



## **FACTUAL HISTORY**

This case has been previously before the Board.<sup>3</sup> The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 31, 2015 appellant, then a 35-year-old sales and service distribution associate, injured both shoulders when a gate fell on her that date. On January 22, 2016 OWCP accepted the claim for concussion without loss of consciousness and sprain of the ligaments of the cervical and lumbar spine. It subsequently expanded the acceptance of appellant's claim to include cervical disc displacement, occipital-atlanto axial region, intervertebral disc displacement of the lumbosacral region, cervical and lumbar disc protrusions, postconcussion syndrome, migraine not intractable, post-traumatic seizures, and strain of the muscle fascia and tendon of the right hip. Appellant stopped work on March 31, 2015 and did not return.

In July 2016 Dr. Keith R. Johnson, a Board-certified orthopedic surgeon, began treating appellant. In an August 12, 2016 report, he diagnosed sprain of the cervical, thoracic, and lumbar ligaments, brachial plexus disorder, sciatica right side, and cervical and lumbar radiculopathy.<sup>4</sup> Dr. Johnson continued to treat appellant.

Additional medical evidence relevant to appellant's claimed right hip condition includes a March 22, 2016 second-opinion evaluation in which Dr. James E. Butler, III, a Board-certified orthopedic surgeon, noted her complaint of right hip pain. Physical examination findings included that hip muscle strength was normal. Dr. Butler diagnosed cervical and lumbar sprains and concussion without loss of consciousness. He advised that appellant could return to modified-duty work and needed no further orthopedic treatment.

On a June 5, 2017 treatment note, Dr. Johnson additionally noted appellant's complaint of right hip pain. He diagnosed unspecific sprain of the right hip. On a work capacity evaluation (Form OWCP-5c) dated August 8, 2017, Dr. Johnson advised that appellant did not have full range of motion of her hip. In undated correspondence, received by OWCP on September 6, 2017, he noted that her right hip bursa was tender to palpation. Dr. Johnson opined that additional conditions were caused by the March 31, 2015 employment injury, including right hip labral tear. In reports dated October 4, 2017, he noted appellant's complaint of constant right hip pain with difficulty bending, decreased range of motion, and a positive pincer sign. Dr. Johnson requested authorization for right hip diagnostic studies.

Dr. Gary D. Barham, also Board-certified in orthopedic surgery, completed a second-opinion evaluation on September 19, 2017. He advised that there was questionable validity of his

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<sup>3</sup> Docket No. 17-1393 (issued March 20, 2018). By that decision the Board found that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,387.01 for the period May 14, 2016 through April 1, 2017, properly denied waiver of recovery of the overpayment, and properly required recovery of the overpayment by deducting \$250.00 from her continuing compensation payments.

<sup>4</sup> Dr. Helson Pacheco-Serrant, who practices neurosurgery, began treating appellant in March 2016 for her spinal conditions. On October 4, 2017 he requested authorization for cervical spine surgery.

examination findings, noting psychic overlay. Dr. Barham diagnosed lumbosacral and cervical sprains.<sup>5</sup>

By letter dated October 13, 2017, OWCP asked Dr. Barham specific questions regarding appellant's right hip condition. In an October 18, 2017 response, he advised that, regarding the right hip, the March 31, 2015 injury did not aggravate a preexisting condition, did not precipitate a latent condition, and did not accelerate an underlying condition. Dr. Barham explained that appellant had no major muscular/skeletal pathology of significance that would be aggravated by the trauma experienced on March 31, 2015 noting no radiographic or clinical signs that would indicate such, and opined that soft tissue injuries such as contusion, bruise, *etc.* would clear within 7 to 10 days. He also indicated that the conditions of concussion without loss of consciousness, sprain of ligaments of cervical spine, sprain of ligaments of lumbar spine, other cervical displacement, occipito atlanto axial region, and other intervertebral disc displacement, lumbosacral region had all resolved.

