

This case has previously been before the Board. On June 29, 1987 appellant, then a 43-year-old preventative maintenance worker, sustained a thigh and groin injury when an elevator closed on his left leg. The Office accepted his claim for muscle ligament strain and bruise and avascular necrosis of the left femoral head. Appellant underwent surgery on January 12, 1988.

He underwent a total hip replacement on October 20, 1993. The Office accepted this condition as employment related. By decision dated February 15, 1995, it determined that appellant's actual earnings in the position of roofer fairly and reasonably represented his wage-earning capacity. Appellant began working in this position on December 13, 1994. The Office granted him a schedule award for 44 percent impairment of his left lower extremity on April 3, 1995.

Appellant filed a recurrence of disability claim on September 25, 2003. The Office denied his claim for a consequential back injury and the Branch of Hearings and Review affirmed this decision on February 9, 2005. Appellant appealed this decision to the Board. In an order remanding case dated October 7, 2005,¹ the Board found that the Office should have adjudicated the case as a request for modification of wage-earning capacity determination and remanded the case for further review.

By decision dated December 13, 2005, the Office denied modification of the February 15, 1995 wage-earning capacity determination, finding that the evidence did not establish that appellant's back condition was a consequence of his accepted employment injuries and that he did not sustain a material change in the nature and extent of his injury-related condition. Appellant again requested an appeal before the Board. By decision dated August 11, 2006,² the Board affirmed the Office's decision. The record before the Board contained a report from Dr. Scott Kurzrok, a Board-certified osteopath specializing in family medicine, dated January 21, 2004. Dr. Kurzrok attributed appellant's current lumbar disc herniations to his total hip replacement, which did not allow "the normal and natural forces of realignment in his back." He opined that a total hip replacement would cause undue stress in the lumbar spine and make appellant prone toward disc herniation.

On June 27, 2007 appellant resubmitted medical and factual records regarding his left hip claim, dated December 1987 and through his recovery from total hip replacement and return to work in December 1994. He submitted additional factual information regarding his left hip claim on July 18, 2007. Appellant requested reconsideration before the Office on August 6, 2007 and referenced the previously submitted report from Dr. Kurzrok. In a report dated July 6, 2007, Dr. Kurzrok stated that appellant had developed increasing pain in his low back without any strenuous work requirements. He opined that appellant's total hip replacement caused or contributed to his herniated discs and chronic back pain. Dr. Kurzrok stated that asymmetry and walking gait following a total hip replacement can precipitate the development of osteoarthritis due to abnormal biomechanics, such as "an unleveling of the pelvis which can lead to disc herniations and chronic back pain." He referenced and included several articles.

By decision dated November 15, 2007, the Office denied modification of the August 11, 2006 decision.

Appellant requested reconsideration on September 30, 2008 and submitted an August 20, 2008 report from Dr. Kurzrok, who again opined that appellant's back problems could be related to his 1987 employment injury. By decision dated December 3, 2008, the

¹ Docket No. 05-807 (issued October 7, 2005).

² Docket No. 06-459 (issued August 11, 2006).

Office declined to reopen appellant's claim for consideration of the merits, finding that Dr. Kurzrok's report was repetitive of his previously submitted opinions.

LEGAL PRECEDENT

Section 8128(a) of Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

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.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 Office issued a wage-earning capacity determination on February 15, 1995 based on appellant's actual earnings as a roofer. By decision dated December 13, 2005, the Office denied modification of its February 15, 1995 decision. The Board affirmed the December 13, 2005 decision on August 11, 2006.

To reopen the case for merit review appellant must meet one of the requirements of section 10.606(b)(2) of the Office's regulations. He did not raise any new legal arguments in his request for reconsideration. Appellant attempted to submit relevant and pertinent new evidence in the form of an additional report from Dr. Kurzrok, a Board-certified osteopath specializing in family medicine, dated August 20, 2008. In this report, Dr. Kurzrok noted appellant's history of injury, again referenced the medical literature, reviewed the medical reports and offered his opinion that appellant's back problems could be related to his 1987 hip injury. This report merely repeated the findings and conclusions offered in Dr. Kurzrok's earlier reports. As there was no new medical reasoning or rationale in support of his conclusions, Dr. Kurzrok's report did not provide any pertinent new and relevant evidence with respect to the issue of whether appellant had sustained a change in the nature and extent of his employment-related condition.

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b).

The Board accordingly finds that appellant did not meet any of the requirements of section 10.606(b)(2). He therefore is not entitled to a merit review in this case.⁵

CONCLUSION

Appellant was not entitled to a merit review since he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2008 is affirmed.

Issued: December 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁵ L.C., 58 ECAB ____ (Docket No. 06-1928, issued May 31, 2007).