

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether OWCP abused its discretion by denying appellant's request for authorization of lumbar laminectomy and fusion surgery; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 6, 2014 appellant, then a 56-year-old supervisory transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on October 3, 2014 she sustained injuries to her knees and lower back when she tripped and fell down at work. She stopped work on the date of injury. On October 15, 2014 appellant accepted a limited-duty position effective October 13, 2014. OWCP accepted her claim for lumbar sprain and bilateral knee contusions. It paid appellant wage-loss compensation and medical benefits on the supplemental rolls as of December 11, 2014 and on the periodic rolls as of May 3, 2015.

Appellant was initially treated by Dr. James P. Sostak, a Board-certified orthopedic surgeon, who indicated in an October 8, 2014 examination note that on October 3, 2014 appellant twisted her lower back and experienced bilateral knee pain and swelling after she tripped and fell down at work. Dr. Sostak related that he had previously treated appellant for preexisting back issues, which required L5-S1 fusion surgery. Appellant informed him that her lower back still hurt from time to time, but it hurt more after the October 3, 2014 fall at work. Dr. Sostak conducted an examination and diagnosed bilateral knee contusions, right low back strain, and status post L5-S1 back surgery with fusion. He recommended that appellant remain off work for the rest of the week and return to work with restrictions on the following Monday.

Appellant received medical treatment from Dr. Steven Mather, a Board-certified orthopedic surgeon, who related in a March 9, 2015 examination note that appellant complained of low back and bilateral leg pain. Dr. Mather indicated that he had previously performed an L5-S1 fusion on appellant years ago and her condition had improved quite well. He described the October 3, 2014 employment injury and the medical treatment that appellant had received. Dr. Mather noted that a lumbar spine computerized tomography (CT) myelogram showed grade 1 spondylolisthesis at L4-5. Upon physical examination of appellant's back, Dr. Mather observed pain with both flexion and extension. Straight leg raise testing also showed moderate low back pain and ipsilateral thigh pain at 45 degrees. Dr. Mather diagnosed spondylolisthesis with severe spinal stenosis at the L4-5 level.

³ Appellant submitted new evidence following the December 12, 2016 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

In March 9, 10, and 16, 2015 treatment notes, Dr. Mather reported that appellant had L4-5 spondylolisthesis and spinal stenosis. He indicated that she needed laminectomy and lumbar fusion surgery at L4-5. Dr. Mather noted that appellant's condition was related to her October 3, 2014 employment injury.

D.S., a human resource specialist for the employing establishment, related in a March 19, 2015 letter that appellant had submitted documentation from Dr. Mather who recommended laminectomy and fusion surgery for appellant's spondylolisthesis and severe stenosis. She alleged that appellant's work-related injury may have aggravated a preexisting condition, but it would not have caused stenosis or spondylolisthesis. D.S. requested that OWCP schedule appellant for a second opinion examination.

On March 26, 2015 OWCP received appellant's request for surgical authorization for removal of L5-S1 hardware and minimally invasive fusion at L4-5 on the left side, with globus instrumentation and cages.

OWCP referred appellant's claim to Dr. Michael Hellman, an OWCP medical adviser and orthopedic surgeon, to determine whether the requested lumbar surgery was medically necessary to treat her October 3, 2014 employment injury. In a March 20, 2015 report, Dr. Hellman described the October 3, 2014 employment injury. He related that approximately five to six years ago appellant underwent L5-S1 fusion surgery for a nonwork-related injury. Dr. Hellman disagreed with Dr. Mather's opinion that appellant's fall at work caused spondylolisthesis at L4-5 and L3-4. He explained that it was more reasonable to conclude that appellant had degenerative spondylolisthesis that was temporarily aggravated by her fall. Dr. Hellman recommended that OWCP deny approval of the requested surgery.

By decision dated April 7, 2015, OWCP denied appellant's request for authorization of lumbar surgery based on Dr. Hellman's March 20, 2015 medical report.

