

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

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<b>D.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0375</b>
	)	<b>Issued: August 4, 2023</b>
<b>DEPARTMENT OF THE NAVY, JOINT BASE</b>	)	
<b>PEARL HARBOR HICKAM, Honolulu, HI,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 21, 2023 appellant filed a timely appeal from a September 21, 2022 merit decision and a January 17, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a back condition causally related to the accepted March 8, 2020 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On October 5, 2021 appellant, then a 45-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 2020 he injured his back when he was leaning against a wall and heard a “pop” in his mid to upper back and ribcage while in the performance of duty. He explained that he asked for a break, and when he sat down, he felt a sharp pain in his back and rib cage. Appellant did not stop work.

Appellant provided an October 5, 2021 narrative statement relating that on March 8, 2020 he was performing first watch and checking identification while wearing a handgun, extra ammunition, a utility belt, handcuffs, spray, a baton, and shotgun with ammunition over his chest. In between checking cars, he leaned against a wall at his post and heard a pop in his mid to upper back. Appellant then asked his partner for a break and when he sat down, he felt sharp pains in his back and ribcage. He notified his supervisors and sought medical treatment on March 9, 2020 from Dr. John Mickey, a Board-certified internist. Appellant also provided a duty log dated March 8, 2020 indicating that he began work at 4:03 a.m., listing his weapon as an M9, and the number of rounds issued as 45.

Appellant provided a series of medical reports in support of his claim. In notes dated March 9, through September 21, 2020, Dr. Mickey treated appellant due to an upper back injury and provided work restrictions. He restricted appellant’s sitting standing, lifting and carrying of more than 25 pounds, overhead activity, and weightbearing on his upper body or hip and recommended the use of a leg holster to reduce the weight of his belt.

In notes dated March 23 through September 21, 2020, physician assistants, provided work restrictions.

In an October 20, 2021 development letter, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On October 28 and November 15, 2021 Dr. Yefim Levy, an internist, recounted appellant’s history of work injury on March 8, 2020, noting that he was wearing his full equipment weighing 50 pounds when he injured his mid back. He diagnosed thoracic disc herniation and sequela of soft tissue injury of the back.

By decision dated December 10, 2021, OWCP denied appellant’s traumatic injury claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted March 8, 2020 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant continued to provide evidence. In a December 7, 2021 report, Dr. Ira D. Zunin, a physician specializing in general practice, family medicine, and legal medicine, reviewed an October 27, 2020 magnetic resonance imaging (MRI) scan findings of right paracentral disc protrusion or disc bulge with annulus tear at T7-8. He noted that appellant was in full-body armor

equipment when he injured his mid back. Dr. Zunin diagnosed work-related thoracic disc herniation and soft tissue injury of the back.

On December 24, 2021 appellant requested reconsideration. He provided additional notes dated December 7, 2021 from Julie A. Rizzolo, a nurse practitioner and a December 23, 2021 narrative statement.

In December 29, 2021 and January 11, 2022 treatment notes, Dr. Zunin recounted that appellant was awaiting thoracic spine surgery for his work-related injury. He reported that he was in full-body armor equipment when he injured his mid back. Dr. Zunin reiterated his prior diagnoses of thoracic disc herniation and soft tissue injury of the back.

On December 29, 2021 Roxanne D. Haverkort-Yeh, a nurse practitioner, examined appellant and assessed thoracic disc herniation.

By decision dated February 22, 2022, OWCP denied modification of the December 10, 2021 decision.

On March 2, 2022 appellant submitted an unsigned request for reconsideration. On March 16, 2022 he requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Appellant resubmitted his narrative statement.

By decision dated April 4, 2022, OWCP's Branch of Hearings and Review denied appellant's March 16, 2022 request for an oral hearing, noting that he had previously requested reconsideration. It explained that, under 5 U.S.C. § 8124(b)(1), he was not entitled to a hearing on the same issue as a matter of right. OWCP also exercised its discretion and considered whether to grant a discretionary hearing and found that the issue could be equally-well addressed by requesting reconsideration and submitting evidence not previously considered.

Appellant provided notes dated April 1, 2022 from Dr. Zunin repeating his previous findings and diagnoses.

By decision dated May 20, 2022, OWCP modified the December 10, 2021 decision to find that appellant had established a medical diagnosis in connection with the accepted employment incident. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between his diagnosed back condition and the accepted March 8, 2020 employment incident.

On June 29, 2022 appellant requested reconsideration. He provided notes dated December 7, 2021 through June 6, 2022, wherein Dr. Zunin diagnosed work-related thoracic disc herniation. Dr. Zunin again noted that appellant was in full-body armor equipment when he injured his mid back.

In an August 4, 2022 note, Dr. Levy diagnosed work-related thoracic disc herniation.

By decision dated September 21, 2022, OWCP denied modification of its prior decision.

On November 7, 2022 appellant requested reconsideration. He provided an October 7, 2022 note from Dr. Levy diagnosing work-related thoracic disc herniation. Appellant also resubmitted employing establishment duty logs indicating that he worked on Sunday, March 8, 2020.

