

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK A. BENCKER and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 98-469; Submitted on the Record;
Issued March 8, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he sustained a bilateral knee condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128.

On August 20, 1990 appellant, then a 63-year-old retired letter carrier, filed a claim for occupational disease alleging that he developed degenerative arthritis in both knees causally related to factors of his federal employment.¹ He has not worked since February 26, 1990 and retired effective April 20, 1990.

Appellant underwent surgery on his left knee on February 28, 1990 consisting of revision of tibial component left total knee arthroplasty. The surgical report prepared by Dr. Chester Walters, a Board-certified orthopedic surgeon, noted that appellant had slipped and fallen on his left knee several weeks prior to the surgery which apparently caused a tendon rupture.

Appellant also had a right knee replacement on April 10, 1990. The postoperative report from Dr. Chester included a diagnosis of degenerative arthritis and varus deformity of the right knee.

In a letter dated October 11, 1990, the Office notified appellant that only work factors after May 13, 1987 would be considered since his prior occupational disease claim was denied

¹ Appellant had a history of knee problems beginning in 1964. He underwent a total left knee replacement on October 29, 1981 and another left knee replacement due to a loosened prosthesis on September 6, 1984. The Office previously approved a claim for right knee strain filed by appellant in relation to a December 14, 1984 slip and fall injury at work. Although appellant also filed a claim on May 13, 1987 alleging that he suffered from degenerative arthritis in his knees caused by his employment duties as a letter carrier, the Office rejected that claim on December 2, 1987.

for work factors before that date. The Office requested that appellant submit additional information and evidence to support his claim for compensation.

In a letter dated November 3, 1990, appellant stated on December 14, 1989 that he was off duty, mailing some parcels for himself at the employing establishment, when he slipped and fell on his face. He indicated that he sustained a nasal fracture, but denied any more pain than usual in his left knee after the fall. Appellant noted that from April 1, 1997 to October 19, 1990 he sorted mail for three hours a day from 6:00 a.m. to 9:00 a.m., collected mail by walking around for one hour and was then placed anywhere he was needed within his medical restrictions.

By decision dated December 7, 1990, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish a causal relationship between appellant's work factors after May 13, 1987 and his bilateral knee condition.

In subsequent years appellant filed numerous requests for reconsideration and the Office issued decisions denying modification on April 15, October 16, 1991, January 17, 1992 and September 11, 1995. For purposes of this decision, the medical evidence is summarized in chronological order without specific reference to those earlier merit decisions.

The medical evidence of record includes a January 14, 1991 report from Dr. Waters which stated that appellant was followed since February 1, 1990 for fixation failure and progressive varus deformity with fracture of the proximal lateral tibial metaphysics of his left knee following a total knee revision arthroplasty. He stated:

“[Appellant] works as a carrier for the [employing establishment] spends many hours on his feet, more in the past than presently. The revision knee surgery was done in 1984 and, although some of the signs of radiographic loosening [were] present on x-rays [from February 1, 1990] suggest that this has been going on fairly chronically, the accelerated loosening resulting in the proximal tibial metaphysis fracture resulting in revision surgery [February 28, 1990] ... has been at least partly due to the length of time he has had to spend on his feet in the last few years. This has probably not directly caused the prosthetic loosening but has materially affected it resulting in much more rapid loosening than might otherwise have been the case.”

In a July 18, 1991 report, Dr. Waters stated that appellant developed an aseptic loosening and ultimately a stress fracture of the tibial metaphysis requiring surgery related to weight bearing stresses that he encountered working and having to walk on his total knee and, “particularly, once loosening developed, accelerated this process significantly.” He reiterated his diagnosis in reports dated November 7, 1991 and February 27, 1992.

The Office referred the file for review by an Office medical adviser, Dr. Daniel Zimmerman, on September 12, 1991. He opined that appellant's February 28, 1990 left knee surgery was necessitated only by the December 14, 1989 nonwork-related fall.

The Office requested that Dr. Waters clarify his opinion on the causal relationship between appellant's knee surgery, his degenerative arthritis and the specific work factors of appellant's federal employment. In a report dated November 7, 1991, he stated: "I believe [appellant's] condition is related to the weight bearing stresses that he has encountered working and having to walk on his total knee and particularly once loosening developed, accelerated this process significantly. I cannot state this anymore clearly and hope that this helps finally clear up this matter."²

In a report dated April 22, 1993, Dr. Waters made the following comments:

"I have followed [appellant] since February 1, 1990 for fixation failure and progressive varus deformity of his total knee arthroplasty on the left. This was primarily caused by mechanical stress and gradual loosening from his many hours a day on [h]is feet [as] a mail carrier. Recently it has come to my attention that [appellant] had a single injury [on] December 14, 1989 but I believe the x-ray appearance is one of progressive stress fracturing of the lateral tibial cortex due to the varus toggle and loosening, not a result of a single traumatic event."

By letter dated September 20, 1993, appellant noted that he was removed from limited duty February 6, 1989 and that by the middle of the summer 1989 he was working in the pouch rack which required him to stand for four hours per day, three days a week. He stated that he continued that job until October 1989.

Following a merit decision dated September 11, 1995, appellant requested an oral hearing which was held on July 11, 1986. At the hearing, appellant testified that after October 1989 he was assigned to a full-time job casing mail using a rest bar and that he worked a total of 96 hours of overtime. He alleged that his job duties and not the fall in December 1990 caused the need for his subsequent surgeries in February and April 1990.