In an April 17, 2015 letter, Dr. Mather indicated that he reviewed Dr. Hellman's March 20, 2015 report and disagreed with Dr. Hellman's opinion that appellant sustained a "temporary aggravation." He explained that appellant's lumbar CT myelogram showed a complete block at L4-5 and noted that she continued to experience back symptoms. Dr. Mather alleged that appellant required additional laminectomy fusion surgery.

On April 24, 2015 OWCP expanded acceptance of appellant's claim to include aggravation of lumbar spondylolisthesis.

OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative on April 27, 2015.

Appellant submitted medical reports dated October 7 to December 12, 2013 by Dr. Mather, who related appellant's complaints of progressive lower back pain and noted that she had an L5-S1 fusion three years ago. Dr. Mather provided physical examination findings and diagnosed spondylolisthesis at L4-5 with low back pain syndrome. In a December 12, 2013 report, he indicated that appellant would likely require extension of the fusion up to L4-5.

On June 8, 2015 OWCP referred the claim to Dr. David H. Garelick, an OWCP medical adviser and Board-certified orthopedic surgeon, to determine whether the requested lumbar surgery was medically necessary to treat her October 3, 2014 employment injury. In a June 15, 2015 report, Dr. Garelick related that appellant had a significant history of low back symptoms and had undergone a previous nonwork-related L5-S1 fusion approximately five to six years ago. He noted that he reviewed her medical records and pointed out that she had significant ongoing low back issues prior to the October 3, 2014 employment injury. Dr. Garelick further related that appellant's physician recommended extending her lumbar fusion to the L4-5 level almost one year before the October 3, 2014 employment injury. He recommended that OWCP not authorize low back surgery as appellant's low back condition for which surgery was contemplated was clearly preexisting.

By decision dated October 1, 2015, an OWCP hearing representative set aside the April 3, 2015 OWCP decision and remanded the case for further medical development. On remand, she directed OWCP to prepare a statement of accepted facts (SOAF) and refer appellant's claim, along with relevant medical records, to a second opinion examiner for an opinion on the causal relationship between the proposed lumbar surgery and the October 3, 2014 employment injury.

OWCP referred appellant's claim, along with the medical record and a SOAF, to Dr. M. Safwan Barakat, a Board-certified neurological surgeon and second opinion examiner, for examination and an opinion as to whether the requested lumbar fusion and laminotomy surgery was medically necessary to treat appellant's October 3, 2014 employment injury.

In a December 4, 2015 report, Dr. Barakat provided an accurate history of the October 3, 2014 employment incident and noted appellant's accepted conditions of lumbar sprain, bilateral knee contusions, and aggravation of lumbar spondylolisthesis at L4-5. He related that she underwent a previous lumbar fusion surgery at L5-S1 in 2009 for a nonwork-related lumbar condition. Dr. Barakat indicated that appellant currently complained of low back pain mainly in the midline and no radicular pain involving the lower extremities. Neurological examination of appellant's back revealed limited range of motion and localized tenderness in the lumbosacral area mainly in the midline. Dr. Barakat reported that straight leg raise testing was negative bilaterally. Deep tendon reflexes were positive in both knees and ankles. Dr. Barakat diagnosed degenerative changes in the lumbar spine, especially L3-4, L5 and status post fusion L5-S1.

Dr. Barakat opined that appellant sustained a temporary aggravation of the accepted lumbar spondylolisthesis at L4-5 and L5-S1 condition, which was related to the October 3, 2014 employment injury. He recommended that her condition be handled in a conservative manner, specifically a pain management program to alleviate her symptoms. Dr. Barakat noted that the aggravation of the spondylolisthesis had resolved, but appellant continued to suffer from low back pain syndrome, which should be treated conservatively. He reported that another surgical fusion would not resolve her back pain problems.

In a decision dated February 1, 2016, OWCP again denied appellant's request for authorization for lumbar surgery. It found that the weight of medical evidence rested with the December 4, 2015 report of Dr. Barakat, OWCP's second opinion examiner, who determined that appellant sustained a temporary aggravation of lumbar spondylolisthesis, which had

resolved, and that lumbar surgery was not medically necessary to address the effects of her October 3, 2014 employment injury.

