

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

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**S.O., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Belton, MO, Employer**

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**Docket No. 15-1199  
Issued: August 25, 2015**

*Appearances:*  
*Pearson E. Dubar, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 5, 2015 appellant, through counsel, filed a timely appeal from a November 13, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from July 11, 2013 the date of the most recent OWCP merit decision, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration without a merit review pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On November 25, 2009 appellant, then a 53-year-old clerk, filed a traumatic injury claim alleging that he sustained a hip injury after he tripped and fell on a pallet jack at work. OWCP

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

accepted the claim for left hip sprain and later expanded the claim to include closed trochanteric fracture. Following the injury, appellant accepted a modified-duty position on November 30, 2009.

Initial medical reports diagnosed left hip strain and an avulsion fracture of the lesser trochanter medially. Diagnostic tests also revealed a possible bone tumor which later was discovered to be non-Hodgkin's lymphoma. In a December 18, 2009 disability status report, Dr. Doris Zhong, Board-certified in occupational medicine, advised that appellant was unable to work due to treatment for a left hip tumor. On December 24, 2009 appellant had an open biopsy and partial excision of bone from the left proximal femur, and on January 11, 2010 he had an en bloc resection of the proximal left femur secondary to lymphoma of the bone. Appellant also underwent chemotherapy. In a May 7, 2010 disability status report, Dr. Howard Rosenthal, a Board-certified orthopedic surgeon, advised that appellant was unable to work from December 14, 2009 until further notice due to hip replacement caused by a fracture.

On July 1, 2010 appellant filed a claim to buy back leave for the period January 26 to April 9, 2010. The employing establishment challenged the leave buy back arguing that it provided a modified-duty assignment which appellant worked until he was unable to work due to his cancer treatment.

In a September 7, 2010 report, Dr. David Williams, a Board-certified family medicine practitioner, advised that appellant was totally disabled from December 14, 2009 until August 2, 2010. He noted that appellant initially injured his left hip at work. Dr. Williams advised that it was later determined that appellant had a non-Hodgkin's lymphoma with a large osteolytic lesion in the left femur. He noted that appellant was treated with a radial resection of the proximal left femur with proximal femoral replacement arthroplasty and adjuvant chemotherapy. Dr. Williams opined that appellant's proximal femoral fracture was caused by his fall at work. He further opined that his proximal femoral replacement arthroplasty was necessary due to his femoral fracture.

By decision dated October 25, 2010, OWCP denied appellant's claim for compensation because the evidence did not establish that he was totally disabled from work as a result of the accepted condition.<sup>2</sup>

Appellant's attorney requested an oral hearing. A telephonic hearing took place on February 10, 2011. Counsel reiterated appellant's treatment history and argued that the femoral fracture was related to the work injury. Appellant also provided additional medical evidence. In a January 29, 2010 report, Dr. Rosenthal advised that appellant was two weeks post left proximal femur replacement due to a diffuse large cell lymphoma. He opined that he would not have needed proximal femoral replacement due to fracture if not for his cancer status.

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<sup>2</sup> OWCP also issued August 13 and 18, 2010 decisions that denied appellant's claim for compensation. In an August 24, 2010 letter, it informed appellant's attorney that these decisions were issued in error. OWCP also noted that it mistakenly processed duplicate Form CA-7's for leave buy back. The letter advised that OWCP would issue a new decision regarding appellant's request for leave buy back.

In a March 7, 2011 report, Dr. Rosenthal detailed appellant's treatment history. He opined that the popping sound that appellant heard as a result of his fall was the actual avulsion fracture of the lesser trochanter. Dr. Rosenthal noted that the lymphoma was certainly present prior to the injury, but the incident exacerbated his pain symptoms and produced the pathological fracture. He argued that given the extent of appellant's tumor there was no way to prophylactically fixate the remainder of femur as the tumor extended all the way up to the femoral head. Thus, a resection of the diseased bone and reconstruction with prosthesis was required. Dr. Rosenthal stated that the surgical procedures performed were due to the exacerbation of the pain as well as the avulsion fracture secondary to work.