An October 25, 2017 magnetic resonance imaging (MRI) scan arthrogram of the right hip demonstrated a full-thickness labral tear component with no displacement, mild gluteus minimus insertional tendinosis, and mild edema/trace fluid in the trochanteric bursal region.

By report dated November 29, 2017, Dr. Johnson indicated that appellant reported that her hip pain began after the March 31, 2015 employment injury, that her symptoms continued to become progressively more severe, and that they interfered with her normal activities of daily living including sleep, work, and recreation. He noted the October 25, 2017 MRI scan arthrogram findings. Right hip examination revealed pain, clicking, limited range of motion, and positive impingement. Dr. Johnson diagnosed other sprain of the right hip, right hip labral tear, and right hip pain. He indicated that appellant had failed greater than six months of conservative treatment including activity modification, physical therapy, rest, and analgesics, and requested surgical authorization.

On December 3, 2017 OWCP determined that a conflict in medical opinion evidence had been created between the opinion of appellant's treating physician Dr. Johnson, who maintained that her right hip condition was related to the March 31, 2015 employment injury, and OWCP's second opinion physician Dr. Barham, who opined that her right hip condition preexisted the March 31, 2015 employment injury.<sup>6</sup>

On December 11, 2017 Dr. Johnson requested authorization for right hip arthroscopy femoroplasty and acetabuloplasty.

By letter dated December 12, 2017, OWCP notified appellant that her request for authorization of right hip arthroscopy with femoroplasty and hip arthroscopy acetabuloplasty could not be approved because the requested treatment did not appear to be medically necessary for and

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<sup>5</sup> September 19, 2017 x-rays of the cervical, thoracic, and lumbosacral spines demonstrated mild degenerative changes with no acute pathology.

<sup>6</sup> OWCP additionally found that the conflict between the two physicians was also regarding whether appellant's right shoulder condition was caused by the March 31, 2015 employment injury and whether she had residuals of the accepted conditions.

causally related to accepted conditions. It requested that she submit a detailed explanation regarding whether additional conditions should be accepted and how and why the requested procedure was needed.

In correspondence dated December 17, 2017, appellant maintained that her right hip injury was not preexisting and that she would proceed with right hip surgery because she was in pain. She forwarded a copy of December 12, 2017 correspondence from OWCP to her requesting a periodic medical report. This included unsigned, undated, and unidentified comments indicating that the right hip labral tear was related to the March 31, 2015 employment injury, noting that appellant was in pain and walked with a terrible limp. Appellant also submitted an undated declaration in which she described the March 31, 2015 employment injury.

In a Form OWCP-5c dated January 10, 2018, Dr. Johnson indicated that appellant was totally disabled pending surgery.

On February 16, 2018 OWCP referred appellant to Dr. Daniel Romanelli, a Board-certified orthopedic surgeon, for a referee examination.

In a March 2, 2018 report, Dr. Romanelli noted his review of the statement of accepted facts, the medical record, and appellant's complaints of extreme hip, lumbar spine, shoulder and neck pain. He reported her description of the March 31, 2015 employment injury, noting that she had not worked since then, and that she disagreed with some of the medical evidence of record, including the initial emergency department report. Dr. Romanelli meticulously described examination findings, noting that, on right hip examination, left logroll caused bilateral hip pain and left leg pain; right logroll caused pain in appellant's leg and right hip, sacrum and tailbone; that with the Hoover's test appellant was not able to lift her right leg off the bed; forward flexion was to 10 degrees with discomfort, and that appellant was unable to do the Faber test. His diagnoses included right hip sprain/strain caused by the March 31, 2015 employment injury. Dr. Romanelli opined that the sprains and strains usually resolve within 6 to 12 weeks. Regarding the right hip, he opined that to a reasonable degree of medical probability and certainty, the March 31, 2015 injury did not precipitate or aggravate any underlying condition. Dr. Romanelli advised that appellant had multiple inconsistencies throughout her examination that were nonanatomic and nonphysiologic and were suggestive of behavioral illness, noting descriptions that were not physiologically possible. With regard to the right hip, he indicated that the initial diagnostic studies were negative, noting multiple inconsistencies throughout her examination. Dr. Romanelli reviewed extensive diagnostic studies, and advised that x-rays of the hip showed mild degenerative changes consistent with her age, and that the labral tearing shown on the MRI scan was more consistent with degenerative changes than with acute findings. He opined that, to a reasonable degree of medical probability and certainty, appellant was at maximum medical improvement (MMI) by June 31, 2015 with regard to the right hip sprain/strain, and that further medical treatment was not necessary or medically appropriate for this condition. Dr. Romanelli opined that she had no temporary, permanent, or preventative restrictions, and that she could return to full duty in the same position held prior to the date of injury. He concluded that, to a reasonable degree of medical probability and certainty, the accident of March 31, 2015 did not aggravate, precipitate, or accelerate any preexisting or underlying condition.

