

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

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**J.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Eatontown, NJ, Employer**

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**Docket No. 12-1830  
Issued: May 23, 2013**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 5, 2012 appellant, through her attorney, filed a timely appeal from an August 23, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the most recent merit decision dated January 5, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case<sup>1</sup> pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> An appeal of final adverse OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3(e).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 1, 2009 appellant, then a 56-year-old express clerk, filed a traumatic injury claim alleging that on that day she suffered intense pain in her hip/groin area over her right leg. She stated that the mail hamper wheels did not swivel/move as they were supposed to and the pressure she applied with her right leg to get the cart back into the “tight” set up caused the pulling, tearing feeling at the hip/groin area over her right leg. OWCP accepted the claim for right hip sprain. Appellant did not work from December 3, 2009 through January 3, 2010. She returned to full-time regular duty on January 4, 2010.

Appellant stopped work on June 15, 2010 and did not return. On June 20, 2010 she filed a recurrence claim alleging that her June 15, 2010 work stoppage was causally related to her December 1, 2009 work injury. In support of her claim of recurrence of disability, appellant submitted several reports from Dr. Michael J. Cunningham, a Board-certified orthopedic surgeon. In a June 15, 2010 report, Dr. Cunningham noted appellant’s history of injury and diagnosed right hip avascular necrosis, stage four. He did not offer an opinion regarding the cause of the avascular necrosis. Dr. Cunningham discussed continued conservative treatment and total hip replacement with appellant. On June 25, 2010 he requested authorization for total hip replacement. On August 30, 2010 OWCP also received a July 20, 2010 addendum report from Dr. Kimberly Atienza, an internist, who summarized appellant’s continued treatment for hip pain. Dr. Atienza concluded that following June 14, 2010 appellant’s hip pain recurred and she was no longer physically able to work.

By decision dated November 9, 2010, OWCP denied the recurrence claim as the factual and medical evidence were insufficient to establish that the claimed recurrence resulted from the accepted work injury.

On November 15, 2010 appellant requested a hearing, which was held March 31, 2011. At the hearing, she asserted that her avascular necrosis and right shoulder condition were attributable to her accepted hip injury. On June 5, 2011 appellant submitted a series of reports from Dr. Cunningham. In an August 10, 2010 report, Dr. Cunningham stated an impression of “probable avascular necrosis with severe degenerative changes of the right hip.” He did not provide an opinion regarding the cause of the conditions. On September 9 and 23, 2010 Dr. Cunningham noted an impression of “severe degenerative changes of the right hip, secondary to injury sustained on December 1, 2009.” On November 4, 2010 he noted an impression of “severe degenerative changes of the right hip, secondary to hip injury, including the sprain, which occurred on December 1, 2009 originally with a reinjury occurring on June 14, 2010, as previously described, as well.” Records from the Bayshore Community Hospital dated January 19, 2011 state that appellant underwent a total right hip replacement on January 19, 2011. Appellant’s postoperative diagnosis was stated as right hip osteoarthritis.

By decision dated June 28, 2011, an OWCP hearing representative affirmed the November 9, 2010 decision. The hearing representative found that appellant had not established that the necrotic hip condition was related to the December 1, 2009 work incident or that the medical evidence was sufficient to support that the accepted hip strain was the cause of her June 15, 2010 recurrence of disability.

On October 3, 2011 appellant's attorney requested reconsideration of the June 28, 2011 OWCP decision. He argued that Dr. Cunningham provided medical support to establish that the recurrence of injury beginning June 14, 2010 and appellant's subsequent right hip replacement surgery were directly related to the December 1, 2009 work injury. Counsel also contended that appellant aggravated her right shoulder condition as a result of her hip replacement surgery and rehabilitation. Additional progress reports from Dr. Cunningham were received. In a March 15, 2011 report, he related diagnoses of status post total right hip replacement, bilateral shoulder impingement and possible early mild right carpal tunnel symptoms. Dr. Cunningham did not offer any opinion regarding the cause of these conditions. On April 26, 2011 he noted an impression of "status-post right total hip replacement with some intermittent pain. Dr. Cunningham repeated the hip and shoulder diagnoses on May 10 and June 14, 2011, but again offered no opinion regarding the cause of these conditions.

In a narrative report dated October 10, 2011, Dr. Cunningham explained that he had been treating appellant for her right hip injury since June 15, 2010. At that time an x-ray evaluation performed in his office revealed severe degenerative changes of the right hip, consistent with avascular necrosis, stage four. Dr. Cunningham stated that he also reviewed an x-ray from the date of injury, December 1, 2009, which revealed some mild irregularity of the femoral head, which was consistent with an early collapse of the articular surface, consistent with early avascular necrosis. He concluded that, based upon these radiographic findings, appellant's accepted injury resulted in a severe exacerbation of a previously undiagnosed underlying condition, avascular necrosis of the right hip, which necessitated the right hip replacement.

By decision dated January 5, 2012, OWCP denied modification of the June 28, 2011 decision. It found that the medical evidence failed to establish that the claimed recurrence of disability of June 15, 2010 was related to the accepted injury of December 1, 2009 by proximate causation, precipitation, acceleration or aggravation. Specifically, OWCP found that Dr. Cunningham failed to provide a well-reasoned explanation as to how avascular necrosis of the right hip was aggravated by the December 1, 2009 employment incident and whether and how the accepted right hip sprain caused the claimed June 15, 2010 recurrence of disability.

