

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

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C.S., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Grand Rapids, MI, Employer )

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**Docket No. 07-669**

**Issued: November 7, 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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 16, 2007 appellant filed a timely appeal of a May 25, 2006 decision of the Office of Workers' Compensation Programs which denied merit review. Because more than one year has elapsed between the most recent merit decision dated September 22, 2005 and the filing of this appeal on January 16, 2007 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 denied appellant's request for reconsideration.

## **FACTUAL HISTORY**

On January 18, 2005 appellant, then a 39-year-old clerk, filed an occupational disease claim alleging that he developed a right hip condition while in the performance of duty.<sup>1</sup> He became aware of his condition on July 26, 2004. Appellant stopped work on January 18, 2005.

Appellant submitted a July 26, 2004 report from Dr. Don H. Powell, an osteopath, who treated him for low back and radicular pain in his buttocks and leg that developed when he was sorting mail and lifting packages at work. Dr. Powell diagnosed sudden onset of back pain. An October 14, 2004 nuclear medicine bone scan of the hips revealed abnormal activity in the right femoral neck region which may be attributed to bursitis, avascular necrosis of the femoral head or a stress reaction to an old injury. In a November 12, 2004 report, Dr. James R. Ellis, a Board-certified physiatrist, treated appellant for right hip pain. He noted that appellant had a work-related lifting injury in July 2004 which caused a resolved back injury. Dr. Ellis diagnosed right hip pain which preexisted the July 26, 2004 injury. Also submitted was a January 14, 2005 return to work slip from Dr. Gregory J. Golladay, a Board-certified orthopedic surgeon, who diagnosed bursitis and hip contusion.

Appellant submitted diagnostic test findings and reports from Dr. Golladay dated January 14 and February 11, 2005, who treated him for right hip pain which occurred after prolonged standing and twisting at his job. Dr. Golladay diagnosed right hip pain contusion, mechanical stress reaction on the femoral head, early osteoarthritis and trochanteric bursitis. Also submitted was a report from Dr. David Galluch, a Board-certified physiatrist, dated March 20, 2005, who diagnosed femoral neck stress reaction and noted that appellant's right hip pain had dramatically improved over the last month.

By decision dated June 16, 2005, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his claimed medical condition was caused by employment-related events.

Appellant requested reconsideration and submitted additional medical evidence. In May 27 and June 20, 2005 reports, Dr. Golladay noted right hip pain, in trochanteric bursitis and a stress injury to the femoral neck caused by an injury on July 26, 2004. He indicated that appellant's lumbar strain was directly related to twisting and bending at his job which caused an alteration in appellant's gait mechanics and was related to the stress syndrome that developed in his femoral neck and the underlying degenerative arthritis in the hip.

In a decision dated September 22, 2005, the Office denied modification of the June 16, 2005 decision.

In a letter dated March 9, 2006, appellant requested reconsideration. He submitted a report from Dr. Golladay, dated March 1, 2006, who opined that appellant's stress reaction in his hip was secondary to the alteration in his gait from his lumbar strain that occurred on

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<sup>1</sup> Appellant filed a claim for a lumbar injury occurring on July 26, 2004 which was accepted by the Office for a lumbar strain, claim number 09-2049438.

July 26, 2004. Dr. Golladay opined that the types of changes seen in appellant's femoral neck and on the bone scan could be related to an alteration and gait mechanics.

In a letter dated April 5, 2006, the Office informed Dr. Golladay that appellant filed a claim for a back injury sustained on July 26, 2004 which was accepted for lumbar strain. It indicated that appellant filed a separate occupational disease claim on January 18, 2005 for a hip condition which commenced on July 26, 2004 and was caused by repetitive work factors. The Office requested that Dr. Golladay address whether appellant's hip condition was caused by an altered gait he developed as a result of the July 26, 2004 traumatic injury or whether the condition was due to repetitive work factors and whether these conditions are resolved.

In a report dated May 9, 2006, Dr. Golladay diagnosed hip pain, hip joint effusion, stress reaction in the femoral neck and difficulty walking. He indicated that appellant's hip joint arthritis was separate, but probably aggravated by his lumbar strain and advised that he could not comment on appellant's gait because he had not examined him recently. Dr. Golladay indicated that on the last examination appellant complained of hip pain and noted that it was not unusual for an acute injury to unmask or exacerbate the symptoms of arthritis. He also provided a work restriction evaluation.

By decision dated May 25, 2006, the Office denied appellant's reconsideration request on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>3</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

### ANALYSIS

On September 22, 2005 the Office denied modification of appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant sustained a hip condition in the performance of duty. However, following issuance of the September 22, 2005 decision and after appellant's March 9, 2006 reconsideration request, the Office received additional medical evidence, specifically a report from Dr. Golladay dated March 1, 2006, and conducted further development of appellant's claim by requesting that Dr. Golladay address the cause of his hip condition. In so doing, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is analogous to *David F. Garner*,<sup>5</sup> in which the Board found that, after soliciting and receiving new evidence on reconsideration, the Office did not conduct a limited review of the case and that it erred in finding that the reconsideration request was untimely and did not establish clear evidence of error. The Board stated:

“Because the Office, in its own discretion, reopened appellant's case for a full merit review and further developed the case by soliciting additional medical and factual evidence from appellant, it cannot now deny appellant's reconsideration request using the clear evidence of error standard. Rather, the Office should have applied the abuse of discretion standard to grant or deny modification of its ... decision and then apprise appellant of his concomitant appeal rights.”<sup>6</sup>

In this case, appellant was notified by the Office on April 5, 2006 that it was further developing his claim by requesting that Dr. Golladay address whether his hip condition was caused by an altered gait he developed as a result of the July 26, 2004 traumatic injury or whether the condition was due to repetitive factors and whether these conditions were resolved. As the record currently stands, the Office has not issued a merit decision evaluating the evidence it solicited and obtained from Dr. Golladay. 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).

### CONCLUSION

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

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<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> 43 ECAB 459 (1992); *see also Joyce A. Fasanello*, 49 ECAB 490 (1998).

<sup>6</sup> *Id.* at 462.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 25, 2006 is set aside and the case remanded for further proceedings consistent with this decision.

Issued: November 7, 2007  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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