

FACTUAL HISTORY

On January 14, 2014 appellant, then a 58-year-old food service worker filed a traumatic injury claim alleging that on January 4, 2014 he experienced pain in his groin radiating into the right leg when he twisted his back while steering a food cart. He stopped work on January 4, 2014 and returned to work on January 6, 2014.

In an emergency room report dated January 4, 2014, Dr. Alex H. Cho, a Board-certified internist, discussed appellant's history of increasing back pain over the last nine months. He noted that appellant worked part time and that his duties "include[ed] pushing heavy food carts, which he states exacerbate his back, particularly when he has been working multiple days in a row." Dr. Cho diagnosed low back pain with paraspinal muscle spasm on the right extending to the gluteal and hamstring muscles.

On February 3, 2014 Dr. David Musante, a Board-certified orthopedic surgeon, diagnosed primary localized osteoarthritis and osteoarthritis of the pelvic region and thigh. He found that appellant could work in a seated position. On February 7, 2014 Dr. Brett Gilbert, a Board-certified orthopedic surgeon, diagnosed osteoarthritis of the pelvic region and thigh and primary localized osteoarthritis. He released appellant to sedentary employment pending surgery. Dr. Gilbert requested that OWCP authorize a right total hip arthroplasty.

By letter dated February 13, 2014, OWCP informed appellant that it had administratively approved the payment of limited medical expenses but was now going to formally adjudicate his claim based on his request for surgical authorization. It requested that he submit additional factual and medical information, including a narrative report from his attending physician addressing the relationship between a diagnosed condition and the identified work incident.

In a report dated February 3, 2014, received by OWCP on February 19, 2014, Dr. Musante discussed appellant's treatment on March 29, 2013 for a "March 2013" injury that resulted in a diagnosis of axial back pain and lumbar degenerative disc disease. He noted that appellant believed that his March 2013 injury was due to his employment but did not receive coverage under workers' compensation. Dr. Musante stated:

"[Appellant] has been living with the discomfort in his back ever since then, but nonetheless working. However, he reinjured his back on January 4, 2014 pushing a heavy object at work. It was a food cart. After that injury, [appellant] went to the emergency room. He says the pain is different than it was before. Previously when we saw [appellant], it was only back and right groin, but now the pain is going all the way down his right leg into his calf."

Dr. Musante diagnosed pain in the right groin and thigh, possibly due to right hip osteoarthritis instead of lumbar pathology. He reviewed x-rays which showed "severe end stage bone on bone osteoarthritis" and recommended a hip replacement.

On February 7, 2014 Dr. Gilbert evaluated appellant for a right hip replacement. He noted that he "had a work injury in March 2013 and a second work injury on January 4, 2014. Since then appellant has had debilitating pain in the right hip as well as groin and buttock pain."

Dr. Gilbert diagnosed end-stage arthritis of the right hip in a workers' compensation patient. He stated, "We did discuss the chronic nature of arthritis, but also the fact that appellant was pain-free prior to his injury by report. I feel this is an exacerbation of a chronic condition and should likely be covered under his [w]orkers' [c]ompensation claim." Dr. Gilbert noted that appellant had a remote history of a right tibia fracture with rod placement.

In a statement dated February 24, 2014, appellant attributed his need for a total hip replacement to OWCP's prior denial of his request in March 2013 for authorization for injections and physical therapy. He stated, "Five years of constantly banging the cart with my hip to release the [ReFirm] hot boxes from the wall has caused permanent damage to my right hip joint. Delivering the meals on the carts also requires twisting, pulling and pushing the carts through hallway traffic...." Appellant further related, "This work has caused permanent damage to my right hip joint and has exacerbated the initial pain (for which I requested payment from [OWCP] for an injection suggested by a physician) for this injury."

By decision dated April 11, 2014, OWCP denied appellant's claim on the grounds that the medical evidence was insufficient to show that he sustained a diagnosed condition causally related to the accepted January 4, 2014 work incident.

On April 22, 2014 appellant requested reconsideration. He questioned why OWCP did not discuss his 2013 injury² in its April 11, 2014 decision. Appellant noted that his pain radiated into his right leg and that he required a total right hip replacement.

By decision dated May 9, 2014, OWCP denied appellant's claim after finding that he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review under section 8128.

On appeal, appellant maintains that the workers' compensation specialist at the employing establishment directed him to see a physician's assistant even though she knew it would not be sufficient for his claim. He argues that Dr. Brett's February 9, 2014 report supports his traumatic injury claim. Appellant relates that he bumped ReFirm units to release them from the wall units for six years and pushed and pulled food carts weighing over 250 pounds.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the

² The record reveals that OWCP denied appellant's claim for an alleged injury sustained on March 4, 2013 in OWCP File No. xxxxxx498.