By decision dated May 5, 2011, an OWCP hearing representative vacated the prior decision and remanded the case for review by an OWCP medical adviser with regard to whether appellant's fracture was caused by the work injury, whether his surgery was necessitated by the work injury, and whether his period of disability was related to the accepted injury.

On May 18, 2011 an OWCP medical adviser opined that the fracture, excluding any cancer impact, was work related. He stated that the left total hip replacement and chemotherapy were not needed because of the fracture. The medical adviser advised that the cancer treatment was needed because of the lymphoma which was not caused or aggravated by work factors. He noted that the fracture did not cause appellant to limp and would typically be treated nonsurgically. The medical adviser opined that appellant stopped work due to lymphoma treatment, the total hip replacement that was performed to manage the lymphoma, and chemotherapy.

By decision dated June 1, 2011, OWCP denied appellant's claim for compensation because medical evidence was insufficient to establish that his total disability from work was related to the work injury. On June 2, 2011 it expanded the claim to include trochanter fracture, but found that the left hip replacement and chemotherapy were not conditions resulting from the November 25, 2009 work incident.

Appellant, through his attorney, requested reconsideration on July 21, 2011. In a June 23, 2011 report, Dr. Rosenthal disagreed with OWCP's decision. He opined that a lesser trochanteric hip fracture in the face of an underlying neoplastic process such as lymphoma, renders the entire hip as an impending fracture which would require surgery. Dr. Rosenthal noted that given lymphoma within this area, hip pinning or fixation could not be performed as there was not enough good foundation of bone for securing the plate and screws that would be required. He agreed that the lymphoma caused the bone to be weakened resulting in the work injury, but noted that if a comorbidity of an underlying problem is exacerbated by any work-related activity, the entire situation is covered. Dr. Rosenthal stated that the fracture of the lesser trochanter required the proximal femur replacement total hip arthroplasty. He noted that this procedure alters a patient's gait and ability to perform activities required for the patient's job performance.

In a July 21, 2011 statement, counsel argued that, when a primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment. He argued that in this instance the work-related lesser trochanteric fracture was established and that therefore the subsequent progression of that

condition including the hip replacement surgery and chemotherapy remain compensable so long as they were not produced by an independent, nonindustrial cause.

On November 4, 2011 OWCP denied modification of its June 1, 2011 decision finding that the medical evidence was insufficient to establish that the disability for work was due to the accepted work injury.

By letter dated November 2, 2012, appellant, through his attorney, requested reconsideration. Counsel argued that appellant stopped work on December 14, 2009 when Dr. Rosenthal diagnosed a pathological fracture and avulsion of the lesser trochanter. He further noted that appellant did not begin treatment for lymphoma until February 5, 2010. Therefore, the proposition that appellant stopped work for his lymphoma treatment was incorrect. Counsel argued that the medical evidence showed that appellant could not work from December 14, 2009 until August 2, 2010 due to treatment for left hip avulsion fracture.

Appellant provided a May 22, 2012 report from Dr. Rosenthal who addressed appellant's disability. Dr. Rosenthal noted that once appellant's fracture was treated and repaired, he would have been able to ambulate with assistive devices at a limited weight-bearing status three months later. He advised that his treatment for lymphoma would extend this period of recuperation time and the use of ambulatory assistive devices would limit the ability to carry, push, pull, and climb as the crutches or walker must be utilized by both extremities.

By decision dated July 11, 2013, OWCP denied modification of its November 4, 2011 decision.

By letter dated July 9, 2014, appellant, through his attorney, requested reconsideration. Counsel argued that appellant stopped work on December 14, 2009 when Dr. Rosenthal assessed a pathological fracture and avulsion of the lesser trochanter. He noted that chemotherapy did not begin until February 5, 2010 and that the rationalized medical evidence showed that appellant missed work due to hip replacement surgery and not the chemotherapy. Counsel further argued that the primary injury was the work-related injury and that any natural consequences that flow from that injury are deemed to have arisen out of the employment. He also cited *Clinton K. Yingling* arguing:

“[W]here qualified opinions in a case involving cancer, heart disease or other disease of insecure or unknown etiology and the relative circumstances of the case strongly suggest a relationship of cause and effect, such factors may be relied upon to support a compensation award until medical science demonstrates with a greater degree of certainty that the disease cannot be so caused or aggravated.”<sup>3</sup>

By decision dated November 13, 2014, OWCP denied the request for reconsideration without a merit review. It noted that appellant's claim was denied for insufficient medical evidence. However, he submitted no relevant medical evidence with his request for reconsideration.

