

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 11, 2009 appellant, then a 51-year-old diagnostic radiologic technologist,⁴ filed an occupational disease claim⁵ alleging that he sustained right hip disease as a result of lifting and moving patients. In a November 11, 2009 narrative statement, he listed his work duties which included lifting and transporting patients weighing 90 to 400 pounds, pushing and pulling wheelchairs of various weights and sizes that contained patients, lifting equipment weighing 50 to 1,000 pounds, reaching, reaching overhead, bending, squatting, stooping and continuous walking, standing and sitting on hard floors. Appellant performed these activities 5 to 40 times a week.

In a December 16, 2009 letter, the employing establishment controverted appellant's claim, contending that the claimed employment duties did not cause his injury.

By decision dated February 16, 2010, OWCP denied appellant's claim, finding that he failed to submit any medical evidence establishing a causal relationship between his condition and established employment duties.

On February 25, 2010 appellant, through counsel, requested an oral hearing.

In medical reports dated January 23 and February 20, 2002, Dr. Michael P. Dohm, a Board-certified orthopedic surgeon, advised that appellant had right L5 spondylolysis, right hip capsulitis and iliopsoas tendinitis with left footballer's ankle and possibly capsulitis. Further evaluation was recommended to rule out a femoral hernia. Appellant was feeling much better a few weeks after receiving an iliopsoas injection.

A March 1, 2002 report from Dr. Mark C. Mountford, a Board-certified radiologist, indicated that he administered a successful steroid injection.

In an April 22, 2003 report, Dr. James E. Maclean, a Board-certified radiologist, stated that appellant received right hip steroid and marcaine injections.

Reports dated May 23, 2003 through March 12, 2008 from Dr. Jeffrey M. Nakano, a Board-certified orthopedic surgeon, advised that appellant had right hip symptoms secondary to

⁴ Appellant last worked for the employing establishment on December 9, 2006 and was placed off its rolls on February 12, 2007.

⁵ The Board has issued a decision regarding appellant's prior claim under File No. xxxxxx305 which OWCP accepted for displacement of a herniated disc at C6-7 and authorized an August 26, 2003 surgery. In a November 2, 2005 decision, the Board affirmed an OWCP decision dated September 28, 2004 which found that appellant received an overpayment in the amount of \$3,076.26 for which he was at fault. Docket No. 05-1090 (issued November 2, 2005). The cervical claim is not currently before the Board and will not be addressed in this appeal.

moderate degenerative changes. Appellant's symptoms may also have been caused by lumbar radiculopathy, meralgia paresthetica or increased activity. His ankle symptoms were secondary to anterior impingement. Dr. Nakano noted that appellant underwent right hip surface replacement and advised that a subsequent x-ray demonstrated a satisfactory appearance of the hip replacement.

In reports dated June 2, July 21 and August 28, 2006, Dr. Roy E. Erb, a Board-certified radiologist, stated that he successfully treated appellant's right hip degenerative joint disease, synovitis and pain with injections.

An unsigned report dated September 20, 2006 noted appellant's complaints of back, knee, hip and ankle pain. Appellant received an injection in his hip.

In reports dated September 21, 2006, Dr. Cynthia M. Kelly, a Board-certified orthopedic surgeon, advised that appellant had several right hip conditions, including degenerative disc disease secondary to avascular necrosis (AVN). On December 13, 2006 she performed right Birmingham hip arthroplasty with no complications to treat his right hip degenerative arthritis. In reports dated March 19 to June 22, 2010, Dr. Kelly stated that she performed left Birmingham hip arthroplasty to treat appellant's left hip pain. Appellant was doing well post surgery and could return to work at any point.

In a report dated November 15, 2006, Rhonda Haver, a physician's assistant, stated that appellant was scheduled to undergo total hip arthroplasty on December 13, 2006. Appellant would be off work for a minimum of three weeks followed by an evaluation to determine his ability to perform light-duty work.