On March 13, 2018 OWCP expanded acceptance of appellant's claim to include strain of the muscle fascia and tendon of the right hip.

By decision dated March 13, 2018, OWCP denied authorization for right hip arthroscopic femoroplasty and arthroscopic acetabuloplasty. It found that Dr. Romanelli's report represented the special weight of the medical evidence and established that the proposed right hip surgery was not medically necessary or causally related to the accepted work-related conditions.

On March 16, 2018 appellant requested reconsideration. She submitted a report from Dr. Pacheco-Serrant dated January 10, 2017, the unsigned, undated response to an OWCP questionnaire dated December 12, 2017, copies of OWCP's March 13, 2018 decision, and an undated declaration statement, all previously of record. Appellant also submitted a January 10, 2018 treatment note from Dr. Johnson in which he reiterated his previous findings and conclusions, again maintaining that her right hip labral tear was not preexisting.

In a March 23, 2018 decision, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that, as her request neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8103 of FECA<sup>7</sup> provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.<sup>8</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, and the only limitation on OWCP's authority is that of reasonableness.<sup>9</sup>

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.<sup>10</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>11</sup> In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.<sup>12</sup>

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<sup>7</sup> *Supra* note 1.

<sup>8</sup> 5 U.S.C. § 8103(a); *see M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

<sup>9</sup> *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

<sup>10</sup> *See R.M.*, Docket No. 19-1319 (issued December 10, 2019) *Debra S. King*, 44 ECAB 209 (1992).

<sup>11</sup> *B.I.*, *supra* note 9; *see also K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

<sup>12</sup> *See T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>13</sup> This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>15</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly exercised its discretion by denying appellant authorization for right hip arthroscopic femoroplasty and acetabuloplasty. Dr. Johnson, an attending orthopedic surgeon, requested authorization for the procedure. OWCP properly found that, a conflict in medical opinion was created between the opinions of him, appellant's attending physician, and Dr. Barham, an OWCP referral physician, regarding whether the proposed right hip procedure should be authorized. Consequently, pursuant to 5 U.S.C. § 8123(a) of FECA, OWCP properly referred appellant to Dr. Romanelli to resolve the conflict in medical opinion.<sup>16</sup>

The Board finds that the special weight of the medical evidence rests with the opinion of Dr. Romanelli who examined appellant, reviewed the medical evidence, and found that the need for any further medical treatment, which would include the proposed right hip surgery, was neither medically necessary nor causally related to the accepted right hip strain.<sup>17</sup>

In an extensive March 2, 2018 report, Dr. Romanelli reviewed appellant's history and noted findings on examination. His diagnoses included right hip sprain/strain, and on that basis, on March 13, 2018 OWCP expanded acceptance of her claim to include strain of the muscle fascia and tendon of the right hip. Regarding the right hip, Dr. Romanelli opined that, to a reasonable degree of medical probability and certainty, the March 31, 2015 employment injury did not precipitate or aggravate any underlying condition, advising that sprains and strains usually resolved within 6 to 12 weeks. He further noted that appellant had multiple inconsistencies throughout her examination that were nonanatomic and nonphysiologic, and were suggestive of behavioral illness. Dr. Romanelli advised that she was at MMI for the right hip sprain/strain by June 31, 2015. He indicated that the initial right hip diagnostic studies were negative, that right hip x-rays showed mild degenerative changes consistent with appellant's age, and that the labral tear shown on the MRI scan was more consistent with degenerative changes than with acute findings. Dr. Romanelli further opined that, to a reasonable degree of medical probability and

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<sup>13</sup> 5 U.S.C. § 8123(a); *see H.N.*, Docket No. 18-0501 (issued February 20, 2020); *Guiseppa Aversa*, 55 ECAB 164 (2003).

