United States Department of Labor
Employees' Compensation Appeals Board

C.Q., Appellant	)	
and	)	**Docket No. 10-528**
	)	**Issued: October 19, 2010**
DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Fort Worth, TX, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2009 appellant filed a timely appeal from a November 23, 2009 nonmerit decision of the Office of Workers' Compensation Programs that denied reconsideration of a February 9, 2009 merit decision. As an appeal of an Office decision issued on or after November 19, 2008 must be filed within 180 days, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

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 December 10, 2008 appellant, a 45-year-old examiner exchanger, filed a traumatic injury claim (Form CA-1) for "a possible" bucket handle meniscus tear in his right knee that he

attributed to an October 26, 2008 incident that occurred while getting up quickly from an office chair.

In support of his claim, appellant submitted an unsigned health unit note, dated November 25, 2008 and a December 5, 2008 report from Dr. Patrick F. Kelly, an osteopathic physician, who diagnosed acute meniscus tear of the left knee.

By decision dated February 9, 2009, the Office denied the claim because the evidence of record did not establish that the accepted employment incident caused appellant's condition.

In a note, dated February 22, 2009, appellant stated that the correct date of injury was October 21, 2008, not October 26, 2008. He also described his history of injury, noting that the chair he was sitting in at the time of the incident was still broken. Appellant also noted that his supervisor had witnessed the incident. He also described previous injuries and other medical conditions.

On October 29, 2009 appellant requested reconsideration. In a separate note, also dated October 29, 2009, he argued that "the agency doctor" mishandled his claim.

Appellant also submitted a blank work restriction form.

By decision dated November 23, 2009, the Office denied the request without conducting a merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] 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.[2] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] 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.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id*. at § 8128(a).

[3] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[4] 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).

[5] 20 C.F.R. § 10.606(b)(2).

application for review within one year of the date of that decision.[6] 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.[7]

ANALYSIS

Appellant's reconsideration request did not show the Office erroneously applied or interpreted a specific point of law nor did it advance a relevant legal argument not previously considered by the Office. Therefore, he was not entitled to a merit review based upon the first two enumerated grounds noted above.

Concerning the third enumerated ground, appellant submitted two notes, dated February 22 and October 29, 2009 and a blank work restriction form.[8] Though "new," this evidence is not relevant or pertinent because the issue underlying his claim, causal relationship, is a medical issue that can only be proven by medical opinion evidence. The blank form contains no probative evidence supporting appellant's claim. Appellant also submitted a statement regarding the cause of his knee condition. His lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[9] Therefore, appellant's notes are not relevant or pertinent to the issue underlying his claim and provide no grounds for reopening his claim for a merit review.

Appellant has not satisfied any of the above-mentioned criteria. The Board finds that the Office properly refused to reopen his case for merit review.

Appellant argues on appeal that his treating physician had promised to submit medical evidence in support of his claim but did not do so. The Board notes, however, that it is appellant's burden of proof to establish his claim.[10]

CONCLUSION

The Board finds 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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[6] *Id.* at § 10.607(a).

[7] *Id.* at § 10.608(b).

[8] Appellant submitted additional evidence to the Office after the November 23, 2009 decision. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB 293 (2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision). That evidence can be submitted to the Office with a request for reconsideration.

[9] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[10] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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