³ *Supra* note 1.

employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁷ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that he experienced a sharp groin pain radiating into his right leg on January 4, 2014 after pushing and steering a food cart. He has established that the January 4, 2014 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

The Board finds that appellant has not established that the January 4, 2014 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.⁹

On January 4, 2014 Dr. Cho evaluated appellant in the emergency room for complaints of back pain that had worsened over the past nine months. He noted that appellant related that pushing heavy food carts increased his back pain. Dr. Cho diagnosed low back pain with paraspinal muscle spasm on the right extending to the gluteal and hamstring muscles. He did not, however, address the cause of the low back pain with spasm. Medical evidence that does not offer any opinion on the cause of an employee’s opinion is of limited probative value on the issue of causal relationship.¹⁰ Additionally, Dr. Cho did not provide a clear diagnosis of a low

⁴ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁵ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁷ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁸ *Id.*

⁹ *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

¹⁰ *See Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

back condition but instead provided findings of low back pain with muscle spasms. A diagnosis of pain, however, does not constitute a basis for compensation.¹¹

On February 3, 2014 Dr. Musante discussed appellant's prior treatment for axial back pain and lumbar degenerative disc disease after a March 3, 2013 injury. He experienced pain after that injury but was able to work until he pushed a heavy food cart at work on January 4, 2014. Appellant indicated that the pain now extended from his groin into his right leg. Dr. Musante found that x-rays revealed end-stage bone on bone osteoarthritis and recommended a hip replacement. In a disability certificate dated February 3, 2014, he diagnosed primary localized osteoarthrosis and osteoarthritis of the pelvic region and thigh and found that appellant could perform sedentary employment. Dr. Musante did not attribute the diagnosed conditions of osteoarthrosis and osteoarthritis of the pelvis and thigh directly to the January 4, 2014 employment incident. In order to establish a compensable work injury, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting causal relationship.¹² The opinion of the physician must be of reasonable medical certainty and explain the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. As Dr. Musante did not provide any causation finding, his report is of diminished probative value.¹³

In a report dated February 7, 2014, Dr. Gilbert indicated that appellant experienced work injuries in March 2013 and January 4, 2014 and now had severe pain in his right hip, groin and buttock. He diagnosed right hip end-stage arthritis. Dr. Gilbert noted that appellant had not had pain prior to his injury and opined that he had experienced an exacerbation of a chronic condition that should probably be accepted by workers' compensation. A medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁴ Further, the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.¹⁵ Dr. Gilbert did not provide any rationale for his finding that appellant aggravated a preexisting condition on January 4, 2014 and thus his opinion is of diminished probative value. Additionally, his finding that appellant's claim should probably be covered under workers' compensation is also couched in speculative terms and thus of little probative value.¹⁶

On appeal, appellant contends Dr. Gilbert's finding in his February 19, 2014 report that his condition should likely be covered under workers' compensation. As discussed, however,

¹¹ See *T.K.*, Docket No. 08-715 (issued September 23, 2008); *Robert Broome*, 55 ECAB 339 (2004).

¹² See *John M. Tornello*, 35 ECAB 234 (1983).

¹³ See *K.W.*, 59 ECAB 271 (2007).

¹⁴ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁵ See *D.E.*, 58 ECAB 448 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁶ *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

Dr. Gilbert's opinion is speculative and unrationalized and thus insufficient to meet his burden of proof.

Appellant additionally contends that the employing establishment sent him to a physician's assistant for a March 2013 injury. The relevant issue, however, is whether the medical evidence is sufficient to show that he sustained a traumatic injury on January 4, 2014.

On appeal, appellant also argues that he had to bump ReFirm units to release them from the wall for six years and push, pull and maneuver food carts weighing over 250 pounds. He notes that the employing establishment has now replaced the units with those that do not have to be physically bumped to release. In his February 24, 2014 statement to OWCP, appellant attributed his right hip condition to banging the food cart with his hip to release food boxes from a wall over the past five years. He further indicated that maneuvering the food cart to deliver the meals worsened his condition. Appellant's claim, consequently, may more properly be characterized as a claim for an occupational disease as it appears to have occurred over a period of time.¹⁷

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁸ 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.¹⁹ 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.²⁰ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.²¹

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²² The Board also has

¹⁷ An occupational disease or illness is a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q); *Ellen L. Noble*, 55 ECAB 530 (2004).

¹⁸ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

¹⁹ 20 C.F.R. § 10.606(b)(3).

²⁰ *Id.* at § 10.607(a).

²¹ *Id.* at § 10.608(b).

²² *See F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²³ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁴

ANALYSIS -- ISSUE 2

OWCP denied appellant's traumatic injury claim after finding that the medical evidence was insufficient to establish that he sustained a diagnosed condition causally related to the January 4, 2014 work incident. The issue is whether appellant's reconsideration request met at least one of the three standards for obtaining a merit review of his case. He did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. He contended that OWCP did not discuss his initial injury in 2013. Appellant further described his symptoms of pain into his right leg and his need for a total knee replacement. However, the underlying issue, which is whether he submitted sufficient medical evidence to establish that he sustained a traumatic injury on January 4, 2014, is medical in nature and can only be resolved through the submission of probative medical evidence from a physician.²⁵ Appellant's contentions are not relevant to the issue involved and thus insufficient to warrant reopening his case for merit review.²⁶ A claimant may be entitled to a merit review by submitting evidence that constitutes relevant and pertinent new evidence not previously considered by OWCP, but he submitted no evidence with his reconsideration request. Accordingly, the Board finds that appellant's reconsideration request met none of the standards for reopening his case.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on January 4, 2014 in the performance of duty. The Board further finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under section 8128.

²³ See *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁴ See *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

²⁵ See *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

²⁶ See *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002) (evidence that does not address the particular issue involved does not warrant reopening a case for merit review).

ORDER

IT IS HEREBY ORDERED THAT the May 9 and April 11, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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