OWCP received a February 1, 2016 report and note by Dr. Mather who related appellant's complaints of low back pain, bilateral leg paresthesias, and leg pain. Dr. Mather indicated that a lumbar x-ray examination taken that day showed a 9.6 millimeter (mm) spondylolisthesis at L4-5 and solid L5-S1 fusion. Upon physical examination of appellant's back, he observed fairly severe pain in the lower back radiating to the buttocks with extension and difficulty standing straight up again from a bent over position. Dr. Mather also reported decreased sensory in the left L5 distribution into the great toe as well as left lateral thigh. He diagnosed spondylolisthesis with spinal stenosis causing back and leg symptoms. Dr. Mather opined that appellant's spondylolisthesis was aggravated by the October 3, 2014 employment injury and clearly required an L4-5 laminectomy and lumbar fusion surgery.

A February 1, 2016 lumbar spine x-ray examination report by Dr. Mather revealed a 9.6 mm spondylolisthesis and solid L5-S1 fusion. He noted that a lumbar CT myelogram also showed a complete block at L4-5.

In a February 8, 2016 letter, Dr. Mather indicated that he disagreed with Dr. Barakat's opinion. He related that appellant's lumbar CT myelogram showed a complete block at L4-5 and a grossly unstable spine with a 9.6 mm spondylolisthesis far in excess of what is normally seen in spondylolisthesis. Dr. Mather explained that the complete block on the myelogram clearly indicated that she did not suffer a temporary aggravation. He alleged that the lumbar CT scan was more than adequate objective evidence that appellant had significant neurologic compression in her spine secondary to the October 3, 2014 fall. Dr. Mather reported that there was overwhelming evidence that she had nerve root compression in her spine causing back and radicular complaints that were caused, not aggravated, by her slip and fall.

On February 11, 2016 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative.

Appellant underwent an unauthorized lumbar fusion and laminotomy surgery by Dr. Mather on March 9, 2016.

Lumbar x-ray examination reports dated March 18 to August 8, 2016 by Dr. Mather showed good position of screws and cages at L4-5, along with posterolateral bone graft mass. He noted a completely solid fusion at L4-5.

In an August 8, 2016 office note, Dr. Mather related that appellant continued to have some achiness across the lower back and right neck and arm pain, but showed gradual improvement. Upon physical examination of appellant's lower back, he observed some pain with range of motion. Strength and sensory examination were normal. Dr. Mather reported that x-ray scan examination reports showed excellent solid fusion at L4-5. He diagnosed status post fusion with cervical radiculopathy.

Dr. Mather indicated in an August 26, 2016 office note that appellant continued to complain of neck and right arm pain and numbness. He noted that her overall physical examination remained unchanged. Dr. Mather reported that a cervical spine MRI scan showed

severe cervical stenosis at C5-6 and C6-7. He diagnosed cervical stenosis with right arm radiculopathy.

On September 6, 2016 a telephone hearing was held before an OWCP hearing representative. Counsel noted that appellant underwent lumbar fusion surgery on March 9, 2016 by Dr. Mather. Appellant indicated that prior to the surgery she experienced a lot of numbness in her left leg, a lot of tingling and numbness in her toes, and excruciating pain in her low back. She related that Dr. Mather informed her that he had never seen a nine mm drop in lumbar discs as bad as what she had. Appellant stated that she was still off work and had not sustained any other back injuries since 2014.

In a September 9, 2016 note, Dr. Mather explained that appellant's L4-5 lumbar fusion surgery was medically necessary as appellant had a gross unstable spondylolisthesis, demonstrated by preoperative flexion-extension films and CT and MRI scans. He indicated that a preoperative lumbar CT myelogram showed significant stenosis at L4-5. Dr. Mather reported that laminectomy and fusion were appropriate in the setting of spinal stenosis and spondylolisthesis. He noted that appellant's spondylolisthesis was nine mm as opposed to the normal three mm size. Dr. Mather explained that this finding also correlated with her back and leg pain.

