

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

D.H., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort McCoy, WI, Employer**

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**Docket No. 06-1641
Issued: October 12, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 12, 2006 appellant filed a timely appeal of a May 2, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated June 6, 2001, and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 9, 1982 appellant, then a 35-year-old painter, filed an occupational disease claim alleging that his duties as a painter contributed to his bilateral knee condition.¹ The Office accepted the claim for acceleration of avascular necrosis of the right hip, with bipolar end prosthetic replacement of the right hip in 1983 and revision of the total hip in 1988, depressive disorder and neurotic depression.² Appellant stopped work on November 19, 1982 and received appropriate compensation. On October 11, 1991 the Office granted a schedule award for 45 percent impairment of the right leg.

By letter dated July 3, 1999, appellant requested an increased schedule award and expansion of his claim to include a low back condition. In a May 27, 1999 report, Dr. Michael R. Treister, a Board-certified orthopedic surgeon, found that appellant had “almost no voluntary motion and almost no passive motion of the hip.” He noted that appellant “has long had problems with the lower back” which was “directly related to his hip problem” and opined that appellant would require revisions to his total hip arthroplasty and had a greater impairment than he received. Dr. Treister opined that appellant was totally disabled.

On October 15, 1999 Dr. R.H.N. Fielden, a Board-certified orthopedic surgeon and a second opinion physician, noted that appellant’s “examination was difficult because of his grossly exaggerated type of response patterns.” He advised that appellant’s avascular necrosis was not aggravated by work as it was a progressive disorder and would have continued regardless of appellant’s work. Dr. Fielden indicated that he could not fully assess if appellant had other back conditions because appellant could not perform the simplest of maneuvers despite no specific abnormality. He indicated that appellant had one objective finding, one leg was longer, and opined that this had contributed in some degree to his hip and groin discomfort. Dr. Fielden opined that appellant’s back complaints were not related to his hip condition and that the only special assist item that would be due to his hip replacement would be a raised toilet seat. He noted that, based on the total hip replacement, appellant had no limitations on excessive walking and climbing.

In a February 15, 2000 decision, the Office denied an increased schedule award and denied appellant’s request to expand the claim to include a consequential back condition. The Office also denied reimbursement for out of pocket expenses for housing modifications, with the exception of an elevated toilet seat. Appellant subsequently requested reconsideration. In an August 16, 2000 decision, the Office denied modification of its February 15, 2000 decision. Appellant requested reconsideration and submitted a December 7, 2000 report from Dr. Treister who opined that appellant was “status quo” with regard to his right hip. Dr. Treister opined that appellant’s need for a chair lift was unequivocally related to his hip problem and was a necessity for his activities of daily living. In a June 6, 2001 decision, the Office denied modification of its

¹ Appellant has several nonwork-related conditions such as lumbar degenerative disc disease, obesity, depression, alcohol abuse, chronic sinusitis and allergic rhinitis. He also had injuries from nonwork-related automobile accidents in 1982, 1983 and 1984.

² Appellant has other work-related injuries that include contusions to his left elbow, head, shoulder and right foot in claims that are closed and retired.

prior decisions. The Office also found that the evidence did not establish the need for requested support grab bars and a stairway power lift due to residuals of the accepted right hip condition.

In a January 8, 2004 letter, addressed to appellant's representative, the Office indicated that appellant's claim for a consequential back condition was formally denied by decision dated February 15, 2000. The Office also noted that additional medical development was needed to address appellant's claim that he now had a cervical spine condition as a result of his hip injury, and that a formal decision would be issued.

On January 8, 2004 the Office requested that appellant's treating physician, Dr. Janet E. Whirlow, a Board-certified orthopedic surgeon, provided additional information regarding appellant's conditions. On January 27, 2004 the letter to Dr. Whirlow was returned as undeliverable.

On January 28, 2004 appellant requested reconsideration. He alleged that his neck and back conditions were connected to his hip injury.

On February 9, 2004 the Office referred appellant to Dr. Paul S. Drinkwater, a Board-certified physiatrist for a second opinion. In a March 4, 2004 report, Dr. Drinkwater responded to Office questions and opined that appellant did not sustain a consequential neck condition that was directly the result of his accepted injuries and found that appellant was not capable of working. He stated that both work-related and nonwork-related factors prevented appellant from working. Dr. Drinkwater opined that appellant's low back condition was "at least partially related in my opinion to his hip." On March 25, 2004 the Office requested that Dr. Drinkwater clarify whether appellant could work part time or participate in vocational rehabilitation. On April 6, 2004 Dr. Drinkwater advised that appellant could work one or two hours per day.

By decision dated March 26, 2004, the Office denied appellant's request for reconsideration because it was not timely filed and failed to present clear evidence of error. On April 12, 2004 appellant requested reconsideration. He alleged that the Office erred in referring him to Drs. Fielden and Drinkwater.

By decision dated June 23, 2004, the Office denied appellant's claim for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error. The Office addressed the second opinion report of Dr. Drinkwater and appellant's arguments related to his examination with the physician.

