

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 29, 2004 appellant, then a 57-year-old logistics management specialist, filed a traumatic injury claim alleging that she was walking to her automobile on January 27, 2004 when she slipped on ice, fell on her rear and struck her head.<sup>2</sup> OWCP accepted the claim for back, face, scalp and neck contusions, but found the medical evidence insufficient to establish an employment-related left hip condition.

Appellant filed an occupational disease claim on September 15, 2006, alleging that she sustained severe left hip joint pain resulting from her temporary assignment in Germany.<sup>3</sup> She was stationed at Rhein-Main Air Base for the period April 27 to June 9, 2005 and that her job duties alternated during 8-to-12-hour shifts between sedentary computer work, lifting and frequent use of a manual transmission automobile. Appellant also routinely climbed five flights of stairs to her lodging facility. After her return, she was advised in July 2005 to obtain medical treatment at the employing establishment's occupational health center. Appellant was subsequently referred to physical therapy starting August 30, 2005. She noted that a physical therapy technician performed a maneuver "applying downward pressure on my left hip and leg while I was lying on a table with my right leg resting on his shoulder" on multiple occasions. Following the fourth session, appellant experienced considerable pain and, by September 18, 2005, was unable to ambulate without a cane. She underwent left hip replacement surgery on December 28, 2006.

On November 30, 2007 OWCP referred appellant for a second opinion examination to Dr. Rudolf A. Hofmann, a Board-certified orthopedic surgeon.<sup>4</sup> After reviewing the medical file and conducting a physical examination, Dr. Hofmann opined in a December 18, 2007 report that her diagnosed left hip osteoarthritis was not causally related to her temporary assignment in Germany.

By decision dated February 1, 2008, OWCP denied appellant's occupational disease claim, finding that Dr. Hofmann's report constituted the weight of the medical evidence.

On August 18, 2008 OWCP's hearing representative affirmed the February 1, 2008 decision following a June 3, 2008 telephonic hearing. She determined, however, that a formal decision was not made as to whether appellant's left hip condition was causally related to the accepted January 27, 2004 employment incident. OWCP's hearing representative ordered OWCP on remand to combine the claims, conduct further development as needed and issue a decision.

On September 9, 2008 appellant filed a second occupational disease claim, alleging that her left hip joint symptoms were exacerbated by five sessions of physical therapy, particularly

---

<sup>2</sup> OWCP File No. xxxxxx160.

<sup>3</sup> OWCP File No. xxxxxx470.

<sup>4</sup> OWCP denied appellant's occupational disease claim by decision dated December 28, 2006. On October 4, 2007 its hearing representative set aside the December 28, 2006 decision and remanded the case, finding the medical evidence sufficient to warrant further development.

the “manual hip extractions,” furnished by the employing establishment in September 2005. OWCP informed her in an October 7, 2008 letter that the new claim was an extension of the September 15, 2006 claim and that “[c]laiming ‘medical treatment’ is not a basis for filing a new claim.”<sup>5</sup>

On April 29, 2009 OWCP referred appellant for a second opinion examination to Dr. Pietro Seni, a Board-certified orthopedic surgeon. In a May 13, 2009 report, Dr. Seni reviewed the medical record, diagnosed femoroacetabular impingement of the left hip and concluded that the January 27, 2004 employment incident, which temporarily aggravated preexisting hip osteoarthritis, did not otherwise result in permanent damage.<sup>6</sup> He opined that appellant’s left hip arthroplasty was necessary due to the deterioration symptomatic of femoroacetabular impingement. Dr. Seni also diagnosed femoroacetabular impingement of the right hip, but ruled out any causal relationship to the January 27, 2004 incident.

By decisions dated December 15 and 18, 2009, OWCP accepted appellant’s claim for temporary aggravation of preexisting left hip osteoarthritis, but did not authorize bilateral hip replacements.