Dr. Mather indicated in a September 19, 2016 examination note that appellant complained of radicular pain down her right arm. Upon physical examination, he reported positive Spurling maneuver and weakness of her right triceps. Dr. Mather indicated that a cervical spine MRI scan showed cervical kyphosis and stenosis at C5-6 and C7, especially with foraminal stenosis at C6-7 on the right. He diagnosed cervical stenosis.

In a September 26, 2016 letter, Dr. Mather indicated that appellant underwent lumbar surgery on March 9, 2016 for a nine mm L4-5 spondylolisthesis. He noted that she had a previous L5-S1 fusion six years prior and did exceedingly well from that operation. Dr. Mather related that appellant did not have any recurrent significant symptoms until an October 3, 2014 slip and fall injury at work. He explained that he had examined her on December 12, 2013, before the October 3, 2014 employment injury, and noted that a lumbar spine MRI scan showed spondylolisthesis at L4-5. Dr. Mather reported that they discussed extension of the fusion up to L4-5. He explained that appellant's spondylolisthesis worsened after the October 3, 2014 trip and fall at work and the condition measured nine mm, which was a definite indication for surgery. Dr. Mather related that he disagreed with Dr. Hellman's and Dr. Barakat's opinions that appellant sustained a temporary aggravation by her fall. He alleged that appellant's pain was significantly worse after the trip and fall and that her symptoms remained.

By decision dated October 17, 2016, an OWCP hearing representative affirmed the February 1, 2016 decision. She found that the medical evidence of record was insufficient to establish that appellant's lumbar surgery was medically necessary to treat her October 3, 2014 employment injury. The hearing representative determined that the weight of medical opinion evidence rested with Dr. Barakat, the second opinion examiner, and Dr. Garelick, OWCP's medical adviser, who determined that the medical evidence of record was insufficient to establish that the requested surgery was medically necessary to treat appellant's October 3, 2014 employment injury, and not her preexisting lumbar condition.

OWCP received an October 17, 2016 examination note by Dr. Mather who related appellant's complaints of bilateral lower back pain. Upon physical examination, he reported that she struggled to get out of a chair because of complaints of lower back pain. Dr. Mather indicated that appellant complained of pain with flexion or extension of the lumbar spine, which markedly limited her lumbar range of motion. He related that lumbar spine x-ray examination reports showed a completely solid fusion of L4-S1 with hardware. An October 17, 2016 lumbar x-ray examination report by Dr. Mather showed a completely solid fusion of L4-S1 with hardware.

On November 30, 2016 appellant, through counsel, requested reconsideration. He related that he was submitting Dr. Mather's September 9 and 26, 2016 medical reports. Counsel resubmitted Dr. Mather's September 9 and 26, 2016 notes, which were previously received by OWCP.

By decision dated December 12, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim finding that her request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening in the amount of monthly compensation.⁴ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.⁵ OWCP has broad administrative discretion in choosing the means to achieve this goal.⁶ The only limitation on OWCP's authority is that of reasonableness.⁷

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁸

While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the

⁴ 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *W.T.*, Docket No. 08-812 (issued April 3, 2009); *A.O.*, Docket No. 08-580 (issued January 28, 2009).

⁶ *Vicky C. Randall*, 51 ECAB 357 (2000).

⁷ *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

⁸ *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

effects of an employment-related injury or condition.⁹ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁰ Therefore, in order to prove that the surgical procedure is warranted, the employee must submit medical evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted.¹¹ Both of these criteria must be met in order for OWCP to authorize payment.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that on October 3, 2014 appellant sustained a lumbar sprain, bilateral knee contusions, and aggravation of lumbar spondylolisthesis in the performance of duty. On March 26, 2015 it received her request for surgical authorization for laminectomy and lumbar fusion L4-5 surgery.

The Board finds that OWCP did not abuse its discretion in denying authorization for the requested surgical procedure.

