that his immediate supervisor did not have actual knowledge of the alleged employment-related injury within 30 days.

By letter dated July 23, 2009, appellant requested reconsideration of the August 12, 2008 decision. He resubmitted copies of reports from March 9, 1990 to June 30, 2004 from the health unit and navy hospital. In a September 18, 2008 report, Dr. Suffis listed findings on physical examination of appellant's knees and diagnosed bilateral knee traumatic degenerative arthritis. A December 10, 2008 report from Dr. Monica Alberts, a hand surgeon, listed her findings on physical examination and advised that appellant had right thumb carpometacarpal joint arthritis. Dispensary permits/mishap reports from employing establishment supervisors dated September 25, 1995 to March 26, 2004 addressed appellant's bilateral knee conditions and

limited-duty work assignment. In reports dated October 3, 2003 and March 26, 2004, it was stated that appellant sustained a left knee injury on July 1, 2002.

By decision dated August 17, 2009, the Office denied appellant's request for reconsideration. It found that the evidence submitted was repetitious in nature and, thus, insufficient to warrant further merit review of appellant's claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulation provide that 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>3</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>4</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 of the merits.

### **ANALYSIS**

Appellant's July 23, 2009 request for reconsideration neither alleged nor 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. The Board finds that 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).

Appellant did not submit relevant and pertinent new evidence not previously considered by the Office. He resubmitted medical records dated March 9, 1990 to June 30, 2004 from the employing establishment health unit and Navy hospital. This evidence was previously of record and reviewed by the Office. Duplicative evidence does not warrant reopening a case for further merit review.<sup>5</sup> None of the other evidence submitted is relevant to the issue of whether he timely filed a claim for a bilateral knee injury. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>6</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. *Id.* at § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *See L.H.*, 59 ECAB 253 (2007); *James E. Norris*, 52 ECAB 93 (2000).

<sup>6</sup> *D'Wayne Avila*, 57 ECAB 642 (2006).

While the October 3, 2003 and March 26, 2004 dispensary permits/mishap reports indicate that appellant sustained a left knee injury on July 1, 2002, this evidence does not pertain to the occupational disease claim filed in 2008 or establish that she filed any traumatic claim due to a July 1, 2002 incident. The Board finds that this evidence does not address the relevant issue and is insufficient as a basis for reopening the claim for further review on the merits.<sup>7</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his July 23, 2009 request for reconsideration.<sup>8</sup>

On appeal, appellant contended that his claim was not timely filed because he was unaware of the filing time limitations and he did not work as a workers' compensation clerk or deal with such matters on a regular basis. However, the Board has held that unawareness of possible entitlement, lack of access to information and ignorance of the law or of one's rights and obligations under it do not constitute exceptional circumstances that could excuse a failure to file a timely claim.<sup>9</sup>

Appellant further contended that his managers had actual knowledge of his claimed bilateral knee injury as he verbally notified management that his knee injury was employment related and the managers signed numerous forms regarding his light-duty assignment and questioned him as to when he was going to file an occupational disease claim and undergo treatment to repair his knees. He did not submit evidence sufficient to his contentions.<sup>10</sup> The Board finds, therefore, that appellant's contentions have not been established.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>7</sup> *Id.*

<sup>8</sup> *M.E.*, 58 ECAB 694 (2007) (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).

<sup>9</sup> *Roger W. Robinson*, 53 ECAB 846, 851 (2003).

<sup>10</sup> The Board notes that the submitted medical evidence did not address an employment relationship between the claimed occupational disease and the federal employment to serve to put the supervisors on notice of an employment relationship. *See, e.g., Charlene B. Fenton*, 36 ECAB 151 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 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