Appellant requested a review of the written record on January 14, 2010. She submitted a January 22, 2010 letter with attachments that contended, *inter alia*, that her September 9, 2008 occupational disease claim should have been addressed in the manner prescribed in Chapter 2.804.19(a) of OWCP’s procedure manual.<sup>7</sup>

By decision dated April 27, 2010, OWCP’s hearing representative affirmed the December 15 and 18, 2009 decisions. She also pointed out that OWCP correctly combined the September 15, 2006 and September 9, 2008 occupational disease claims as the latter was “not new.” OWCP’s hearing representative did not specifically address appellant’s argument regarding application of Chapter 2.804.19(a) of OWCP’s procedure manual.

On June 23, 2010 appellant requested reconsideration and reiterated her previous legal argument.<sup>8</sup> She asserted that her left hip condition was permanently aggravated by physical therapy at work in 2005 and that this necessitated her hip surgery. Appellant resubmitted her January 22, 2010 letter with attachments.

On August 4, 2010 OWCP denied the request on the basis that she did not present new evidence or legal contentions warranting further merit review.

---

<sup>5</sup> An October 30, 2009 letter from OWCP restated that “medical treatment is not work related.”

<sup>6</sup> Dr. Seni indicated that appellant brought five or six binders of unofficial documents for him to review during the visit. They also discussed the details of her case for over an hour. As a result, Dr. Seni was unable to conduct a physical examination.

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.19(a) (March 1994).

<sup>8</sup> Appellant also requested a second hearing before OWCP’s Branch of Hearings and Review on May 19, 2010, which was denied.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>9</sup> its regulations provide that the evidence or argument submitted by a claimant must either: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by it; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>10</sup> Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>11</sup>

## **ANALYSIS**

On reconsideration of the April 27, 2010 merit decision, as well as on oral argument before the Board, appellant argued that OWCP did not properly consider her September 9, 2008 occupational disease claim, which alleged that her left hip joint condition was aggravated by physical therapy furnished by the employing establishment in September 2005.<sup>12</sup> By decision dated August 4, 2010, OWCP refused to reopen the case for merit review on the grounds that she did not present new evidence or legal contentions.

On reconsideration appellant argued that OWCP erroneously applied or interpreted a specific point of law,<sup>13</sup> namely Chapter 2.804.19(a) of FECA Procedure Manual.<sup>14</sup> This provision states that an employee who participates voluntarily in an employing establishment's health service program is considered in the performance of duty on those occasions when such participation causes absence from regular duties for the specific purpose of obtaining the medical service offered by the employing establishment. Deleterious effects such as injury while undergoing periodic medical examination, reaction to agency-sponsored inoculation or disease contracted from instrumentation are compensable.<sup>15</sup> After appellant filed her September 9, 2008 occupational disease claim, OWCP mistakenly informed her on at least two occasions that she could not claim compensation for the deleterious effects resulting from her physical therapy. While she frequently asserted that its action contradicted the explicit terms of Chapter 2.804.19(a), OWCP never addressed the substance of the argument.

---

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> *E.K.*, Docket No. 09-1827 (issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

<sup>12</sup> Appellant also made numerous arguments with respect to OWCP decisions issued in 2006, 2007, 2008 and 2009. However, as noted, the Board only has jurisdiction to review the August 4, 2010 nonmerit decision.

<sup>13</sup> *See Charles A. Jackson*, 53 ECAB 671 (2002).

<sup>14</sup> *See supra* note 7. *See also E.S.*, Docket No. 10-1756 (issued April 1, 2011); *P.T.*, Docket No. 09-728 (issued December 11, 2009).

<sup>15</sup> *See supra* note 7.

The standard for reopening a claim for merit review does not require the claimant to submit all evidence that may be necessary to discharge her burden of proof.<sup>16</sup> Furthermore, a request for reconsideration predicated on a legal premise need only contain an assertion of an adequate legal premise having some reasonable color of validity.<sup>17</sup> In this case, appellant contended that OWCP erroneously applied or interpreted a specific point of law. The case shall be remanded to OWCP to conduct a merit review of the claim. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 4, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further merit review.

Issued: October 7, 2011  
Washington, DC

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

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

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

---

<sup>16</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>17</sup> See *Daniel O'Toole*, 1 ECAB 107 (1948).