

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

D.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Denver, CO, Employer)

Docket No. 08-2209
Issued: September 3, 2009

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 7, 2008 appellant filed a timely appeal from a May 15, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As more than one year has elapsed between the filing of this appeal and the most recent merit decision, the Board lacks jurisdiction to review the merits of the case.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 15, 2008 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for further consideration of the merits of his case under 5 U.S.C. § 8128.

¹ 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On January 9, 2005 appellant, then a 53-year-old housekeeper aid, filed a recurrence of disability claim on December 26, 2005 causally related to an August 14, 2003 work injury. He related that when he “went to sit down in to the chair it moved and I went down.” On the reverse side of the claim form, appellant’s supervisor noted that he worked light duty due to a hip injury unrelated to his employment. In an accompanying statement, appellant attributed his condition to numerous falls while using a buffer on slippery floors. He further maintained that performing his work duties from 1980 to 2001 resulted in a hip condition.

On January 18, 2006 the Office noted that it was converting the notice of recurrence of disability into a claim for a traumatic injury. By decision dated September 6, 2006, it denied appellant’s claim on the grounds that he did not establish that he sustained a medical condition due to the accepted work incident.

In a statement dated February 21, 2007, appellant described in detail his duties as a housekeeping aid. He asserted that performing his work duties resulted in pressure on his right hip and required continual bending and twisting.

On February 22, 2007 appellant, through his attorney, requested reconsideration of the September 6, 2006 decision denying his “occupational injury claim for the right hip.” By decision dated May 22, 2007, the Office denied modification of its September 6, 2006 decision. It noted that appellant originally filed a recurrence of disability claim under file number xxxxxx964 which “was a short form closure case for an incident which occurred on August 14, 2003. This claim was never formally adjudicated thus there [were] no accepted conditions.” The Office found that appellant’s statement with the notice of recurrence of disability attributed his condition to repetitive falls but that on the form he described a specific injury occurring in December 2005. It stated, “These are two distinct allegations, one, a traumatic injury which occurred on December 20, 2005 and the other, an occupational condition which is attributed to work factors causing a condition over a period of time.” The Office found that appellant did not establish a traumatic injury on December 20, 2005 because the medical evidence was insufficient to show that he sustained an injury on that date when he fell from a chair that moved. It further determined that appellant did not establish an occupational disease claim because he did not establish as factual that he sustained multiple falls in the performance of duty.

On March 27, 2008 appellant, through his attorney, requested reconsideration. Counsel argued that the Office erred in failing to analyze whether work activities caused his right hip condition. He noted that appellant, in his January 9, 2006 statement, attributed his condition to using his right hip working with the buffer and numerous falls on slippery floors. Counsel related that the employing establishment did not dispute appellant’s description of his work duties. He maintained that the Office erred in failing “to consider the effect of these work activities, in conjunction with other evidence result[ed] in an occupational right-hip condition.” Counsel indicated that appellant did not report his falls to the employment establishment because

they were not separate traumatic injuries but instead were only significant as an aggravating factor in his occupational disease.

In a report dated February 19, 2008, Dr. Stewart K. Weirnerman, a Board-certified orthopedic surgeon, evaluated appellant for “long-standing osteoarthritis in his right hip.” He noted that he had treated appellant since 2001 for right hip arthritis.² Dr. Weirnerman found that appellant could not perform normal activities and recommended a total hip arthroplasty.

Appellant also resubmitted medical reports from Dr. Weirnerman dated May 19 and June 30, 2005, May 8 and September 21, 2006 and April 2, 2007 and witness statements dated January 13, 2006.

By decision dated May 15, 2008, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case for further review of the merits under section 8128. It found that the underlying issue was whether appellant had established that he sustained a traumatic injury occurring on December 20, 2005 in the performance of duty. The Office indicated that appellant could file an occupational disease claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,³ the Office’s regulations provide 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.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

ANALYSIS

The Office in its most recent merit decision dated May 22, 2007 found that appellant had not submitted medical evidence sufficient to establish that he sustained a traumatic injury on December 26, 2005. It further determined that appellant had not factually established that he

² Appellant also submitted a November 19, 2001 work restriction evaluation form from Dr. Weirnerman, who found that he could perform sedentary work eight hours per day.

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.”

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

experienced numerous falls at work from 1980 to 2001; consequently, the Office found that he failed to establish that he sustained an occupational disease of the right hip.

On February 22, 2007 appellant's attorney requested reconsideration. He argued that the Office erred in failing to consider appellant's allegation that the performance of his work duties from 1980 to 2001 resulted in a right hip condition. In denying appellant's request for reconsideration, the Office identified the underlying issue as whether he sustained a traumatic injury on December 26, 2005. In its prior merit decision of May 22, 2007, however, it considered his allegation that he sustained an occupational disease but found that he failed to factually establish that he sustained numerous falls in the course of his federal employment. Counsel argued on reconsideration that the Office should have considered appellant's contention that the performance of his work duties as a housekeeping aid over a 20-year period resulted in an occupational disease. His argument is new and relevant to the issue of whether the Office properly adjudicated appellant's occupational disease claim.⁷ Consequently, the Board finds that it improperly denied his request for review of the merits of the claim. The case will be remanded to the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 15, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁷ See *Gregory Apicos*, 51 ECAB 272 (2000).