

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 31, 2016 appellant, then a 58-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed left hip end-stage degenerative joint disease as a result of factors of his federal employment. He noted that he first became aware of his condition and its relation to his federal employment on August 12, 2014. Appellant did not stop work.

In a supplemental statement dated June 28, 2016, appellant indicated that he had worked as a city letter carrier since July 6, 1988 and that his duties required lifting, bending, carrying, and walking. He alleged that these activities caused his severe hip condition for which he had a hip replacement. Appellant noted that he was filing an occupational disease claim for aggravation and acceleration of left hip degeneration. He described a typical day of work which included standing on a concrete floor with a rubber mat, and lifting/carrying heavy trays of mail for sorting and loading into a case. Appellant asserted that his work delivering mail involved extensive walking while carrying a satchel hanging over his shoulder. The satchel contained up to 35 pounds of mail and small parcels. He noted that his route consisted of long blocks with many stairs and stoops, and the route took about seven hours to complete. Appellant concluded that he walked approximately 15 miles daily. He noted that he underwent surgery on his hip on June 8, 2015, and returned to work at the end of August 2015.

In an April 28, 2016 report, Dr. Easwaran Balasubramanian, a Board-certified orthopedic surgeon, summarized appellant's medical treatment. He noted that he initially saw appellant on August 14, 2014. Dr. Balasubramanian described in detail appellant's employment duties. He noted that he initially treated appellant with cortisone injections, which helped temporarily, but by February 2015 appellant's symptoms were so severe that he could no longer perform his carrier duties. As a result, Dr. Balasubramanian recommended that appellant not return to work. Appellant then underwent physical therapy three times a week, and after conservative treatment measures were exhausted, he was scheduled for a left hip replacement which occurred on June 8, 2015. Dr. Balasubramanian indicated that appellant was currently back at work in a modified capacity, and had been working since September 2015. He noted that appellant had increasing pain with increasing activities while performing his work duties. Dr. Balasubramanian noted that appellant's job involved being on his feet constantly, almost the entire workday for the past 27 years. He opined that appellant had left hip degenerative arthritis which was aggravated by his work as a mailman which involved casing mail while standing and then walking for substantially the rest of his workday carrying mail in a satchel weighing up to 35 pounds. Dr. Balasubramanian noted that appellant performed these duties for about seven hours a day on

⁴ Docket No. 18-0149 (issued September 5, 2018).

average and walked about 15 miles a day. He noted that this activity aggravated the preexisting hip degenerative arthritis such that he eventually needed to take appellant off work in the hopes that conservative treatment measures would alleviate his symptoms. When conservative treatment measures failed, Dr. Balasubramanian opined that this necessitated the total hip replacement and subsequent permanent modified-duty restrictions. He opined that appellant's employment activity aggravated the condition of his hip and contributed to his left hip replacement. Dr. Balasubramanian noted that appellant had a very good result from the hip replacement and was presently working with permanent restrictions due to his condition. The record also contains the June 8, 2015 report regarding the left total hip arthroplasty and further treatment notes from Dr. Balasubramanian.

By development letter dated August 1, 2016, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

On August 22, 2016 appellant noted that he first saw his family doctor regarding his hip issue on April 23, 2014 and underwent x-ray examination. He noted that at that time he had been having left leg pain for approximately a year, but that his doctor told him it was just a minor condition and something he would have to live with. Appellant reported that it was his understanding that he had three years to file his claim. "He noted that the full scope of his condition and severity took some time to unfold."

On September 1, 2016 OWCP referred the record to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). In a September 25, 2016 report, Dr. Orenstein reviewed appellant's employment and medical history, and opined that appellant's left total hip arthroplasty was medically necessary for appellant's symptomatic avascular necrosis and osteoarthritis of the left hip, which had been poorly responsive to conservative treatment measures. However, he opined that appellant's avascular necrosis and associated osteoarthritis was not causally related to his occupation as a city letter carrier. Dr. Orenstein noted that there was insufficient evidence to assign causation to heavy employment duties. He opined that more than likely there was a genetic component to osteoarthritis of the hip and that there is often a positive family history of osteoarthritis of the hip. Dr. Orenstein further noted that appellant had x-ray and pathologic evidence of vascular necrosis of the left hip leading to collapse and progressive osteoarthritis of the left hip that would not have a causal relationship to the claimant's employment-related activities as a city letter carrier. He therefore disagreed with Dr. Balasubramanian and opined that appellant's left total hip surgery was not causally related to his employment activities as a letter carrier.

By decision dated September 28, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment factors.⁵

⁵ It accepted as established factors of federal employment that appellant was responsible for retrieving and loading letters and flat mails, bending and lifting trays, and sorting, twisting, pushing, walking, and carrying mail in a satchel on his shoulder.

In a letter dated October 24, 2016, appellant, through his then-counsel, requested review of the written record by a representative of OWCP's Branch of Hearings and Review. Then-counsel contended that the report of Dr. Orenstein was not rationalized as it was not based upon the evidence in the record, an understanding of the work duties performed by appellant, nor a physical examination. He contended that it was not necessary to remand the case for a second opinion examination, but that the case should be accepted based on the opinion of Dr. Balasubramanian.