<sup>14</sup> 20 C.F.R. § 10.321(b).

<sup>15</sup> *H.N.*, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *R.M.*, Docket No. 19-1319 (issued December 10, 2019).

certainty, no further medical treatment was necessary or medically appropriate for the work-related injuries, including the right hip.

In situations where the case is referred to an impartial medical examiner for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>18</sup> Dr. Romanelli had full knowledge of the relevant facts and evaluated the course of appellant's condition, and his opinion was based on proper factual and medical history.<sup>19</sup> He accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached a conclusion that no further treatment was needed for the accepted right hip strain.<sup>20</sup> The Board thus finds that Dr. Romanelli's opinion represents the special weight of the evidence, and OWCP properly relied on his report in denying authorization for the requested right hip surgery.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>21</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>22</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>23</sup>

A timely request for reconsideration, including all supporting documents, must 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.<sup>24</sup> When a timely request for reconsideration does not meet at least one of

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<sup>18</sup> *H.N.*, *supra* note 13.

<sup>19</sup> *See* 5 U.S.C. § 8123(a); *J.E.*, Docket No. 18-0228 (issued August 8, 2019); *Solomon Polen*, 51 ECAB 341 (2000) (where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight).

<sup>20</sup> *Id.*

<sup>21</sup> 5 U.S.C. § 8128(a); *see D.S.*, Docket No. 18-0353 (issued February 18, 2020).

<sup>22</sup> 20 C.F.R. § 10.607; *see D.W.*, Docket No. 18-0876 (issued March 10, 2020).

<sup>23</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>24</sup> *Id.* at § 10.606(b)(3).

the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>25</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant's March 16, 2018 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. The undated declaration appellant submitted was previously reviewed by OWCP. Consequently, she is not entitled to further review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>26</sup>

With her reconsideration request, appellant submitted a January 10, 2017 report from Dr. Pacheco-Serrant, an unidentified, undated response to an OWCP questionnaire dated December 12, 2017 and a copy of OWCP's March 13, 2018 decision. However, these reports are duplicative as they were previously of record and considered by OWCP and do not constitute relevant and pertinent new evidence. Therefore, the Board finds that they are insufficient to require OWCP to reopen the claim for consideration of the merits.<sup>27</sup>

Appellant also submitted a January 10, 2018 treatment note from Dr. Johnson that was not previously of record. While this report is new, it is not relevant as it is substantially similar to Dr. Johnson's November 1, 2017 report that was already of record and previously reviewed by OWCP. Providing additional medical evidence that either duplicates or is substantially similar to evidence of record does not constitute a basis for reopening a case.<sup>28</sup> As appellant did not provide relevant and pertinent evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>29</sup>

The Board accordingly finds that appellant has not met 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.<sup>30</sup>

### **CONCLUSION**

The Board finds that OWCP properly exercised its discretion by denying appellant authorization for right hip arthroscopic femoroplasty and acetabuloplasty. The Board further finds

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<sup>25</sup> *Id.* at § 10.608(a), (b).

<sup>26</sup> *Supra* note 23; *see D.S.*, *supra* note 21.

<sup>27</sup> *D.S.*, *supra* note 21; *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>28</sup> *M.O.*, Docket No. 19-1677 (issued February 25, 2020).

<sup>29</sup> *Id.*

<sup>30</sup> *D.S.*, *supra* note 21.



that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 23 and 13, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 12, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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