

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

D.A., Appellant)

and)

**DEPARTMENT OF JUSTICE, IMMIGRATION)
& NATURALIZATION SERVICE,)
Los Angeles, CA, Employer)**

**Docket No. 10-740
Issued: October 20, 2010**

Appearances:

*Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 25, 2010 appellant filed a timely appeal from an August 28, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. The most recent merit decision was issued on April 21, 2008, more than one year prior to the appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office's nonmerit decision.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On August 20, 1997 appellant, then a 44-year-old special agent, sustained a left knee injury in the performance of duty. The Office accepted his traumatic injury claim for left knee strain and authorized left knee arthroscopic surgery. Appellant retired from federal service on January 1, 2003.

On October 19, 2006 appellant filed a claim for a recurrence of disability. By decision dated June 26, 2007, the Office denied his recurrence claim finding that the evidence was insufficient to establish that his current condition was causally related to his accepted injury.

On March 3, 2008 appellant requested reconsideration of the June 26, 2007 decision. He submitted a November 27, 2007 report from Dr. John B. Dorsey, a Board-certified orthopedic surgeon, who provided a history of injury and treatment. Based on examination findings and magnetic resonance imaging scan reports, he diagnosed severe tricompartmental osteoarthritis of the left knee and a chronic anterior cruciate ligament tear. He opined that the recurrent posterior horn meniscal tear was actually a postsurgical change, rather than a re-tear. Dr. Dorsey advised that appellant's disability was causally related to his duties as a special agent, which required running, jumping, climbing and other strenuous activities. He noted that these activities could result in an arthritic knee, particularly as appellant had prior knee surgery. Additionally, the partial removal of a meniscus leads to the development of posttraumatic osteoarthritis over a period of years and had done so in appellant's case. He concluded that, as appellant had been working in a sedentary position since his 2003 retirement, it was his physical activity as a special agent that caused the damage to his left knee.

In a decision dated June 10, 2008, the Office denied modification of its June 26, 2007 decision. It found that the medical evidence failed to establish that appellant's current condition was causally related to the accepted injury, as Dr. Dorsey's opinion was speculative and his report failed to address evidence of appellant's preexisting osteoarthritis condition.

On June 1, 2009 appellant, through his representative, submitted a request for reconsideration, together with a May 13, 2009 report from Dr. Dorsey. Counsel contended that the medical evidence established that appellant's condition resulted from work activities he engaged in following his return to work in March 1998.

In a May 13, 2009 letter, Dr. Dorsey reiterated his opinion that appellant's disabling tricompartmental osteoarthritis of the left knee was causally related to his federal employment. He explained: "it is an established fact that patients that have had an arthroscopic debridement and who have had an injury requiring a debridement will go on to develop osteoarthritis." Dr. Dorsey stated that, as a result of the meniscectomy, appellant lost the cushioning effect of the meniscus, causing a propensity to develop osteoarthritis, which had been confirmed by clinical and physical evidence, as well as by imaging studies. He further stated: "even if the osteoarthritis was not caused by the incident and subsequent surgery, it would have definitely been aggravated by the surgery and the activities described."

By decision dated August 28, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence presented was repetitive and cumulative and, therefore, did not warrant merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, 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.² 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.³ 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.⁴

ANALYSIS

The Board finds that the Office improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On reconsideration, appellant submitted a May 13, 2009 report from Dr. Dorsey that was not previously considered by the Office. Dr. Dorsey provided an explanation as to how appellant's left knee osteoarthritis was causally related to accepted injury, stating that "it is an established fact that patients that have had an arthroscopic debridement and who have had an injury requiring a debridement will go on to develop osteoarthritis." Dr. Dorsey advised that, as a result of the prior meniscectomy, appellant lost the cushioning effect of the meniscus, which caused a propensity to develop osteoarthritis. He addressed the Office's concern regarding appellant's preexisting osteoarthritis, stating that even if it was not caused by the incident and subsequent surgery, it would definitely have been aggravated by the surgeries and the activities described.

Dr. Dorsey's report is new to the record and relevant to the issue of causal relationship. It is sufficient to require further review of the merits of appellant's claim.⁵ The case will be remanded for the Office to review this evidence. After such further development of the claim as it deems necessary, it shall issue an appropriate decision.

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ *See R.M.*, 61 ECAB ____ (Docket No. 09-1231, issued July 27, 2010).

CONCLUSION

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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