On January 7, 2005 appellant requested reconsideration. He asserted that the Office did not timely provide him with Dr. Drinkwater's report, the Office withheld and covered up information to his claim and the Office was biased against him.

By decision dated March 8, 2005, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error. The Office also noted that there was no evidence on file to support that the Office erred with respect to the development pursued in his claim, and noted that Dr. Drinkwater provided appropriate information regarding his work capabilities. By letter dated March 15, 2005, the

Office advised appellant that, based upon the report of Dr. Drinkwater, he continued to be entitled to the same level of benefits that he was currently receiving.

In a September 30, 2005 letter, appellant reiterated previous contentions about his claim. In a letter dated October 25, 2005, the Office advised appellant that his only avenue of appeal related to the March 8, 2005 decision was an appeal to the Board.

On April 18, 2006 appellant requested reconsideration and generally asserted that the Office erred developing his claim. The Office also received copies of previously received medical reports and several new reports from Dr. Treister. In a July 17, 2005 report, Dr. Treister noted that it was highly likely that appellant would require another revision in the future to his total right hip arthroplasty and that he was totally disabled. The Office also received several reports from Dr. Whirlow which included an October 20, 2004 report in which she noted that appellant had no change in comparison to 2002 and that his left hip had moderate arthrosis. The Office received several reports from Dr. Jennifer Kalmer, a Board-certified physiatrist. These included a disability certificate diagnosing low back pain, lumbar stenosis, lumbar and degenerative disc disease and chronic neck pain. In reports dated August 16, November 21, 2005 and February 20, 2006, Dr. Kalmer diagnosed avascular necrosis of the right hip, status post revisions times two with chronic pain, cervical and spinal stenosis with degenerative disc disease, left shoulder impingement with evidence of a labral tear, chronic myofascial pain and hypertension which was stable. The Office received a February 11, 2005 functional capacity evaluation performed by a physical therapist and a June 23, 2005 letter from appellant requesting that the Office review Dr. Treister's treatment notes.

In a decision dated May 2, 2006, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ 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.”⁴

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

of discretionary authority granted the Office under section 8128(a).⁵ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office's decision for which review is sought.⁶ Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁸ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

In a February 15, 2000 decision, the Office denied appellant's claim for an increased schedule award and expansion of his claim for a consequential back condition. The Office also denied reimbursement for out of pocket expenses for housing modifications, with the exception of an elevated toilet seat. The Office denied modification of its February 15, 2000 decision on August 16, 2000 and June 6, 2001.

However, following issuance of the June 6, 2001 decision and after appellant's January 28, 2004 reconsideration request, the Office received additional medical evidence into the record and further developed the claim by referring appellant to Dr. Drinkwater for a second

⁵ *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.607(b).

⁸ *Steven J. Gundersen*, 53 ECAB 252, 254-55 (2001).

⁹ *Id.*

opinion. The Office's referral to Dr. Drinkwater occurred after the Office unsuccessfully sought further opinion from appellant's physician, Dr. Whirlow, regarding appellant's condition. Dr. Drinkwater's March 4, 2004 report found that appellant did not sustain a consequential neck condition due to his accepted injuries, that appellant was not capable of working and that other factors prevented appellant from working. He opined that the factors which prevented appellant from working included his "low back condition, which is at least partially related in my opinion to his hip," his neck condition, psychological status and "the fact that this gentleman has not worked since his original hip injury...." In response to the Office's March 25, 2004 request for clarification, Dr. Drinkwater advised that appellant could work one to two hours per day.

In referring appellant to Dr. Drinkwater, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is similar to *David F. Garner*,¹⁰ in which the Board found that, after reopening the merits of the employee's claim for further development, the Office abused its discretion in denying reconsideration under the clear evidence of error standard. Rather, the Board noted that the Office should have conducted a merit review of the claim. Following appellant's January 28, 2004 reconsideration request, the Office, as noted, advised appellant that it was further developing his claim by his referral to Dr. Drinkwater for a second opinion examination and opinion on one of the relevant points at issue, *i.e.*, on the issue of appellant's continuing entitlement to benefits, which included whether there were any objective findings to support work-related acceleration of avascular necrosis of the right hip, whether appellant's subsequent surgery continued to be symptomatic and causally related to his work injury of September 9, 1982 and whether appellant had continued residuals of the work-related injuries. As the record currently stands, the Office has not issued a merit decision evaluating the evidence it obtained from Dr. Drinkwater, the second opinion physician, or the additional medical evidence submitted by appellant during the development of his claim after June 6, 2001.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate merit review of the evidence under section 8128(a).¹¹ Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly found that appellant's reconsideration requests were untimely filed and did not present clear evidence of error.

¹⁰ 43 ECAB 459 (1992); *see also* Joyce A. Fasanello, 49 ECAB 490 (1998).

¹¹ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2006 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further proceedings consistent with this decision.

Issued: October 12, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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