

FACTUAL HISTORY

On August 12, 2008 appellant, a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) for osteoarthritis in her right hip. She attributed her condition to employment tasks involving repetitive lifting, twisting and turning. Appellant first became aware of her condition on November 25, 2005 and realized that it was caused by her federal employment on August 4, 2008.

In support of her claim, appellant submitted several reports from her treating physician, Dr. Alisa Hideg, Board-certified in family medicine. In a report dated August 4, 2008, Dr. Hideg reviewed appellant's medical history, diagnosed right hip osteoarthritis and noted appellant's work restrictions. Regarding causal relationship, she stated: "The right hip osteoarthritis-arthrosis of [the] hip [716.956] is on a more probable than not basis related to [appellant's] prior on-the-job injuries at the [employing establishment]. It should therefore be covered by her work." In a report dated September 10, 2008, Dr. Hideg, after noting appellant's prior injuries, added an explanation regarding the cause of her right hip osteoarthritis, stating: "Repeated injuries have altered [appellant's] gait and limited her range of motion. This has resulted in premature wear and deterioration of her hip joint. It should therefore be covered by her work."

By decision dated September 26, 2008, the Office denied the claim because appellant had not demonstrated that the established employment factors caused a medically-diagnosed condition.

Appellant submitted reports signed by a physician's assistant, a note signed by a registered nurse, an unsigned report and a September 30, 2000 note, in which Dr. Leanne Rousseau, Board-certified in family medicine, diagnosed "work-related repetitive use injuries."

Appellant submitted an April 23, 2001 report in which Dr. Tom Kearney, a family physician, presented findings on examination and diagnosed right knee pain, a "clearly related residual of right thigh scarred hematoma/lipoma" peripheral neuropathy in her left upper extremity "suggestive of C6 radiculopathy, likely due to spondylolisthesis," and bilateral knee pain.

On May 8 and 18 and June 4, 2001 Dr. Gary Gleason, an orthopedist, diagnosed pain and swelling in appellant's left ankle and an asymmetrical edema in her lower left extremity.

In a subsequent note dated August 10, 2001, Dr. Kearney diagnosed left ankle sprain.

On November 30, 2001 Dr. Gordon Teel, a Board-certified diagnostic radiologist, reported that x-rays of appellant's left foot revealed a preexisting deformity of the proximal interphalangeal joint, while x-rays of her right foot were normal.

In an April 12, 2007 report (Form CA-20), Dr. Hideg diagnosed fasciitis and foot pain. By checkmark, she opined that appellant's condition was employment related.

In an October 6, 2008 note, Dr. Hideg reviewed appellant's history of injury, employment duties and stated:

“The right hip osteoarthritis -- ARTHRITIS OF THE HIP [716.95G] is on a more probable than not basis related to [appellant's] prior on-the-job injuries at the [employing establishment]. Repeated injuries have altered her gait and limited her range of motion. This has resulted in premature wear and deterioration of [appellant's] hip joint. It should therefore be covered by her work.”

However, Dr. Hideg also noted:

“[Appellant's] job duties include lifting heavy trays and tubs of mail, getting in and out of a mail truck that is over [two] feet off the ground and pushing large containers of mail. Each of these job duties causes wear and tear on the joints and hips, knees and back -- resulting in worsening osteoarthritis with time. This process is accelerated by each acute injury ... and by any change in normal body mechanics or gait caused by injuries.”

Appellant submitted a report (Form CA-17) bearing an illegible signature, unsigned treatment notes and a note signed by a physician's assistant.

In an April 18, 2008 note, Dr. John K. Shuster, a Board-certified orthopedic surgeon, presented findings on examination and diagnosed “probable right hip arthritis” and “possible spondylolisthesis.”

On December 10, 2008 Dr. Mark R. Varga, a physiatrist, presented findings on examination and diagnosed deep vein thrombosis prophylaxis and anemia.

Appellant submitted a December 10, 2008 report in which Dr. Donald E. Ellingsen, a Board-certified orthopedic surgeon, diagnosed right hip osteoarthritis.

On September 16, 2009 appellant, through her attorney, requested reconsideration.

By decision dated October 9, 2009, the Office denied appellant's reconsideration request without conducting a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations review provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he 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).

³ 20 C.F.R. § 10.606(b)(2).

terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

Appellant's reconsideration request did not demonstrate that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a merit review of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Most of the medical reports appellant submitted after the September 26, 2008 decision did not provide new and relevant evidence in support of appellant's right hip occupational injury claim. The Board notes that appellant submitted reports from a physician's assistant and a nurse. Reports prepared by physician's assistants and nurses do not constitute competent medical evidence as these health care professionals are not considered "physicians" under the Act. Furthermore, most of the medical reports, including those of Drs. Rousseau, Kearney, Gleason, Teal and Varga submitted to the record after September 26, 2008 did not address appellant's right hip condition, but rather pertained to other lower extremity conditions. While Drs. Shuster and Ellingsen did provide diagnoses pertinent to appellant's right hip condition, these reports did not address the underlying issue in this case, causal relationship.

However, appellant did submit new relevant and pertinent evidence supporting her claim and thus is entitled to merit review under the third enumerated ground.

In previous reports, Dr. Hideg stated that appellant's condition is "... more probable than not ... related to her prior on-the-job injuries at the [employing establishment]. Repeated injuries have altered her gait and limited her range of motion. This has resulted in premature wear and deterioration of her hip joint. It should therefore be covered by her work."⁶ However, in the October 6, 2008 report, submitted to the record after the September 26, 2008 decision, Dr. Hideg reviewed appellant's history of injuries, noted that these injuries had affected her gait and her ability to work in an ergonomically correct way and then added:

"Her job duties include lifting heavy trays and tubs of mail, getting in and out of a mail truck that is over 2 feet off the ground, and pushing large containers of mail. Each of these job duties causes wear and tear on the joints in the hips, knees and back -- resulting in worsening osteoarthritis with time. This process is accelerated by each acute injury (such as those listed above) and by any change in normal body mechanics or gait caused by injuries."

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ See *Leonard J.O. Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

This evidence was new, pertinent and relevant to the underlying issue of causal relationship, *i.e.*, whether the established employment factors caused a medically-diagnosed condition. Dr. Hildeg's prior reports did not provide this detailed analysis in support of causal relationship.

Since appellant submitted relevant and pertinent new evidence not previously considered by the Office, the Office improperly declined to reopen her case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that the Office improperly declined to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2009 decision of the Office of Workers' Compensation Programs is vacated and this case is remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: September 7, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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