



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant asserts that OWCP did not consider new legal arguments presented in her November 5, 2012 reconsideration request and that the decision was confusing with regards as to whether OWCP had reviewed evidence submitted by appellant.

## FACTUAL HISTORY

On September 20, 1979 appellant, then a 37-year-old operations analyst, was injured in a motor vehicle accident while she was on travel status in Clarksville, Tennessee. The claim was accepted for cervical and lumbar strains, a soft tissue injury of the left hip and aggravation of congenital dislocation of the left hip. In 1986, appellant underwent authorized left total hip replacement and in 1992 began employment as an attorney. She owned a private law firm from January 1993 until March 2003, when she underwent a second authorized left hip replacement procedure.<sup>4</sup> Appellant briefly returned to her law practice, until she closed it on September 30, 2004 and elected FECA benefits effective October 1, 2004. She has not returned to work.

OWCP continued to develop the claim and in July 2007 referred appellant to Dr. Carl W. Huff, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Thereafter, it determined that a conflict in medical evidence had been created regarding her work capacity and referred her to Dr. David St. Clair for an impartial evaluation.

In a January 2, 2008 report signed by Dr. D.S. St. Clair, the physician advised that the employment-related conditions had resolved and appellant could return to the operations analysis position and could also work as an attorney, as both were sedentary.

By decision dated July 24, 2008, OWCP found that the weight of the medical evidence rested with the opinion of Dr. St. Clair and terminated appellant's wage-loss compensation and medical benefits, effective August 3, 2008. Appellant began receiving Office of Personnel Management retirement benefits, effective August 3, 2008.

Following a December 16, 2008 hearing, in a March 12, 2009 decision an OWCP hearing representative affirmed the termination decision, but as appellant had subsequently submitted medical evidence regarding whether the authorized treatment for her left hip condition, including repeat surgeries, permanently altered the condition, the case was remanded to OWCP to obtain a supplemental report from Dr. St. Clair regarding whether appellant had continuing residuals due to aggravation of the preexisting left hip dislocation.<sup>5</sup>

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<sup>4</sup> In an October 9, 1998 decision, the Board affirmed OWCP's termination of further medical treatment in Phoenix, Arizona. The law and facts of the prior Board decision are incorporated herein by reference. Docket No. 96-1666.

<sup>5</sup> In that decision, the hearing representative noted that Dr. St. Clair had undergone gender reassignment surgery and that appellant questioned Dr. St. Clair's report based on the gender issue. Appellant acknowledged Dr. St. Clair's surgery at the December 16, 2008 hearing and noted that she was expecting to see a male doctor. Dr. St. Clair was now known as Dr. Deborah S. St. Clair, a Board-certified orthopedic surgeon.

On March 23, 2009 OWCP again referred appellant to Dr. St. Clair for examination. In an April 20, 2009 report, Dr. Deborah S. St. Clair noted that she again examined appellant. She advised that residuals remained as a consequence of treatment for appellant's congenital hip dislocation and indicated that appellant had numerous subjective complaints. In a July 6, 2009 decision, OWCP finalized the termination effective August 3, 2008.

Appellant requested a hearing, by form dated July 31, 2009.

Following a November 23, 2009 hearing, in a February 18, 2010 decision, OWCP's hearing representative found that the statement of accepted facts, the second-opinion examiner and the referee physician had not displayed knowledge of the fact that OWCP accepted the reparative hip surgeries as being causally related to the accepted September 20, 1979 employment injury. He remanded the case to OWCP to prepare an addendum to the statement of accepted facts and forward it to the referee physician to determine whether appellant had employment-related residuals and/or disability.<sup>6</sup>

On February 24, 2010 OWCP asked Dr. St. Clair to address whether appellant continued to have medical conditions causally related to the accepted employment injuries and/or surgeries and, if so, to address the period and extent of disability. In a report received by OWCP on March 24, 2010, Dr. St. Clair stated that, when appellant was examined on April 20, 2009, she had multiple sprains/strains and aggravation of spondylosis and nothing objective. She indicated that she could not connect any of appellant's current symptoms to the September 20, 1979 employment injury.

In a May 7, 2010 decision, OWCP found that the weight of the medical evidence rested with Dr. St. Clair and affirmed the termination of benefits effective August 3, 2008. Appellant requested a hearing. Following a November 3, 2010 hearing, OWCP's hearing representative affirmed the May 7, 2010 decision. Appellant requested reconsideration on May 31, 2011 and in a nonmerit decision dated July 12, 2011, OWCP denied her request. She requested reconsideration on September 20, 2011. In a merit decision dated November 14, 2011, OWCP denied modification of its prior decisions and found that the weight of the medical evidence rested with Dr. St. Clair.<sup>7</sup>

On November 5, 2012 appellant again requested reconsideration. She noted that the record indicated that Dr. David St. Clair had examined her in January 2008 and asserted that she had not been examined by Dr. David St. Clair and, as such, the termination should be reversed. She further asserted that the opinion of Dr. Deborah St. Clair did not provide sufficient explanation to carry the weight of the medical evidence. Appellant also submitted additional medical evidence including reports dated March 24, 2011 and June 26, 2012, in which Dr. Gulish described her symptoms of low back and left hip pain. Dr. Gulish provided physical examination findings and diagnosed status-post motor vehicle accident resulting in left total hip

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<sup>6</sup> The hearing representative noted considering a November 5, 2009 report from Dr. Lucius Wright, a Board-certified internist, whose report indicated that appellant had a continuing left hip condition causally related to her September 20, 1979 work injury.