While appellant's treating physician, Dr. Mather recommended the surgical procedure, his opinion was not well rationalized.¹³ In letters dated February 8 to September 26, 2016, he related that appellant had undergone L5-S1 lumbar fusion surgery six years prior and did not have any recurrent symptoms until the October 3, 2014 employment injury. Dr. Mather also related his current findings. However, he did not fully explain why he had recommended further L4-5 fusion in December 2013, if in fact appellant had no recurrent symptoms until the October 3, 2014 employment injury. Dr. Mather did not discuss in detail appellant's medical history prior to the October 3, 2014 employment injury sufficiently to provide a rationalized explanation as to why the surgery he recommended after October 3, 2014 was not for the same findings for which he recommended the surgery in December 2013. As such his report was not well rationalized.¹⁴

Appellant's request for authorization of the surgical procedure was initially reviewed by Dr. Hellman, acting as OWCP's medical adviser. Dr. Hellman related that appellant had a degenerative spondylolisthesis that was only temporarily aggravated by the October 3, 2014 employment trip and fall. He recommended that OWCP deny approval of the requested surgery.

In his December 4, 2015 second opinion report, Dr. Barakat accurately described the October 3, 2014 employment incident and related appellant's accepted conditions of lumbar

⁹ See *Debra S. King*, 44 ECAB 203, 209 (1992).

¹⁰ *Id.*; see also *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹¹ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

¹² See *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹³ *Supra* note 10.

¹⁴ See *L.B.*, Docket No. 16-092 (issued March 24, 2016).

sprain, bilateral knee contusions, and aggravation of lumbar spondylolisthesis at L4-5. He noted that she had previous lumbar fusion surgery for a nonwork-related lumbar condition. Dr. Barakat provided physical examination findings. He opined that appellant sustained a temporary aggravation of lumbar spondylolisthesis at L4-5 and L5-S1, which had now resolved. Dr. Barakat explained that her current low back pain and symptoms should be treated conservatively and did not require lumbar fusion surgery. He opined that another surgical fusion would not resolve appellant's back pain. The Board finds that reports from Dr. Hellman and Dr. Barakat explain why the requested surgery was for a degenerative condition not causally related to the accepted employment injury.¹⁵ As such they constitute the weight of the medical opinion evidence.

Based on the evidence of record, the Board finds that OWCP did not abuse its discretion in denying the proposed surgical procedure. As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.¹⁶ Absent sufficient explanation as to why the proposed surgery was causally related to the October 3, 2014 employment injury, the Board finds that OWCP acted reasonably in denying appellant's request for surgery.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁹

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁰ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²¹ If the request is timely but fails to meet at least one

¹⁵ See *supra* note 11.

¹⁶ *Supra* note 7.

¹⁷ See *W.T.*, Docket No. 14-1729 (issued June 9, 2015).

¹⁸ 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²⁰ *Id.* at § 10.607(a).

²¹ *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²²

ANALYSIS -- ISSUE 2

Appellant, through counsel, requested reconsideration on November 30, 2016 of OWCP's October 17, 2016 decision denying appellant's request for authorization of lumbar laminectomy and fusion.

The Board finds that appellant failed to show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered by OWCP.

In support of her request for reconsideration appellant resubmitted Dr. Mather's September 9 and 26, 2016 medical reports. These reports, however, had been submitted to OWCP prior to the October 17, 2016 decision and had been previously reviewed by OWCP. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²³ As the September 9 and 26, 2016 medical reports from Dr. Mather had been previously submitted to the record and considered by OWCP, these reports do not constitute relevant and pertinent new evidence.²⁴

The Board thus finds that appellant did not submit any relevant or pertinent new medical evidence with her request for reconsideration.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying authorization of appellant's request for lumbar laminectomy and fusion surgery. OWCP also properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

²² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²³ *James W. Scott*, 55 ECAB 606 (2004).

²⁴ *P.M.*, Docket No. 16-1841 (issued March 3, 2017).

ORDER

IT IS HEREBY ORDERED THAT the December 12 and October 17, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board