In a decision dated September 25, 1996, an Office hearing representative determined that the medical opinion evidence from Dr. Waters was not well reasoned to establish that appellant's bilateral knee condition for which he underwent surgery in February and April 1990 was causally related to the physical activities appellant performed at work and not solely due to the nonwork-related fall of December 14, 1989. The Office hearing representative specifically noted that Dr. Waters based his opinion on an x-ray report dated January 25, 1990, which was not of record, and that he did not explain why he believed that the January 25, 1990 x-ray report showed that appellant's knee fracture was not related to a single traumatic event. Therefore, the decision of the Office dated December 7, 1990 was affirmed.

In letter dated December 20, 1996, appellant requested reconsideration and submitted the following x-ray reports. In a December 18, 1994 x-ray report, x-rays of the left knee dated October 24, 1984 were compared with x-rays dated December 18, 1984 and showed little interval change; in a February 6, 1985 x-ray report, there was no evidence of loosening of the

² Dr. Walter reiterated his opinion in a February 27, 1992 report, noting that appellant had weight bearing stress on his knees from having to work an eight-hour shift or forty hours a week.

left knee prosthesis; in a June 17, 1986 x-ray report, the right knee showed severe degenerative changes; in a December 22, 1986 x-ray report, disc spaces were essentially maintained with possible mild narrowing at C5-6, mild degenerative arthritis, no significant change from the August 5, 1985 x-ray; in a February 26, 1987 x-ray, there was no significant change from the December 22, 1986 x-ray; in an April 13, 1987 x-ray, there was no change from the February 26, 1987 x-ray; in a January 25, 1990 x-ray postoperative, changes were noted consistent with a total knee replacement.

Appellant also submitted copies of medical reports and treatment notes previously of record.

In a decision dated March 3, 1997, the Office denied modification following a merit review.

By letter dated April 21, 1997, appellant requested reconsideration and submitted copies of evidence already of record.

In a June 2, 1997 decision, the Office denied appellant's request for a merit review.

By letter dated September 11, 1997, appellant requested reconsideration and submitted an August 28, 1997 report from Dr. Bach who noted that appellant had been under his care since 1964 for progressive arthritis of both knees and lumbosacral spine. Dr. Bach stated that "[Appellant] sustained several injuries from 1986 through 1989." The fall in 1989 may have aggravated the symptoms in his knee, but his prosthesis was already loosening before the fall." In conjunction with his opinion, there were also attached x-ray reports dated April 13 and February 26, 1987.

By decision dated October 10, 1997, the Office determined that appellant's evidence submitted on reconsideration was insufficient to warrant a merit review because the report of Dr. Bach was cumulative and repetitive in nature.

The Board finds that this case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by claimant were the proximate cause of the condition for which compensation is claimed, or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.⁶

The medical evidence required to establish causation, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by claimant.⁷

In the instant case, the Office found that appellant failed to provide a rationalized opinion to establish that his degenerative knee condition was caused by factors of his federal employment. The Office specifically determined that there was insufficient evidence from which to conclude that appellant's work duties, on or after May 13, 1987, caused or aggravated appellant's bilateral knee condition to such an extent that he was required to undergo knee replacement surgery on February 28 and April 10, 1990. The Office concluded that appellant was only required to undergo surgical procedures on February 28 and April 10, 1990 due to a nonwork-related slip and fall incident which occurred on December 14, 1989.

The Board, however, has reviewed the entirety of the medical record on appeal and finds that the reports from Dr. Waters dated April 22, 1993, November 7, 1991 and January 14, 1991, while insufficiently rationalized to establish that appellant's degenerative knee condition and resultant surgeries were caused or aggravated by factors of his employment, these reports are sufficient to establish a *prima facie* case and to require the Office to undertake further development of the medical record.⁸ As such the Board vacates the Office's last merit decision dated March 3, 1997 and remands this case for further development.

Additionally, the Board finds that the Office abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁹ The regulations provide that a

⁶ *Woodhams, supra* note 5.

⁷ *Id.*

⁸ *See Cherly A. Monnell*, 40 ECAB 545, 551 (1989); *see also Horace Langhorne*, 29 ECAB 820, 821 (1978).

⁹ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁰ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹² Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹³ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁴

In support of his September 11, 1997 reconsideration request, appellant submitted an August 28, 1997 report from Dr. Bach and two x-ray reports. The August 28, 1997 report constitutes new evidence not previously considered by the Office in the instant claim. The Office therefore erred in denying appellant's request for a merit review.¹⁵

On remand, the Office should prepare a statement of accepted facts and refer appellant, along with the statement of accepted facts and a copy of the medical records, to an appropriate specialist for an examination of appellant and a rationalized medical opinion as to whether appellant's bilateral knee condition was caused or aggravated by factors of his federal employment. After such further development as it may deem necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated October 10, 1997 and March 3, 1997 are hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
March 8, 2000

¹⁰ 20 C.F.R. § 10.138(b)(1).

¹¹ 20 C.F.R. 10.138(b)(2).

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

¹⁵ The record indicates that Dr. Bach was appellant's treating physician when he filed his prior occupational claim in 1987. Although there are various reports from him contained in the file, they were proffered to establish the prior claim.

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member