

partial medial meniscectomy of the right knee which was performed on October 29, 1984, and a total left knee replacement which was performed on December 17, 1992. Appellant did not return to work and retired on October 2, 1992.

Appellant filed two claims for schedule awards for the right and left lower extremities. In a report dated August 27, 1993, the Office medical adviser indicated that the date of maximum medical improvement with respect to the right knee was June 27, 1990. He advised that appellant sustained a 50 percent impairment of the right lower extremity. In a report dated August 27, 1993, the Office medical adviser indicated that the date of maximum medical improvement with respect to the left knee was November 30, 1992. He advised that appellant sustained a 46 percent impairment of the left lower extremity.

In decision dated April 29, 1993, appellant was granted a schedule award for 50 percent permanent impairment of the right leg. The period of the award was from June 27, 1990 to March 30, 1993. In a decision dated September 14, 1993, appellant was granted a schedule award for 46 percent impairment of the left lower extremity. The period of the award was from March 31, 1993 to October 14, 1995.

On March 26, 2001 appellant filed a Form CA-2a, notice of recurrence of disability, alleging that he developed a hip condition after his left knee replacement caused the left leg to be longer than his right leg. Appellant submitted a report from Dr. Sonam Kundeling, a Board-certified internist, dated December 6, 2000, who noted treating appellant for hematuria and a left renal cyst. Also submitted was a February 22, 2001 magnetic resonance imaging (MRI) scan which revealed avascular necrosis of the left femoral head. In a report dated August 29, 2001, Dr. Robert L. McRoberts, an attending Board-certified orthopedic surgeon, noted treating appellant for left hip pain due to an avascular necrosis of the proximal femur on the left side. He opined that there was no direct or indirect causal relationship between appellant's work-related injury and his current complaints involving his left hip.

The case record was referred to an Office's medical adviser who, in a report dated December 31, 2001, determined that there was insufficient evidence to find that appellant's left hip condition was related to or a consequence of the accepted injury in 1968.

In a decision dated January 11, 2002, the Office denied appellant's claim for a recurrence of disability on the grounds that the medical evidence failed to establish that it was causally related to the accepted 1968 injury.

On February 4, 2002 appellant requested an oral hearing before an Office hearing representative. The hearing was held on August 28, 2002. Appellant submitted an August 12, 2002 report from Dr. McRoberts, who diagnosed status post total hip replacement on the left, degenerative joint disease of the right knee, and status post total knee replacement on the left. In an October 1, 2002 report, Dr. Thomas G. Grace, a Board-certified orthopedist, who opined that appellant's left hip problem and the avascular necrosis which necessitated replacing his hip were unrelated to the problems appellant experienced with his knee and leg limp discrepancy. He noted that it was possible but not probable that appellant's knee problems may have aggravated his avascular necrosis of the hip.

In a November 22, 2002 decision, an Office hearing representative affirmed the Office decision dated January 11, 2002.

In a letter dated April 5, 2003 and received by the Office on April 9, 2003, appellant requested reconsideration of the November 22, 2002 decision. He noted that he believed his records had been mixed up with another claimant's because his birth date was incorrectly noted in the November 22, 2002 decision. He also indicated that the hearing officer advised him that he would not have a problem getting treatment for his right knee because he had an accepted condition with respect to that extremity.

In a decision dated January 14, 2004, the Office denied appellant's reconsideration request on the grounds that appellant had neither raised a substantive legal question or included new or relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ 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.”

20 C.F.R. § 10.606 states that an employee seeking reconsideration should send the application for reconsideration to the address as instructed in the final decision, and that the application must be submitted in writing and must set forth arguments and contain evidence that either shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.²

With regard to the contents of a request for reconsideration, the Office's procedure manual states: “While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested, and be accompanied by relevant new evidence or argument not considered previously.”³

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (June 2002).

The Office's procedure manual provides: "When a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review."⁴

ANALYSIS

In this case, the most recent merit decision is the Office's November 22, 2002 decision. Appellant requested reconsideration on April 5, 2003, which was received by the Office on April 9, 2003. The Office did not issue a decision on appellant's April 5, 2003 request for reconsideration until January 14, 2004, a delay of over nine months. As this was more than a 90-day delay, it jeopardized appellant's right to have the Board review the merits of his claim. The Office should have issued a decision on the merits of his claim in conformance with its procedures.⁵ The case therefore will be remanded to the Office for issuance of a decision on the merits of appellant's claim.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: September 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁴ *Id.*

⁵ *Carlos Tola*, 42 ECAB 337 (1991).