<sup>7</sup> OWCP noted considering an August 25, 2011 report from Dr. Eugene F. Gulish, a Board-certified orthopedic surgeon, who noted the history of her September 20, 1979 work injury. Dr. Gulish opined that all of appellant's continuing symptoms had their origin in her work injury as she had essentially no symptoms before the work injury and had unabated pain and symptoms since that injury.

replacement, chronic pain and history of congenital hip dysplasia. He concluded that since appellant's symptoms had been continuous since her accident, they should be covered by workers' compensation.<sup>8</sup> In a July 10, 2012 report, Dr. Cameron Knight, a Board-certified orthopedic surgeon noted appellant's complaint of long-standing left hip pain. He provided physical examination findings and diagnosed joint pain, localized in the hip. A July 24, 2012 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated numerous degenerative changes from T1 to L5. In a September 21, 2012 report, Dr. Wright indicated that appellant suffered from closed dislocation of the hip with soft tissue aggravation that was accelerated by the employment injury and cervical and lumbar sprain. He advised that she could not work eight hours a day and could only work for 30 minutes at a time. Dr. Wright concluded that these conditions were permanent and that appellant would never regain full capacity of daily activities. Dr. John Miles, a Board-certified anesthesiologist, saw appellant in consultation on November 5, 2012. He reported complaints of low back and left hip pain and provided physical examination findings. Dr. Miles indicated that her back pain was due to the sacroiliac joint, facet joint arthropathy and degenerative disc disease and performed bilateral sacroiliac joint injections.

In a January 10, 2013 decision, OWCP denied merit review on the grounds that the evidence submitted was cumulative and repetitious and that appellant submitted no new relevant argument.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>9</sup> Section 10.608(a) of the Code of Federal Regulations (C.F.R.) provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>10</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

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<sup>8</sup> Dr. Gulish also discussed a recent right ankle injury in the June 26, 2012 report. Appellant also submitted a July 17, 2012 report signed by Marsha May, M.A. This is not probative evidence as reports from a physician's assistant are not considered medical evidence as a physician's assistant is not considered a physician under FECA. *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.608(a).

<sup>11</sup> *Id.* at § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.608(b).

## ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated January 10, 2013 denying appellant's application for review. Because more than one year had elapsed between the date of OWCP's most recent merit decision dated November 14, 2011 and the filing of this appeal with the Board on July 5, 2013, the Board lacks jurisdiction to review the merits of this claim.<sup>13</sup>

OWCP accepted that appellant sustained cervical and lumbar strains, a soft tissue injury of the left hip and aggravation of congenital dislocation of the left hip on September 20, 1979 when she was in an employment-related motor vehicle accident. It also authorized two hip replacement surgical procedures. On July 6, 2009 OWCP terminated appellant's wage-loss compensation and medical benefits, effective August 3, 2008. This was ultimately affirmed by an OWCP hearing representative on February 2, 2011. Following a reconsideration request by appellant, OWCP thereafter issued a decision on the merits of her claim on November 14, 2011.

Appellant again requested reconsideration on November 5, 2012. In that request and in her appeal to the Board, she raised arguments concerning the opinion of Dr. St. Clair. Appellant noted that the initial impartial evaluation on January 8, 2008 appeared to be signed by "David St. Clair" yet asserted that she was not examined by him. The Board finds that appellant's argument is repetitive as it had been addressed in OWCP's hearing representative's decision dated March 12, 2009. The record before the Board indicates that Dr. David St. Clair had gender reassignment surgery, and at the December 16, 2008 hearing, appellant acknowledged Dr. St. Clair's surgery and the hearing representative explained why that was not sufficient to disqualify her as the impartial medical specialist. Appellant thus has not advanced a legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>14</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted medical evidence with her November 5, 2012 reconsideration request. This included a July 24, 2012 MRI scan of the lumbar spine, reports from Dr. Gulish dated March 24, 2011 and June 26, 2012, a July 10, 2012 report from Dr. Knight, a September 21, 2012 report from Dr. Wright and a November 12, 2012 report from Dr. Miles.

The MRI scan study and the reports from Drs. Knight and Miles do not mention the employment injury or appellant's ability to work. This evidence is not relevant to the merit issue in this case, whether appellant has continuing employment-related disability, and is thus irrelevant and insufficient to warrant merit review.<sup>15</sup>

As to the reports from Dr. Gulish and Dr. Wright, both physicians had submitted evidence previously reviewed by OWCP. In a November 5, 2009 report, Dr. Wright discussed the cause of appellant's condition in a manner similar to that found in his September 21, 2012 report. Likewise, Dr. Gulish's March 24, 2011 and June 26, 2012 reports are similar to his

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<sup>13</sup> *Id.* at § 501.3(e).

<sup>14</sup> *Id.* at § 10.606(b)(2).

<sup>15</sup> *See K.S.*, Docket No. 08-2105 (issued February 11, 2009).

August 25, 2011 report that was previously reviewed by OWCP. The Board has long held that evidence that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>16</sup> Thus, these new reports from Drs. Gulish and Wright are not relevant because they are repetitive. As appellant did not submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.<sup>17</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a merit review pursuant to section 8128(a) of FECA.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 10, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>17</sup> *Id.*