On May 25, 2012 appellant, through counsel, requested reconsideration. He argued that Dr. Cunningham's report supported a causal relationship between appellant's right hip condition and surgery that was performed on January 19, 2011 and her December 1, 1999 work injury. Counsel further requested that OWCP expand the claim to include right shoulder and right carpal tunnel conditions as a result of stress put on the shoulder from appellant's altered gait, as discussed in Dr. Cunningham's report. Medical evidence previously of record was submitted along with January 5 and May 17, 2012 reports from Dr. Cunningham.

In the January 5, 2012 report, Dr. Cunningham related appellant's diagnoses as status post right hip replacement, chronic low back pain, rule out carpal tunnel syndrome and status post old right shoulder arthroscopy with recurrent impingement symptoms.

In his May 17, 2012 report, Dr. Cunningham noted that he first saw appellant on June 15, 2010 for complaints of right hip pain. He again related that he performed x-rays on that date which revealed stage four avascular necrosis with severe degenerative changes. Dr. Cunningham noted the history of appellant's December 1, 2009 work injury and indicated that, when he

evaluated x-rays taken on the date of injury, they revealed mild irregularity of the femoral head consistent with the earliest stages of avascular necrosis. He performed a total right hip replacement surgery on January 19, 2011. Dr. Cunningham noted her progress postoperatively including bilateral shoulder pain and mild flare of carpal tunnel syndrome as a result of the pain and walker usage related to the surgery. He diagnosed avascular necrosis of the right hip, with right hip strain; low back pain with right radiculopathy; carpal tunnel syndrome right wrist and right shoulder impingement syndrome. Dr. Cunningham opined that the work-related right hip strain exacerbated appellant's previous underlying hip pathology of avascular necrosis of the right hip and that the worsening of appellant's hip degeneration caused the recurrence of disability. He opined that appellant's low back pain, with right radiculopathy, was related to the work injury as a consequence of the stress from gait alteration, as a result of the injury and subsequent hip problems. Dr. Cunningham also opined that the carpal tunnel syndrome and right shoulder impingement syndrome, while preexisting, was also related to the injury as a result of stress due to chronic usage of assistive walking devices that were needed because of the altered gait as a result of the hip injury.

By decision dated August 23, 2012, OWCP denied appellant's request for reconsideration on the grounds that no substantive legal questions were raised and there was no new and relevant evidence submitted to support that the avascular necrosis and resultant hip replacement were causally related to the December 1, 2009 injury. It further found that her allegations about other diagnosed conditions (*i.e.*, back, shoulder and carpal tunnel conditions) which developed as a consequence of the avascular necrosis and hip replacement were not relevant as causal relationship had not been established for the avascular necrosis and hip replacement.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>3</sup> OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> To be entitled to a merit review of an OWCP 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.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

### **ANALYSIS**

Appellant disagreed with OWCP's January 5, 2012 decision which denied her recurrence of disability claim of June 15, 2010 and requested reconsideration. The issue presented on

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<sup>3</sup> Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>5</sup> *Id.* at § 10.607(a).

appeal is whether her May 25, 2012 request for reconsideration met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

In her May 25, 2012 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. While appellant advanced arguments regarding the expansion of her claim, the conditions claimed are a consequence of the avascular necrosis and hip replacement and thus would be relevant only if the avascular necrosis and hip replacement are causally related to the injury of December 1, 2009. Furthermore, she had previously asserted that the avascular necrosis, hip replacement and other nonaccepted conditions were due to her December 1, 2009 work injury.<sup>6</sup>

In the May 17, 2012 report, Dr. Cunningham, appellant's attending physician, discussed how the December 1, 2009 work injury caused the avascular necrosis which resulted in the hip replacement and subsequent development of the consequential conditions. He stated that the December 1, 2009 x-ray, which he evaluated at a later date, revealed mild irregularity of the femoral head, which was consistent with the earliest stages of avascular necrosis. Dr. Cunningham explained that appellant's conservative treatment following the work injury failed and, when he first saw her on June 15, 2010, the x-ray revealed stage four avascular necrosis with severe degenerative changes. He opined that the avascular necrosis of the right hip was an exacerbation of the previous underlying hip pathology, which had been asymptomatic and undiagnosed prior to her work-related right hip sprain. This report provided additional explanation on the issue of causal relationship of appellant's avascular necrosis and subsequent hip replacement. The report also discusses the how her other claimed conditions are a consequence of the avascular necrosis and hip replacement.

The Board has conducted a limited review of Dr. Cunningham's May 17, 2012 report and can find no similar explanation of the mechanism of injury. The rationale he provided in his May 17, 2012 report regarding the avascular necrosis of the right hip and hip replacement is new and relevant.<sup>7</sup> It directly addresses OWCP's previous finding that the medical evidence did not explain how the December 1, 2009 work injury caused appellant's avascular necrosis and subsequent hip replacement which resulted in additional condition.

To obtain a reopening of her case for a merit review, appellant need not submit evidence that cures all the deficiencies in her claim and establishes her entitlement to compensation.<sup>8</sup> She need only submit evidence that is relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> The Board finds that appellant has submitted such evidence and is therefore entitled

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<sup>6</sup> *Howard A. Williams*, 45 ECAB 853 (1994). Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case

<sup>7</sup> *See* Fed. R. Evid. 401 (relevant evidence means evidence having any tendency to make the existence of any fact that is of consequent to the determination of the action more probable or less probable than it would be without the evidence).

<sup>8</sup> *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>9</sup> *See* 20 C.F.R. § 10.606(b)(3)(iii). *See also Mark H. Dever*, 53 ECAB 710 (2002).

to a merit review of her case. The Board set aside OWCP's August 23, 2012 decision denying reconsideration and will remand the case for a merit review and *de novo* decision on her injury claim.

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's May 25, 2012 reconsideration request. Appellant is entitled to a merit review of her case.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 23, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action in conformance with this decision.

Issued: May 23, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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