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<sup>3</sup> *Clinton K. Yingling*, 4 ECAB 529 (1952).

On appeal, counsel argued that appellant's disability from work was attributable to his hip replacement and not his chemotherapy treatment. He argued that appellant stopped work on December 14, 2009 due to the accepted fracture, yet did not begin chemotherapy until February 5, 2010. Counsel also argued that the medical evidence established that appellant's chemotherapy would not have prevented him from working. He noted that the medical evidence advised that appellant would have been able to ambulate with the assistive devices with limited weight bearing three months after surgery, but with treatment for lymphoma the period of recoupment was extended.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (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> Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without opening the case for a review of the merits.<sup>5</sup>

### **ANALYSIS**

In a July 11, 2013 merit decision, OWCP found that the medical evidence did not establish that the period of disability from December 14, 2009 to August 1, 2010 was caused by the accepted November 25, 2009 work injury. Appellant submitted a timely request for reconsideration which was denied on November 13, 2014 without a merit review.

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits. The underlying issue in this case is whether the period of disability from December 14, 2011 to August 1, 2010 was caused by the accepted November 25, 2009 work injury. This is a medical issue. OWCP's decisions informed appellant of the defects of his claim and particularly advised him of why the medical evidence was deficient. In his reconsideration request, counsel explained how the medical evidence established that the period of total disability was related to appellant's hip replacement. This argument is insufficient to reopen the case for reconsideration. The Board has held that a claimant's belief that the medical evidence supported causal relationship and his disagreement with OWCP's findings on the probative value of the medical evidence did not constitute a new and relevant legal argument sufficient to warrant merit review of the claim.<sup>6</sup> Similarly counsel cited *Clinton K. Yingling*<sup>7</sup> arguing that the relative circumstances of the case strongly suggested causal relationship and were sufficient to support a compensation award. This argument proffered from *Yingling* is misplaced and is

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<sup>4</sup> *E.K.*, Docket No. 09-1827 (issued April 27, 2010). See 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.606(b).

<sup>6</sup> See *P.J.*, Docket No. 13-376 (issued May 10, 2013); *James O. Johnson*, Docket No. 01-1090 (issued April 9, 2002).

<sup>7</sup> *Supra* note 3.

insufficient to reopen the case for merit consideration. Counsel is essentially asserting his belief that the medical evidence supported causal relationship and his disagreement with OWCP's findings on the probative value of the medical evidence. Furthermore, *Yingling* involved a situation where the Board had jurisdiction over the merits of the claim, unlike the present case. 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.<sup>8</sup>

Counsel also argued that appellant stopped work on December 14, 2009, yet did not begin treatment for lymphoma until February 5, 2010. He explained that this showed that appellant did not stop work to undergo treatment for lymphoma. Counsel also argued that the need for hip replacement surgery and chemotherapy were natural consequences that flowed from the injury. Therefore, such treatments should be deemed necessary as arising out of the employment. These arguments are insufficient to reopen the case for review of the merits because they are not relevant legal argument not previously considered by OWCP. These arguments were raised by counsel in his previous November 2, 2012 request for reconsideration.<sup>9</sup>

Furthermore, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law nor submitted relevant and pertinent new evidence. Because he failed to meet one of the standards enumerated under section 8128(a) of FECA, he was not entitled to further merit review of his claim.

On appeal counsel argued that the medical evidence submitted was sufficient to establish his claim. However, as noted, the Board does not have jurisdiction over the merits of the claim. Because appellant failed to meet any of the three regulatory criteria for reopening a claim, he was not entitled to further merit review of his claim.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits.

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<sup>8</sup> *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>9</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *J.P.*, 58 ECAB 289 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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