

FACTUAL HISTORY

On August 31, 2015 appellant, then a 62-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained right and left hip injuries caused or aggravated by his federal employment. He first became aware of his injuries on October 3, 2011 and realized their relationship to his work on April 14, 2015. In an accompanying narrative statement dated August 27, 2015, appellant provided a detailed description of his rural letter carrier work duties and listed sports activities he participated in during his formative years and as an adult. In October of 2011, he developed pain in his left knee area which he associated with his 2007 medial meniscus surgery.

Following an appointment regarding appellant's knee problem and x-rays Dr. John T. Lynn, II, a Board-certified orthopedic surgeon, informed appellant that his hips were causing his condition. In October 2011, appellant received a cortisone shot in his left hip. He related that it was not until December 15, 2014 diagnostic testing results, and appointments and consultations with Dr. Dennis G. Rork, a Board-certified family practitioner, and Dr. Akhilesh Sastry, a Board-certified orthopedic surgeon, that he became aware of the need for hip replacements. Appellant contended that he and Dr. Sastry believed that his work duties contributed to the development of his bilateral hip osteoarthritis and need for hip replacements.

In a June 24, 2015 medical report, Dr. Sastry noted that appellant was referred to him for treatment of bilateral hip pain. He examined appellant and diagnosed advanced osteoarthritis. Dr. Sastry recommended hip replacements since nonoperative treatments had been ineffective in controlling appellant's pain. Appellant related to him that he worked 37 years as a rural postal carrier for the employing establishment. His work duties included repeated heavy lifting, twisting, turning, stretching, bending, squatting, repetitive motions, high-impact activities, sedentary positions for long periods of time, and ascending and descending movements of the hips. Dr. Sastry opined that these activities contributed to the development of appellant's bilateral hip osteoarthritis and need for hip replacement surgery.

By letter dated September 22, 2015, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

In an October 3, 2011 report, Dr. Lynn noted appellant's complaint of left greater than right hip pain. He reviewed x-rays and diagnosed progressive arthritic change in the bilateral hips, left side worse. On November 7, 2011 Dr. Lynn reported a diagnosis of bilateral hip degenerative joint disease. He noted that appellant had received an intra-articular injection in the left hip which resulted in no pain in the hip.

An October 12, 2011 report from Lawrence O'Malley, a physician assistant, indicated that appellant received an intra-articular steroid injection in the left hip.

In reports dated February 1, 2012 to April 22, 2014, Dr. Jeffrey W. Wiley, an orthopedic surgeon, noted appellant's diagnosis of bilateral hip osteoarthritis, left greater than the right. He also noted appellant's history of difficulties with his left hip, more than the right hip. Dr. Wiley reported findings on physical and x-ray examination. He provided an assessment that he was

coping well with symptomatic management of the diagnosed condition. Dr. Wiley maintained that appellant would likely benefit from hip arthroplasty.

A left hip magnetic resonance imaging (MRI) scan report, obtained on December 15, 2014 by Dr. William Sherman, Jr. a Board-certified radiologist, provided an impression of moderate osteoarthritis. Dr. Sherman also provided an impression of a small zone of bone marrow edema associated with a subchondral cyst in the posterior aspect of the left femoral head. The areas of bone marrow edema were lessor in degree than in the contralateral right hip. There was also underlying labial degeneration. In a right hip MRI scan report dated December 15, 2014, Dr. Sherman provided an impression of moderate degenerative changes with associated reactive or degenerative zones of bone marrow edema. There was also a degenerative appearing tear of the acetabulum labrum.

In a December 1, 2015 decision, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record did not contain a rationalized medical opinion as to why his diagnosed condition was caused or aggravated by the established work factors and not by his sports activities.

In an appeal request form and letter received February 17, 2016, appellant, through his representative, requested reconsideration. The representative contended that appellant's accompanying statement clarified his outside activities. He also cited Board precedent and contended that it was unnecessary for the employment injury alone to have caused a condition. The representative noted that, if an employment factor contributed in any way to appellant's condition, such condition would be considered employment related for purposes of compensation under FECA.

In a February 11, 2016 statement, appellant noted that he had not participated in sports activities in over 40 years. He also noted that he had not run at any level in 10 years. Appellant maintained that he never had any injuries to his hips or sought medical treatment for them due to his outside activities.

Appellant resubmitted Dr. Wiley's April 22, 2014 report. He also submitted a November 26, 2007 report from Dr. Lynn who noted appellant's history of a left knee injury and surgery and a right groin injury. Dr. Lynn reported findings on physical examination and diagnosed status post arthroscopic partial medial meniscectomy and probable right adductor strain. On February 22, 2010 he noted appellant's chief complaint of left greater than right knee pain and right groin pain. Dr. Lynn provided findings on physical and x-ray examination and diagnosed arthritic change in the hips and knees left greater than right, old right hip adductor tendinitis strain, and probable left hamstring tendinitis.

In reports dated April 14 and August 25, 2015, Dr. Sastry noted appellant's complaint of bilateral hip pain and history of his medical, family, and social background. He provided findings on physical examination and reiterated his impression of bilateral hip osteoarthritis and recommendation for hip replacements. Dr. Sastry noted that appellant had developed advanced osteoarthritis in both hips and his right side symptoms were greater than his left side. He related that certainly being a postman for 30 plus years could have contributed to the advancement of arthritis. In a letter dated February 9, 2016, Dr. Sastry reviewed reports from Drs. Wiley, Lynn,

and Rork. He restated appellant's work duties and his opinion that these activities caused or contributed to appellant's bilateral hip osteoarthritis and need for surgery.