Reports dated December 13, 2006 from Dr. Kim I. McMillin, a Board-certified radiologist, stated that x-rays of appellant's right hip showed right total hip arthroplasty.

Appellant submitted hospital laboratory tests results dated December 18, 2006.

In a December 20, 2006 note, W. Etenburn, a physician's assistant, stated that appellant was treated in a hospital emergency room for a headache and leg symptoms. Diagnostic test results were normal. Appellant's headache and leg symptoms had improved. In a January 25, 2007 report, B. Etenburn, a physician's assistant, advised that appellant was status post right hip resurface replacement. Appellant was unable to work for six weeks.

In a February 3, 2010 report, Dr. Christopher B. Ryan, a Board-certified physiatrist, obtained a history of appellant's right hip condition, medical treatment, employment background and physical activities. He reviewed appellant's description of his work duties at the employing establishment. Dr. Ryan listed his findings on physical examination and advised that appellant had right hip osteoarthritis. He opined that the diagnosed condition was causally related to appellant's work duties which accelerated the need for total hip arthroplasty. Dr. Ryan concluded that appellant had 21 percent impairment of the right lower extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a May 5, 2010 report, Dr. Barry A. Schoelch, a Board-certified radiologist, indicated that a left hip x-ray revealed no fracture, subluxation or dislocation with only minimal joint space

narrowing. Also, on May 5, 2010 Dr. Zubeir N. Jaffer, a Board-certified radiologist, obtained a history that appellant had undergone left hip resurfacing. He stated that a left hip x-ray demonstrated postsurgical changes with skin staples and a surgical drain.

A document dated May 20, 2010 listed appellant's medications. A February 23, 2010 information sheet listed the policies of Rocky Mountain Orthopedic Associates.

In a September 14, 2010 decision, OWCP's hearing representative affirmed, as modified, the February 16, 2010 decision to reflect that appellant performed the physical requirements of his work duties for a lesser percentage of time than alleged. She, however, found that the medical evidence did not establish that his right hip condition was causally related to the established work duties.

By letter dated November 2, 2010, appellant, through counsel, requested reconsideration. He submitted duplicate copies of Dr. Dohm's January 23, 2002 report, Dr. Mountford's March 1, 2002 report, Dr. Nakano's May 23, 2003 to March 12, 2008 reports, Dr. Erb's June 2 to August 28, 2006 reports, the September 20, 2006 unsigned report, Dr. Kelly's September 21, 2006 to June 22, 2010 reports, Ms. Havre's November 15, 2006 report, Dr. McMillin's December 13, 2006 report, the December 20, 2006 through March 24, 2008 notes of W. Etenburn and B. Etenburn, the February 23, 2010 information sheet from Rocky Mountain Orthopedic Associates, Dr. Schoelch's and Dr. Jaffer's May 5, 2010 reports and the May 20, 2010 list of medications.

In a June 10, 2002 report, Dr. Larry D. Tice, a Board-certified neurosurgeon, advised that based on a computerized tomography scan, lumbar puncture, cerebral angiogram and magnetic resonance imaging (MRI) scan of the cervical spine and brain, appellant had subarachnoid hemorrhage suspect and headaches.

In an April 22, 2003 report, Dr. Maclean administered a steroid and marcaine injection into appellant's right hip. Also, on April 22, 2003 Dr. Randall H. Gehl, a Board-certified radiologist, advised that a cervical MRI scan demonstrated a slightly progressive right interforaminal disco-osteophytic bulge at C6-7.

In a September 13, 2006 note, Dr. Nakano advised that an MRI scan revealed that appellant had evidence of AVN.

