



aggravation of degenerative arthritis of both hips, right greater than left. In a statement dated January 15, 2000, he indicated that his injury was a result of repetitive strenuous duties, including standing, lifting trays of mail weighing between 10 and 35 pounds, bending, twisting and kneeling. By letter dated September 1, 2000, the Office accepted appellant's claim for aggravation of degenerative arthritis, bilateral hips. On June 20, 2002 he underwent a total right hip replacement. Appropriate compensation and medical benefits were paid. On October 27, 2003 the Office issued a schedule award for a 60 percent bilateral impairment of both lower extremities.

In a medical report dated October 5, 2005, Dr. Jeffrey W. Martin, a Board-certified orthopedic surgeon, stated that appellant had reached maximum medical improvement with regard to his hip. He noted that his final diagnosis was right hip pain of uncertain etiology, with a secondary diagnosis of prosthetic right hip replacement. Dr. Martin noted that his permanent impairment to the extremity at the level of the right hip was 50 percent. On November 8, 2005 appellant filed another claim for a schedule award. In a report dated January 13, 2006, the Office medical adviser noted that Dr. Martin's evaluation did not conform to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 1991). It did not provide sufficient information for determining appellant's rating pursuant to the A.M.A., *Guides*. The Office medical adviser recommended that appellant be referred to a physician skilled in the application of the A.M.A., *Guides* for an impairment rating.

On February 1, 2006 the Office referred appellant to Dr. John A. Gragnani, a Board-certified physiatrist, for a second opinion examination. In a medical report dated February 16, 2006, Dr. Gragnani reviewed appellant's records, discussed his physical examination including his measurements and impairment ratings, and determined that appellant had a 50 percent impairment of the lower extremity for the right hip and a 5 percent impairment rating for the left lower hip pursuant to the A.M.A., *Guides*.<sup>2</sup> In a report dated March 6, 2006, the Office medical adviser noted that Dr. Gragnani's impairment ratings were acceptable based on the A.M.A., *Guides*.

By decision dated March 14, 2006, the Office determined that appellant was not entitled to any additional schedule award since the recent impairment rating was less than the impairment rating of the prior schedule award.

On March 14, 2007 appellant filed a request for reconsideration of the March 14, 2006 decision of the Office. He argued that he remained permanently disabled by a condition causally related to employment and that the Office improperly terminated his benefits. Appellant submitted a March 8, 2007 report from Dr. Martin, who stated:

“[Appellant's] exam[ination] today shows a healed scar without induration or swelling over his right hip. He has essentially supple ROM [range of motion] in both hips including 100 [degrees] flexion, 40 [degrees] abduction, 30 [degrees] internal rotation and 35 [degrees] external rotation. There is essentially no irritability during passive ROM testing. [Appellant] is able to perform a sustained straight leg raising and slight resistance on both sides though he does complain of

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<sup>2</sup> In making this determination, Dr. Gragnani utilized Tables 17-33 and 7-34 of the A.M.A., *Guides*.

discomfort during the maneuver bilaterally. He is mildly tender over the posterolateral trochanteric region bilaterally. [Lumbosacral] spine is nontender. Negative seated straight leg raising to 90 [degrees]. No atrophy of his extremities. Pedal pulses are 2+ [deep pulse] bilaterally. Gait is unremarkable.

“X-rays of [appellant] hips show an unremarkable appearing cementless [total hip replacement] on the right. On the left he has early degenerative superior joint space narrowing with sclerosis and small osteophytes.

“I had a long talk today with [appellant] concerning his hip complaints. I feel his left hip radiographically shows evidence of degenerative arthritis, but I do not see significant degree of worsening of the condition at least on x-ray since his last films. He also has no evidence for any abnormality structurally about his right hip prosthesis. Some degree of pain may be coming from bilateral trochanteric bursitis which is diagnosed on the basis of his localized tenderness. [Appellant] is aware this problem is not likely to worsen or ever become crippling in nature. The maximum treatment typically involves the use of mild analgesics, stretching, aquatherapy, heat/cold application and possibly massage or ultrasound. The problem is also expected to wax and wane over time. He was given a prescription today for [physical therapy] to include aquatherapy for stretching and strengthening in both hips.”

By decision dated April 6, 2007, the Office denied appellant’s request for reconsideration. The Office found that appellant failed to provide new and relevant evidence sufficient to warrant further merit review.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>3</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that 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.<sup>4</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

In support of his request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.<sup>6</sup> Appellant need only submit

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2) (2003).

<sup>5</sup> 20 C.F.R. § 10.608(b) (2003).

<sup>6</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

relevant, pertinent evidence not previously considered by the Office.<sup>7</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>8</sup>

### ANALYSIS

Appellant's claim was accepted for aggravation of degenerative arthritis, both hips. Compensation and medical benefits were paid. In a decision dated October 27, 2003, the Office issued a schedule award for a 60 percent bilateral impairment to appellant's lower extremities. On November 8, 2005 appellant filed another claim for a schedule award. Dr. Martin, appellant's treating physician, indicated in a report dated October 5, 2005 that he had an impairment of his right hip of 50 percent. As this report did not conform to the A.M.A., *Guides* the Office referred appellant to Dr. Gragnani for a second opinion and in a report dated February 16, 2006, Dr. Gragnani applied the A.M.A., *Guides* and determined that appellant had a 50 percent impairment of his right hip and a 5 percent impairment of his left hip. By decision dated March 14, 2006, the Office determined that appellant was not entitled to any additional schedule award since the impairment rating of Dr. Gragnani was less than the impairment noted in appellant's previous schedule award. On March 14, 2007 appellant requested reconsideration.

The underlying issue in this case is whether appellant has more than a 60 percent bilateral impairment to the lower extremities. In support of his request for reconsideration, appellant submitted a March 8, 2007 report from Dr. Martin. Although the physician listed findings regarding the right hip, he did not discuss appellant's impairment to either lower extremity. Rather, his comments were limited to a general discussion of appellant's complaints with regard to his right hip. As Dr. Martin never addressed the nature or extent of impairment, this report is irrelevant to the underlying issue. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.<sup>9</sup>

In his request for reconsideration before the Office and on appeal before the Board, appellant contends that the Office failed to establish that his disability had ceased or was no longer related to his employment. However, the March 14, 2006 decision from which appellant requested reconsideration is not a decision regarding the termination of benefits; it is a decision on appellant's schedule award. Accordingly, his argument is not on point. Therefore, appellant did not advance a relevant legal argument not previously considered by the Office nor did appellant show that the Office erroneously applied or interpreted a specific point of law. As he has not met any of the criteria for requiring merit review of his claim, the Office properly denied his request for reconsideration.

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<sup>7</sup> See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>8</sup> *Annette Louis*, 54 ECAB 783 (2003).

<sup>9</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 6, 2007 is affirmed.

Issued: April 1, 2008  
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