

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

W.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Providence, RI, Employer**

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**Docket No. 10-838
Issued: January 26, 2011**

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 February 3, 2010 appellant filed a timely appeal of the Office of Workers' Compensation Programs' September 10 and November 19, 2009 nonmerit decisions, denying his requests for reconsideration. Because more than one year has elapsed between the last merit decision dated July 8, 2008 denying his recurrence of disability claim and the last termination decision dated August 29, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUES

The issues are: (1) whether the Office, in its September 10, 2009 decision, properly denied appellant's request for further merit review of his claim under 5 U.S.C. § 8128(a) regarding the denial of his recurrence of disability claim; and (2) whether the Office, in its

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

November 19, 2009 decision, properly denied his request for further merit review under section 8128(a) concerning the termination of his compensation benefits.

FACTUAL HISTORY

The Office accepted that on August 15, 2007 appellant, then a 50-year-old mechanic, sustained temporary aggravation of loose bodies in his right knee while in the performance of duty. He stopped work on the date of injury. Appellant returned to full-time regular-duty work on August 22, 2007.

On April 9, 2008 appellant filed a claim alleging that he sustained a recurrence of disability on October 15, 2007 causally related to his August 15, 2007 employment-related injury. He could no longer work due to severe pain and instability in his right and left knee. Appellant stopped work on January 24, 2008. He submitted medical records, including reports from Dr. Glenn Nuttall, an attending Board-certified internist. In a March 28, 2008 report, Dr. Nuttall found that appellant experienced continuing right knee problems. He further found that his left knee symptoms may have been caused by his right knee medial meniscus tear. Dr. Nuttall opined that appellant was totally and permanently disabled for work due to his bilateral knee conditions. He explained that “the degree of damage and pain” in both of appellant’s knees “precludes any gainful employment,” either sedentary or physical.

In a June 16, 2008 report, Dr. Stanley Hom, a Board-certified orthopedic surgeon and Office referral physician, found that appellant had underlying post-traumatic degenerative joint disease of the right and left knee and a degenerative tear of the medial meniscus of the left knee. He opined that appellant no longer had any residuals of his August 15, 2007 employment injury. Dr. Hom further opined that appellant was unable to perform his regular work duties due to his underlying bilateral knee conditions, but he could work eight hours a day with physical restrictions.

In a June 27, 2008 report, Dr. Cohen found that the August 15, 2007 employment injury temporarily aggravated appellant’s preexisting extensive right knee degenerative arthritis. He further found that his chronic preexisting left knee arthritis was not caused by the August 15, 2007 employment injury.

By decision dated July 8, 2008, the Office denied appellant’s claim for a recurrence of disability on October 15, 2007. It found that the June 16 and 27, 2008 medical opinions of Dr. Hom and Dr. George L. Cohen, an Office medical adviser, respectively, constituted the weight of the medical opinion evidence.

In an August 29, 2008 decision, the Office terminated appellant’s compensation for wage-loss and medical benefits with regard to his accepted August 15, 2007 employment-related injury, effective August 31, 2008. It based its decision on Dr. Hom’s June 16, 2008 opinion.

By letter dated July 1, 2009 appellant, through his attorney, requested reconsideration of the Office’s July 8, 2008 decision denying his recurrence claim. Counsel contended that the Office improperly terminated appellant’s wage-loss compensation and medical benefits as he sustained permanent rather than temporary aggravation of loose bodies in his right knee for

which his claim should have been accepted. He further contended that appellant sustained a left knee condition as a consequence of his accepted August 15, 2007 employment injury. Counsel resubmitted Dr. Nuttall's March 28, 2008 report and contended that it established that appellant sustained a consequential left knee injury due to his accepted employment-related right knee injury. He stated that he would file a separate request for reconsideration of the Office's August 29, 2008 termination decision. Counsel requested that the Office consider his separate requests for reconsideration.

On August 24, 2009 appellant, through counsel, requested reconsideration of the August 29, 2008 termination decision. Counsel requested that the Office consider Dr. Nuttall's accompanying August 12, 2009 report in this reconsideration request, as well as the July 1, 2009 reconsideration request. In the August 12, 2009 report, Dr. Nuttall reiterated his opinion that appellant had continuing right knee problems and total and permanent disability for work due to his bilateral knee conditions. He noted the findings of a February 6, 2008 magnetic resonance imaging (MRI) scan of appellant's left knee and opined that his symptoms were directly due to the added stress and change in gait caused by the August 15, 2007 employment-related right knee injury.

In a September 10, 2009 decision, the Office denied appellant's request for reconsideration of the Office's July 8, 2008 decision, finding that the evidence submitted was duplicative and repetitious in nature and not relevant to the recurrence of disability issue and, thus, insufficient to warrant further merit review of his claim.

In a November 19, 2009 decision, the Office denied appellant's request for reconsideration of its August 29, 2008 termination decision on the same grounds, that the evidence submitted was duplicative and repetitious in nature and not relevant.

LEGAL PRECEDENT -- ISSUES 1 & 2

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

² 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. 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

ANALYSIS -- ISSUES 1 & 2

In a July 1, 2009 request for reconsideration, appellant disagreed with the Office's July 8, 2008 decision, which found that he did not sustain a recurrence of disability on October 15, 2007 due to his August 15, 2007 employment-related right knee injury. On September 10, 2009 the Office found that the evidence submitted by appellant was duplicative and repetitive in nature and not relevant to the recurrence issue in the case and, therefore, was insufficient to warrant further merit review. On August 24, 2009 appellant requested reconsideration of the Office's August 29, 2008 decision terminating his wage-loss compensation and medical benefits effective August 31, 2008 on the grounds that he no longer had any residuals or disability causally related to his August 15, 2007 employment injury. On November 19, 2009 the Office found that the evidence submitted by appellant was duplicative and repetitive in nature and not relevant to the termination issue in the case and, therefore, was insufficient to warrant further merit review. Appellant submitted Dr. Nuttall's August 12, 2009 report. Although this evidence reiterated Dr. Nuttall's March 28, 2008 findings that appellant had continuing right and left knee problems and total and permanent disability for work due to his bilateral knee conditions, he offered a new opinion however finding that appellant's left knee symptoms were directly related to his accepted employment-related right knee injury. This medical evidence addresses whether appellant has a continuing condition resulting from his accepted employment injury and is relevant to the issues of whether the Office properly found that he did not sustain a recurrence of disability and have any residuals or disability causally related to his employment-related right knee condition. As such, Dr. Nuttall's August 12, 2009 report constitutes relevant and pertinent new evidence and is sufficient to require the Office to reopen appellant's claims for consideration of the merits. The Board finds, however, that the evidence submitted in support of both requests for reconsideration constituted relevant and pertinent new evidence not previously considered.⁵ Therefore, the Office improperly refused to reopen appellant's cases for further review of the merits.

To obtain merit review, appellant is not required to submit evidence sufficient to establish his claim. He need only provide evidence that is relevant and pertinent and not previously considered by the Office.⁶ Dr. Nuttall's report meets these requirements. The case will, therefore, be remanded for consideration of Dr. Nuttall's August 12, 2009 report, together with the previously submitted evidence of record, and a decision on the merits of both claims.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claims for further review of the merits under 5 U.S.C. § 8128(a) in its September 10 and November 19, 2009 decisions.

⁵ *Id.* at § 10.606(b)(2).

⁶ *Billy B. Scoles*, 57 ECAB 258 (2005).

ORDER

IT IS HEREBY ORDERED THAT the November 19 and September 10, 2009 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: January 26, 2011
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