In an October 21, 2010 report, Dr. Ryan reviewed appellant's medical records, including the notes of Dr. Dohm and Dr. Nakano regarding his worsening left ankle symptoms and right hip pain and again concluded that appellant's right hip condition and resultant surgery were employment related. He stated that it was well accepted that pressure over an osteoarthritic joint would accelerate the degeneration which occurred in appellant's case. Standing, walking, squatting and weighting the hip, such as transferring a patient or carrying heavy objects would accelerate the wear and tear of an osteoarthritic joint. Dr. Ryan opined that appellant's preexisting symptoms at least accelerated the degenerative process. If appellant had a normal hip then his described work duties would not necessarily contribute to his osteoarthritis. However, Dr. Ryan stated that, once a patient became symptomatic and the diagnosis of osteoarthritis was suggested, activities, such as those of appellant placed a greater load on his hip

joint, worsening the fissure and degenerating the articular cartilage. He advised that his left ankle pain was not work related. Dr. Ryan noted Dr. Dohm's finding that appellant's footballer's ankle was sustained during a karate exercise. Although this condition was not work related, appellant's right leg would be weighted to take the weight off his left ankle which would accelerate the wear and tear of his right hip, especially in performing his described work duties. Dr. Ryan stated that the pathology incurred was "microtrauma." The osteoarthritic cartilage became damaged and could not repair itself; and the wearing down process occurred faster than the body could rebuild the cartilage. Thus, Dr. Ryan concluded that the damage progressed to destroy the joint and the total joint arthroplasty was the only remedy.

In a December 14, 2010 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was duplicative and repetitious in nature and not relevant to the causal relation issue and, thus, insufficient to warrant a merit review of his claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA⁶ its 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.⁷ To be entitled to a merit review of OWCP's 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.⁸ 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

In a November 2, 2010 request for reconsideration, appellant disagreed with OWCP's hearing representative's September 14, 2010 decision, which found that he did not sustain a right hip condition causally related to the established work duties. On December 14, 2010 OWCP found that the evidence submitted by appellant was duplicative and repetitious in nature and not relevant to the causal relation issue and, therefore, was insufficient to warrant further merit review. In this regard, the Board finds that the resubmission of reports by Drs. Dohm, Mountford, Nakano, Erb, Kelly, McMillin, Schoelch and Jaffer do not warrant a merit review. As the Board has held, evidence which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.⁹

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(1)-(2).

⁸ *Id.* at § 10.607(a).

⁹ See *Eugene F. Butler*, 36 ECAB 393 (1984).

The reports of the physician's assistants do not constitute relevant and pertinent new evidence as physician's assistants are not physicians as defined in FECA.¹⁰ Similarly, the reports of diagnostic tests conducted by Drs. Tice, Gehl and Nakano are also irrelevant in that they do not address the threshold issue of the causal relationship between his alleged hip condition and factors of his federal employment.

Appellant also submitted Dr. Ryan's October 21, 2010 report. Although this evidence reiterated Dr. Ryan's February 3, 2010 opinion that appellant's right hip osteoarthritis and resultant surgery were due to his work duties, he provided medical rationale in support of his conclusion. This medical evidence explains the causal relationship between the established employment-related duties and the diagnosed condition and, thus, is relevant to the issue of whether OWCP properly denied appellant's claim for compensation. As such, Dr. Ryan's October 21, 2010 report constitutes relevant and pertinent new evidence not previously considered and is sufficient to require OWCP to reopen appellant's claim for consideration of the merits.¹¹ The Board finds, therefore, that OWCP improperly refused to reopen his case for further review of the merits.

To obtain merit review, appellant is not required to submit evidence sufficient to establish his claim. He need only provide evidence that is relevant and pertinent and not previously considered by OWCP.¹² Dr. Ryan's report meets these requirements. The case will, therefore, be remanded for consideration of his October 21, 2010 report. Following any further development of the issue, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a) in its December 14, 2010 decision.

¹⁰ 5 U.S.C. § 8101(2).

¹¹ *Id.* at § 10.606(b)(2).

¹² *Billy B. Scoles*, 57 ECAB 258 (2005).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: December 9, 2011
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