

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

S.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Staten Island, NY, Employer**

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**Docket No. 11-342
Issued: October 27, 2011**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 23, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) decision dated August 30, 2010 which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year elapsed since the most recent merit decision dated September 19, 2007 to the filing of this appeal on November 23, 2010, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

¹ 5 U.S.C. § 8101 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. 20 C.F.R. 501.3(d)(2) (2008). An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2009).

ISSUE

The issue on appeal is whether OWCP properly determined that appellant's request for reconsideration dated August 17, 2010 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On February 2, 2005 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim alleging that on the same day he was lifting trays of mail and he felt his right hip snap. He stopped work on February 2, 2005 and did not return. OWCP accepted a right hip strain.³

Appellant came under the treatment of Dr. Daniel W. Wilen, a Board-certified orthopedist, from March 2 to October 14, 2005, for a work-related right hip injury. He reported that his right hip condition had progressed and he was unable to climb steps or to get into and out of his mail truck. Dr. Wilen diagnosed status post thoracic and lumbar spinal surgery, grade 1 spondylolisthesis at L5-S1 and degenerative changes of the right hip and opined that appellant was totally disabled from work.

In the course of developing the claim, OWCP referred appellant to a second opinion physician and also to an impartial medical examiner. In a September 8, 2006 report, Dr. Edward B. Krisiloff, a Board-certified orthopedist and impartial specialist, opined that appellant's right hip strain had resolved but that the accepted hip strain sustained on February 2, 2005 exacerbated the preexisting right hip arthritis osteoarthritis. He opined that appellant was totally disabled from work due to the right hip osteoarthritis.

On February 22, 2007 OWCP proposed to terminate compensation benefits on the grounds that Dr. Krisiloff's report established no residuals of the work-related right hip strain. Appellant submitted reports from Dr. Wilen dated February 23 to March 23, 2007, who diagnosed work-related injury to the right hip and opined that appellant was totally disabled.

By decision dated April 10, 2007, OWCP terminated appellant's compensation benefits for the accepted right hip strain effective April 15, 2007 on the grounds that the weight of the medical evidence as represented by the referee physician established that appellant had no continuing residuals of his accepted employment injury.

In an undated statement, appellant requested reconsideration. He submitted reports from Dr. Wilen dated May 8 and August 10, 2007. Dr. Wilen diagnosed degenerative joint disease of the right hip.

On August 26, 2007 an OWCP medical adviser opined that the diagnosed osteoarthritis of the right hip was aggravated by the November 6, 2000 work injury. He noted that the proposed right total hip arthroplasty should be authorized as work related.

³ Appellant filed a separate claim for a right hip injury sustained on November 2, 2000 which was accepted by OWCP for a right hip sprain, File No. xxxxxx687. This claim was consolidated with the current claim before the Board.

In a decision dated September 19, 2007, OWCP denied modification of the April 10, 2007 decision. On September 25, 2007 appellant requested reconsideration. He submitted reports from Dr. Wilen dated September 7 and October 5, 2007 who continued to treat appellant for right hip and lumbar pain.

By a decision dated March 6, 2008, OWCP denied appellant's reconsideration request on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

On March 27, 2008 appellant requested reconsideration. On June 6, 2008 appellant, through his attorney, withdrew his March 27, 2008 reconsideration request and requested his claim be referred back to the referee physician for a supplemental report addressing whether the proposed right hip arthroplasty was causally related to appellant's November 6, 2000 work injury.

In a decision dated June 19, 2008, OWCP expanded appellant's claim to include congenital dislocation of the right hip, unilateral osteoarthritis.

Appellant continued to submit reports from Dr. Wilen dated June 24 to August 1, 2008 who treated appellant for right hip and lower back pain. In reports dated June 24 and August 1, 2008, Dr. Wilen recommended a right hip replacement and opined that the surgery was the result of the work injury of February 2, 2005 and subsequent arthritis.

In a letter dated February 11, 2009, appellant requested that his benefits previously terminated be reinstated retroactively as his claim was expanded to include congenital dislocation of the right hip and unilateral osteoarthritis.

On September 30, 2009 OWCP expanded appellant's claim to include aggravation of localized primary osteoarthritis, pelvic region and thigh.

Appellant submitted reports from Dr. Wilen dated October 13 and November 3, 2009 who diagnosed right hip pain and recommended a right hip arthroplasty. In a December 22, 2009 attending physician's report, Dr. Wilen diagnosed work-related right hip and lumbar spine injury and noted with a checkmark "yes" that appellant's condition was caused by a work activity. He noted appellant was totally disabled.

Appellant came under the treatment of Dr. Alan J. Dayan, a Board-certified orthopedist, on November 18, 2009 who noted a history of appellant's February 2, 2005 work injury and subsequent treatment. Dr. Dayan diagnosed severe right hip osteoarthritis by history, aggravation from a work-related injury with progressive symptoms. He recommended a total right hip arthroplasty.

On December 10, 2009 OWCP authorized a right total hip arthroplasty.

On January 6, 2010 appellant filed a CA-7, claim for compensation, for total disability for the period April 15 to November 1, 2007. In a January 14, 2010 letter, OWCP noted that his medical and wage-loss compensation was terminated on April 15, 2007. OWCP indicated that appellant requested reconsideration and in decisions dated September 19, 2007 and March 6,

2008, his request was denied. OWCP instructed him to appeal the March 6, 2008 decision if he sought to reinstate his benefits.

In a letter dated January 27, 2010, appellant indicated that he requested reconsideration of the March 6, 2008 decision on March 27, 2008. He asserted that the termination of benefits was incorrect and noted that OWCP subsequently expanded his claim on June 19, 2008 and September 30, 2009. Appellant requested compensation for total disability for the period April 15 to November 1, 2007.