By decision dated January 17, 2023, OWCP denied reconsideration of the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a).

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

An employee seeking benefits under FECA<sup>2</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>3</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>6</sup>

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported

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<sup>2</sup> *Id.*

<sup>3</sup> *See M.F.*, Docket No. 21-0533 (issued January 31, 2023); *H.H.*, Docket No. 20-0839 (issued May 25, 2021); *C.G.*, Docket No. 20-0957 (issued January 27, 2021); *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *J.S.*, Docket No. 18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>5</sup> *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>6</sup> *M.F.*, *supra* note 3; *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>7</sup> *C.H.*, Docket No. 20-1212 (issued February 12, 2021); *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment incidents identified by the employee.<sup>8</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a back condition causally related to the accepted March 8, 2020 employment incident.

Appellant submitted a series of notes from Dr. Levy dated October 28, 2021 through October 7, 2022 diagnosing work-related thoracic disc herniation and recounting that on March 8, 2020 he was wearing his full equipment weighing 50 pounds when he injured his mid back at work. He also submitted notes dated December 7, 2021 through June 6, 2022 from Dr. Zunin which recounted that appellant was in full-body armor equipment when he injured his middle back sustaining work-related thoracic disc herniation. While these physicians provided conclusory opinions on causal relationship, neither offered rationale to explain how the accepted employment incident, caused or contributed to appellant's diagnosed conditions.<sup>9</sup> Neither Dr. Levy nor Dr. Zunin explained how physiologically his specific work activity caused his thoracic disc herniation. The Board has held that a medical opinion should offer a medically-sound explanation of how the specific employment incident physiologically caused or contributed to the diagnosed condition.<sup>10</sup> These reports are, therefore, insufficient to establish the claim.

In notes dated March 9 through September 21, 2020, Dr. Mickey examined appellant due to an upper back injury and provided work restrictions. However, he did not provide an opinion on causal relationship. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>11</sup> Dr. Mickey's notes, therefore, are insufficient to establish appellant's claim.

The remaining medical evidence consists of notes dated March 23, 2020 through December 29, 2021 signed by nurse practitioners and physician assistants. The Board has long held that certain healthcare providers such as physician assistants, registered nurses, physical therapists, and social workers are not considered physicians as defined under FECA.<sup>12</sup>

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<sup>8</sup> *V.L.*, Docket No. 20-0884 (issued February 12, 2021); *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>9</sup> *G.H.*, Docket No. 21-1225 (issued January 30, 2023); *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *see H.A.*, Docket No. 18-1466 (issued August 23, 2019); *L.R.*, Docket No. 16-0736 (issued September 2, 2016).

<sup>10</sup> *G.H.*, *id.*; *M.M.*, Docket No. 20-1649 (issued January 4, 2023).

<sup>11</sup> *See M.M.*, *id.*; *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>12</sup> 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

Consequently, their findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.<sup>13</sup>

As the medical evidence of record is insufficient to establish a diagnosed back condition causally related to the accepted March 8, 2020 employment incident, the Board finds that he has not met his burden of proof.

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 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 own motion or on application.<sup>14</sup>

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.<sup>15</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>16</sup> If it chooses to grant reconsideration, it reopens

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<sup>13</sup> *Id.* at § 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *Id.* at § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013). *See also* *T.W.*, Docket No. 19-1412 (issued February 3, 2020); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also* *J.D.*, Docket No. 21-0164 (issued June 15, 2021) (nurse practitioners are not considered physicians as defined under FECA); *see also* *S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians as defined under FECA); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians as defined under FECA).

<sup>14</sup> 5 U.S.C. § 8128(a); *see* *K.V.*, Docket No. 21-0628 (issued August 8, 2022); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also* *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).

<sup>15</sup> 20 C.F.R. § 10.606(b)(3); *see* *L.D.*, *id.*; *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>16</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit 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.

and reviews the case on its merits.<sup>17</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>18</sup>

### ANALYSIS -- ISSUE 2

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

Appellant's November 7, 2022 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>19</sup>

The Board further finds that appellant has not provided relevant and pertinent new evidence not previously considered. In support of his request for reconsideration, appellant submitted an October 7, 2022 note from Dr. Levy diagnosing work-related thoracic disc herniation. While this evidence is new, it is duplicative of evidence previously of record. 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>20</sup> As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>21</sup>

The Board accordingly finds that appellant has not met any of the three requirements under 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 appellant has not met his burden of proof to establish a back condition causally related to the accepted March 8, 2020 employment incident. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>18</sup> *Id.* at § 10.608(b); *K.V.*, *supra* note 14; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>19</sup> *J.L.*, Docket No. 21-0726 (issued January 19, 2023); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>20</sup> *J.L.*, *id.*; *G.J.*, Docket No. 20-0071 (issued July 1, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020).

<sup>21</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 21, 2022 and January 17, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2023  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board