By decision dated January 13, 2017, the hearing representative determined that the case was not in posture for decision, as there was a conflict in the medical evidence between appellant's treating physician, Dr. Balasubramanian, and OWCP's DMA, Dr. Orenstein. Accordingly, the hearing representative remanded the case for referral to an impartial medical examiner, and any further development of the evidence as deemed necessary.

In a January 18, 2017 letter, counsel argued that the DMA's memorandum could not form a conflict of medical opinion, and that the opinion of OWCP's DMA was not based on a physical examination, nor was it based upon a review of the factual and medical records of record.

On February 23, 2017 OWCP referred appellant to Dr. Andrew Collier, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 5, 2017 report, Dr. Collier based on obtaining a history from appellant, performing a physical examination, and review of the record, concluded that appellant developed avascular necrosis of the left hip due to idiopathic reasons. He noted that appellant had no history of steroid use, alcohol use, or any comorbidities that would cause avascular necrosis. Dr. Collier noted that appellant had no history of any trauma to the hip region which would include a dislocation and/or fracture of the femoral neck or infection. He opined that appellant's avascular necrosis was not caused by his employment-related activities. Dr. Collier noted that this was an inherent vascular phenomenon of the femoral head totally unrelated to appellant's employment activities. He explained that, if this condition was related to his work, then there would have been similar findings in the right hip, which did not exist. Dr. Collier noted that unfortunately, appellant's femoral head went on to collapse causing severe arthritis in the left hip necessitating the hip replacement. He opined that appellant started developing avascular necrosis in March 2014 with pain. Dr. Collier noted that it did not become radiographically apparent until later when his femoral head finally collapsed. He opined that the collapse of appellant's femoral head would have occurred regardless of appellant's work conditions; that is the natural course in history of avascular necrosis.

By decision dated May 1, 2017, OWCP denied modification of the September 28, 2016 decision.

On May 19, 2017 appellant, through counsel, requested a review of the written record by an OWCP hearing representative.

By decision dated October 17, 2017, the hearing representative affirmed the May 1, 2017 decision.

On October 26, 2017 appellant appealed to the Board. By decision dated September 5, 2018, the Board affirmed the October 17, 2017 decision.⁶

On October 2, 2019 appellant requested reconsideration and disagreed with Dr. Collier's findings and conclusions. He contended that Dr. Collier failed to address Dr. Balasubramanian's assertion that his employment duties aggravated the degenerative arthritis in his left hip. Appellant further contended that Dr. Collier's opinion did not provide a proper analysis under the definition of proximate cause. He argued that he had established through factual and medical evidence that his left hip injury was related to his employment duties. Appellant disagreed with Dr. Collier's opinion that his left hip injury was caused by avascular necrosis and contended that his duties as a letter carrier were a reasonably foreseeable cause of his injury. He listed his employment duties, asserted that repetitive motion injuries were the most common cause of long-term occupational illnesses, and alleged that Dr. Collier failed to identify which nonwork-related activities would have contributed to his injury that did not involve the same repetitive motions as were required by his job.

By decision dated December 30, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

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 compensation at any time on his or her own motion or on application.⁷

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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits. If the request is timely, but fails to meet at least one of the

⁶ *Supra* note 4.

⁷ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

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

⁹ *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 its 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.

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹¹ OWCP will consider an untimely request for reconsideration only if it demonstrates clear evidence of error in OWCP's most recent merit decision. The request must establish, on its face, that such decision was erroneous.¹²

The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been presented, OWCP should deny the request for reconsideration by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹³

ANALYSIS

The Board finds that this case is not in posture for decision.

By decision dated September 28, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment factors. Appellant requested reconsideration and by decision dated May 1, 2017, OWCP denied modification of the September 28, 2016 decision. On October 17, 2017 the hearing representative affirmed the May 1, 2017 decision. Appellant appealed to the Board and, by decision dated September 5, 2018, the Board affirmed the October 17, 2017 decision.¹⁴

OWCP's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.¹⁵ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁶ Timeliness is determined by the date that the request is received by OWCP and that if the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹⁷

The most recent decision reviewing the merits of appellant's claim was the Board's September 5, 2018 decision. Appellant had one calendar year from the date of that decision, or until September 5, 2019, to ensure receipt by OWCP of any reconsideration request. OWCP did not receive appellant's reconsideration request until October 2, 2019. Appellant's request must,

¹⁰ *Id.* at § 10.608(b); A.G., Docket No 19-0113 (issued July 12, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4.b (February 2016).

¹² 20 C.F.R. § 10.607.

¹³ *Supra* note 11 at Chapter 2.1602.5.a (October 2011).

¹⁴ *Supra* note 4.

¹⁵ 20 CFR § 10.607(a).

¹⁶ *Robert F. Stone*, 57 ECAB 292 (2005)

¹⁷ *Supra* note 11.

therefore, be considered untimely. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.¹⁸ In denying appellant's reconsideration request, however, OWCP did not determine that her reconsideration request was untimely filed and did not review the request under the clear evidence of error standard. Rather, it applied the standard of review for timely requests for reconsideration. As OWCP applied the incorrect standard of review to the untimely request for reconsideration, the Board will set aside OWCP's December 30, 2019 decision and remand the case for proper review under the clear evidence of error standard, followed by an appropriate decision.¹⁹

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 22, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁸ 20 C.F.R. § 10.607.

¹⁹ See *D.G.*, Docket No. 17-1323 (issued January 2, 2018); *W.L.*, Docket No. 15-1842 (issued January 14, 2016).