By decision dated May 11, 2016, OWCP denied further merit review of appellant's claim as the evidence submitted was cumulative or irrelevant and did not advance a relevant legal argument not previously considered or demonstrate legal error by OWCP.

In an appeal request form and letters received on July 13 and 25, 2016, appellant's representative requested reconsideration of the December 1, 2015 decision and submitted medical evidence. In a June 28, 2016 report, Dr. Sastry noted that osteoarthritis, often called "wear and tear arthritis," had occurred in this case in both hips after years of use. It resulted in deterioration of the cartilage that normally acted as a cushion between the bones that came together within hip joints where the top of the femur (ball) came together with the acetabulum (socket). Dr. Sastry related that, when the cartilage became worn at this juncture, the bones came into direct contact which caused pain due to the deterioration that had occurred. He restated that appellant had advanced osteoarthritis of the hips. Dr. Sastry noted his previous description of appellant's rural mail carrier work duties and maintained that there was no question these activities which appellant had performed for 37 years contributed to the diagnosis and need for hip replacement surgery. As he stated in his previous reports, he was aware of appellant's outside activities and still opined unequivocally that the noted physical requirements of appellant's job contributed to his diagnosis and need for surgery.

By decision dated September 16, 2016, OWCP denied appellant's request for reconsideration of the merits of the claim. It found that Dr. Sastry's June 28, 2016 report was cumulative in nature and substantially similar to evidence previously reviewed.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.² Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.⁴ Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.608(a).

⁴ *Id.* at § 10.606(b)(3).

⁵ *Id.* at § 10.608(b).

ANALYSIS

OWCP issued a December 1, 2015 decision denying appellant's occupational disease claim finding that the medical evidence of record did not contain a rationalized medical opinion explaining the causal relationship between the established employment factors and his diagnosed medical condition. On February 16 and July 13 and 25, 2016 appellant requested reconsideration of this decision. OWCP declined his requests for reconsideration in May 11 and September 16, 2016 nonmerit decisions.

The Board does not have jurisdiction over the December 1, 2015 merit decision and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue on reconsideration is medical in nature, whether the medical evidence establishes a causal relationship between his bilateral hip condition and established employment factors.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In the February 16, 2016 request for reconsideration, appellant's representative submitted a statement from appellant and contended that it clarified his outside activities. He also cited Board precedent on causal relationship and contribution. The Board finds that these assertions do not show a legal error by OWCP or constitute new and relevant legal argument. The Board notes that appellant did not make any assertions in support of his July 13 and 25, 2016 requests for reconsideration. The Board therefore finds that he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered in support of his February 16, 2016 request for reconsideration. Dr. Sastry's April 4 and August 25, 2015 reports reiterated that appellant had advanced bilateral hip osteoarthritis due to his rural letter carrier work duties as discussed in his prior June 24, 2015 report. Dr. Wiley's April 22, 2014 report was previously reviewed by OWCP in its December 1, 2015 decision. 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.⁶

Dr. Lynn's November 26, 2007 and February 22, 2010 reports found that appellant was status post arthroscopic partial medial meniscectomy and had arthritic change in the hips and knees left greater than right, old right hip adductor tendinitis strain, and probable left hamstring tendinitis. He did not provide an opinion as to whether the diagnosed conditions were caused or aggravated by the established employment factors. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁷

⁶ *James W. Scott*, 55 ECAB 606 (2004).

⁷ *D'Wayne Avila*, 57 ECAB 642 (2006).

The Board finds, therefore, that these reports of Drs. Sastry, Wiley, and Lynn are insufficient to warrant further merit review of the claim. The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) in his February 16, 2016 request for reconsideration. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

The Board finds, however, that appellant submitted relevant and pertinent new evidence not previously considered by OWCP in support of his July 13 and 25, 2016 requests for reconsideration. Appellant submitted a June 28, 2016 report from Dr. Sastry who opined that the established work duties contributed to appellant's advanced bilateral hip osteoarthritis and need for hip replacements. Dr. Sastry explained that years of use of appellant's hips while performing his rural mail carrier duties resulted in deterioration of the cartilage that normally acted as a cushion between the bones that came together within hip joints where the top of the femur ball came together with the acetabulum socket. He further explained that, when the cartilage became worn at this juncture, the bones came into direct contact, which caused pain due to the deterioration that had occurred. Although this evidence reiterated Dr. Sastry's June 24, 2015 opinion on causal relationship, his June 28, 2016 report provided greater medical rationale or reasoning, lacking in his previous reports, in support of his conclusion on causal relationship. This rationale directly addresses OWCP's previous finding that the medical evidence did not explain how the established work factors caused or aggravated appellant's current condition and, thus, is relevant to the issue of whether OWCP properly denied his claim for compensation.

The Board finds that Dr. Sastry's June 28, 2016 report constitutes relevant and pertinent new evidence not previously considered by OWCP and is sufficient to require OWCP to reopen appellant's claim for consideration of the merits.⁸ Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his burden of proof.⁹ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁰ On remand it shall conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's February 17, 2016 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board finds, however, that OWCP abused its discretion by denying his July 13 and 25, 2016 requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

⁸ 5 U.S.C. § 10.606(b)(3).

⁹ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board. The decision dated May 11, 2016 is affirmed.

Issued: March 17, 2017
Washington, DC

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

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

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