

ISSUE

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

FACTUAL HISTORY

On April 20, 2009 appellant, then a 57-year-old retired mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed right knee pain when she would stand for eight hours or sit where both feet could be held back bending at the knee. She also stated that she had surgery on her right knee in 2000 and reinjured her right knee in 2005 at work which resulted in a second surgery.⁴ Appellant reported that when she returned to work the pain continued. She first became aware of her injury and realized it was employment related on August 20, 2006. Appellant first notified her supervisor on August 21, 2009. She retired on December 31, 2008. The employing establishment controverted the claim.

The employing establishment submitted an April 24, 2009 description of job and physical requirements for appellant's position as a mail processing clerk which noted that she would stand for about six hours, sit for about two hours and walk for about one hour each day.

By letter dated May 1, 2009, the Office requested additional information from both appellant and the employing establishment. Appellant was informed that the evidence received failed to establish that she sustained an injury. She was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

By decision dated July 24, 2009, the Office denied appellant's claim finding that she did not establish fact of injury. It specifically noted that the evidence submitted was insufficient to establish that the work activities occurred as alleged and that there was no clarification on which knee was injured.

On August 3, 2009 appellant requested reconsideration of the Office decision. She did not submit any additional evidence.

By decision dated August 11, 2009, the Office denied appellant's request for reconsideration finding that she did not raise a substantive legal question or included any new and relevant evidence.

By letter dated August 11, 2009, appellant, through her attorney, requested reconsideration of the Office decision. Counsel argued that she did not receive the Office's July 24, 2009 decision or a copy of the May 1, 2009 development letter until they contacted the Office and requested that information be sent to them. He noted that there was information which would be submitted in response to the May 1, 2009 letter and would like the case reopened.

⁴ On February 17, 2005 appellant filed a traumatic injury claim Form CA-1 alleging that on February 16, 2005 she sustained a right knee injury when she was getting up and her foot did not clear the ledge. On December 3, 2005 the Office accepted the claim for right knee medial meniscus tear with surgical repair, claim File No. xxxxxx929.

By decision dated August 20, 2009, the Office denied appellant's request for reconsideration finding that she did not raise a substantive legal question or include any new and relevant evidence. It noted that she filed a Form CA-2 for a left knee condition from specific work factors but her claim was denied on July 24, 2009 because she did not provide sufficient factual evidence describing the actual physical requirements of her clerk position. The Office noted that evidence in the file showed that the July 24, 2009 decision was mailed to appellant because she used the appeal request form when she exercised her appeal rights. It also noted that there was no evidence in the file that she did not receive the May 1, 2009 letter.

On September 2, 2009 appellant requested reconsideration of the Office decision. Counsel noted that there were two separate files for her knees and a careful review of both claims would tie the February 2005 injury to the repetitive nature of her work, thereby qualifying her for a schedule award for at least one of her two knee injuries and possibly both.

By decision dated October 7, 2009, the Office affirmed its July 24, 2009 decision finding that the evidence submitted was insufficient to determine whether the claimed work injury resulted in a diagnosed condition.

On December 4, 2009 appellant requested reconsideration of the Office decision. By letter dated December 7, 2009, counsel stated that she had surgery on her right knee in 2000 from which she completely recovered. He noted that appellant's 2005 injury occurred when she moved a tray of mail to a nearby shelf and she caught her right foot, twisted it and reinjured her right knee resulting in knee surgery in 2005.

By decision dated March 9, 2010, the Office denied appellant's request for reconsideration finding that she did not raise a substantive legal question or include any new and relevant evidence.⁵

LEGAL PRECEDENT

To reopen a case for merit review under section 8128(a), 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.⁶ Section 10.608(b) of Office regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section

⁵ Appellant requested reconsideration of the Office decision on July 26, 2010, stating that her first right knee injury in 2005 belonged to claim File No. xxxxxx929 and her injury to her left knee belonged to claim File No. xxxxxx616. On August 19, 2010 she filed a timely appeal to the Board from the Office's March 9, 2010 decision. On August 20, 2010 the Office denied appellant's request for reconsideration finding that she did not raise a substantive legal question or include any new and relevant evidence. As previously noted, the Board does not have jurisdiction over the Office's August 20, 2010 decision. The Board has jurisdiction only over appeals from a final decision of the Office. As appellant filed her appeal on August 19, 2010, the Board has no jurisdiction where the Office has not issued such a decision. 20 C.F.R. § 501.2(c)(2).

⁶ *D.K.*, 59 ECAB 141 (2007).

10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only Office decision before the Board on appeal is the March 9, 2010 decision, denying appellant's application for review. Because more than 180 days elapsed between the date of the Office's most recent merit decision on October 7, 2009 and the filing of appellant's appeal on August 19, 2010, the Board lacks jurisdiction to review the merits of her claim.⁸

On appeal from the Office's October 7, 2009 decision, counsel reported that appellant had surgery on her right knee in 2000 from which she completely recovered. He also stated that her 2005 injury occurred when she moved a tray of mail to a nearby shelf and caught her right foot and twisted it, resulting in her reinjuring her right knee which required surgery. Counsel described appellant's February 16, 2005 traumatic injury claim related to claim File No. xxxxxx929 and failed to establish what employment activities she was engaged in which caused her occupational exposure. This evidence is not material or relevant because the denial of appellant's claim was based on her failure to factually establish the claimed occupational exposure to a condition which caused the medical injury or disease. To require the Office to reopen a case for reconsideration, appellant must submit relevant evidence not previously of record or advance legal contentions not previously considered.⁹ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

Appellant has not established that the Office abused its discretion in its March 9, 2010 decision under section 8128(a) of the Act because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.¹¹

⁷ *K.H.*, 59 ECAB 495 (2008).

⁸ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of the Office's final decision being appealed.

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988); *Ethel D. Curry*, 35 ECAB 737 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979); e.g., *Eladio Joel Abrera*, 28 ECAB 401 (1977).

¹⁰ *Jimmy O. Gilmore*, 37 ECAB 257 (1985).

¹¹ *Sherry A. Hunt*, 49 ECAB 467 (1998).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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