Appellant submitted medical records for a hospital admission from February 18 to 22, 2010, in which Dr. Dayan performed a total right hip arthroplasty. Also submitted were prescription slips for physical therapy from Dr. Dayan dated March 11, April 21 and May 25, 2010. Appellant submitted physical therapy notes from February to June 2010.

On August 17, 2010 appellant requested reconsideration of the March 6, 2008 decision. He requested compensation for total disability for the period April 15 to November 1, 2007. Appellant noted that his claim was expanded on June 19, 2008 to include dislocation of the hip and that he was entitled to compensation for the period claimed.

In an August 20, 2010 letter, OWCP acknowledged appellant's request for reconsideration of the March 6, 2008 OWCP decision and advised that the request was referred to a claims examiner. It advised that his claim was expanded to include congenital dislocation of the hip and aggravation of localized primary osteoarthritis, pelvic region and thigh, and that medical benefits were being paid.

In an August 30, 2010 decision, OWCP denied appellant's reconsideration request finding that the request was not timely filed within one year of the March 6, 2008 decision and did not present clear evidence of error.⁴

LEGAL PRECEDENT

Section 8128(a) of the FECA vests OWCP 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.”⁵

⁴ The Board notes that the March 6, 2008 decision is not a merit decision. The most recent adverse merit decision of OWCP is its September 19, 2007 decision.

⁵ 5 U.S.C. § 8128(a).

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that OWCP will not review a decision unless the application for review is filed within one year of the date of that decision.⁶ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of OWCP in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.⁷

ANALYSIS

In an April 10, 2007 decision, OWCP terminated appellant's compensation benefits for the accepted right hip strain effective April 15, 2007 on the grounds that the weight of the medical evidence as established by the referee physician established that appellant had no continuing residuals of his accepted employment injury. It denied modification of its April 10, 2007 decision on September 19, 2007.

However, following issuance of the April 10, 2007 decision, OWCP received additional medical evidence into the record and conducted further development on the merits of appellant's claim by referring his medical records to an OWCP medical adviser. On August 26, 2007 the medical adviser diagnosed osteoarthritis of the right hip aggravated by the November 6, 2000 work injury and opined that the proposed right total hip arthroplasty should be authorized as work related. Subsequently, on June 19, 2008 OWCP expanded appellant's claim to include congenital dislocation of the right hip, unilateral osteoarthritis. Similarly, on September 30, 2009 it accepted aggravation of localized primary osteoarthritis of the pelvic region and thigh and authorized a right total hip arthroplasty. Thereafter, in view of this additional development by OWCP and its acceptance of additional conditions, appellant further sought compensation for total disability for the period April 15 to November 1, 2007. Instead of acting on his claim for compensation, OWCP informed him that he had to appeal OWCP's nonmerit March 6, 2008 decision. It then found that the reconsideration request was untimely. The Board finds that this was error and that appellant is entitled to a merit decision on his claim for compensation in view of OWCP's additional development and acceptance of the claim and in view of appellant's filing of a claim for compensation following OWCP's development of the claim.⁸

⁶ 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

⁷ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

⁸ OWCP procedures provide that a formal decision is required in any case where the OWCP has received a Form CA-7, claiming compensation, and determined that the claim cannot be paid after appropriate development. These procedures also note that, if the case in its entirety (or the same period of compensation) has already been denied by formal decision, a new decision is not needed. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.2(a)(2) (March 1997). While, as noted, appellant's benefits were terminated on April 10, 2007, OWCP later chose to reopen the claim and accept additional medical conditions as being work related. Thus, the claim cannot be said to be denied in its entirety when appellant claimed compensation on January 6, 2010.

The Board notes that, in referring appellant's file to the OWCP medical adviser and accepting additional conditions as being work related, OWCP proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is similar to *David F. Garner*,⁹ in which the Board found that, after reopening the merits of the employee's claim for further development, OWCP abused its discretion in denying reconsideration under the clear evidence of error standard. Rather, the Board noted that OWCP should have conducted a merit review of the claim. Following the April 10, 2007 termination of appellant's benefits and his reconsideration request, OWCP, as noted, advised him that it was further developing his claim by his referral to an OWCP medical adviser for an opinion on one of the relevant points at issue, *i.e.*, on the issue of appellant's continuing entitlement to benefits and whether his diagnosed congenital dislocation of the right hip, unilateral osteoarthritis and aggravation of localized primary osteoarthritis of the pelvic region and thigh were work related. As the record currently stands, OWCP has not evaluated the evidence it obtained from OWCP's medical adviser, or reviewed the additional medical evidence submitted by appellant during the development of his claim after April 10, 2007 and issued a merit decision on appellant's request for total disability for the period April 15 to November 1, 2007.

Exercising its discretionary authority, OWCP solicited and received relevant pertinent evidence not previously considered. Therefore, it must conduct an appropriate merit review of the evidence under section 8128(a) and issue a decision on appellant's claim for compensation that was made in view of OWCP's development of the claim.¹⁰ Following such a review and any development which OWCP deems necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant's counsel asserts that OWCP's actions in expanding the claim and authorizing medical procedures represented a reversal of its decision terminating compensation benefits. As explained, the Board does not have jurisdiction over the merits of this claim. However, as noted, OWCP improperly treated appellant's claim for compensation as an untimely request for reconsideration and, upon return of the case record, it shall issue a merit decision regarding his claim for compensation.

CONCLUSION

The Board finds that OWCP improperly found that appellant's reconsideration request was untimely and did not present clear evidence of error.

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

¹⁰ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2010 decision of Office of Workers' Compensation Programs is reversed and the case remanded for further proceedings consistent with this decision.

Issued: October 27, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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