



## **FACTUAL HISTORY**

On November 14, 2016 appellant, then a 66-year-old mail handler/equipment operator, filed an occupational disease claim (Form CA-2) alleging that he aggravated his preexisting right sciatica and osteoarthritis of the lumbar spine with radiculopathy, due to factors of his federal employment. On September 17, 2018 OWCP accepted the claim for lumbar spine ligament sprain; bilateral plantar fascial fibromatosis; and bilateral lesions of the lower limb plantar nerve.

In a report dated January 15, 2020, Dr. Paul Kisilewicz, a podiatrist, noted that appellant was seen on December 11, 2019 for reevaluation, with complaints of extreme pain, discomfort, and weakness in his back and lower limbs. He explained that despite a request for the use of an ergonomic chair at work, appellant was not provided with one and was forced to use a nonergonomic chair that hurt his back. Dr. Kisilewicz placed appellant off work from December 6, 2019 until January 19, 2020, and from January 20 through March 4, 2020. He explained that this would allow appellant to recover.

Appellant completed an employing establishment form entitled Request for Notification of Absence on December 4, 2019 requesting FECA benefits as work was not available within his restrictions. On March 16, 2020 he filed a claim for compensation (Form CA-7) for the period February 15 to March 11, 2020. Appellant continued to submit claims for wage-loss compensation.

In March 3 and April 4, 2020 reports, Dr. Kisilewicz repeated appellant's request for an ergonomic chair and continued to advise that appellant was to remain off work from December 6, 2019 and continuing.

In a May 25, 2020 progress note, Dr. Kisilewicz recounted that appellant's medical records reflected that appellant developed significant injuries to his back, hips, discs in his lower back, and his lower extremity from the repetitive and accumulative trauma of getting in and out of his vehicle over 50 times per day and standing and walking for 10 hours on cement every workday for over 20 plus years. He repeated the request for an ergonomic chair and continued to place appellant off work. In a June 1, 2020 report, Dr. Kisilewicz repeated his request for an ergonomic chair and continued to place appellant off work.

By decision dated September 28, 2020, OWCP denied the claim for disability compensation for the period December 6, 2019 and continuing.

Appellant requested reconsideration on November 4, 2020. On September 22, 2021 appellant's then counsel requested reconsideration and submitted a September 1, 2021 report from Dr. John B. Dorsey, a Board-certified orthopedic surgeon. In this report, Dr. Dorsey recounted appellant's history of injury and medical treatment. He provided physical examination findings, opined that appellant's accepted conditions were permanent and stationary, and concluded that appellant was totally disabled from work. Dr. Dorsey also requested that the acceptance of appellant's claim be expanded to include lumbar degenerative changes with radiculopathy, and right hip osteoarthritis.

On September 26, 2021 appellant submitted additional evidence including a September 24, 2021 report from Dr. Kisilewicz and diagnostic reports dating from July 14, 2016. In his September 24, 2021 report, Dr. Kisilewicz explained that appellant was sent home by his supervisor on December 4, 2019 because he was unable to work due to his back condition. Appellant informed Dr. Kisilewicz that his supervisor could not provide work for him within his work restrictions because an ergonomic chair was not available. Dr. Kisilewicz again requested that appellant be provided an ergonomic chair as he wanted to continue to work for a few more years. He also added that appellant's right hip/femur condition should be considered as part of his claim.

By decision dated December 16, 2021, OWCP denied modification.

On December 15, 2022 appellant's then counsel requested reconsideration and submitted additional evidence.

In a December 14, 2021 report, Dr. Kisilewicz opined that walking and standing on cement for multiple hours per day and jumping on and off the machinery caused appellant's accepted conditions which led to his disability and inability to work. He related that appellant had no preexisting condition which correlated with the accepted conditions. Dr. Kisilewicz referenced a fall appellant experienced in 2017 and indicated that the fall was not the cause of appellant's disability from December 6, 2019 to the present, but rather that his conditions were industrial and related to his work activities. He explained that appellant had to jump off the truck from two to three feet multiple times a day and had to walk and stand on cement for 20 plus and opined that those activities caused his condition and symptoms to a reasonable degree of medical probability and prevented appellant from working in any capacity commencing December 6, 2019.

By decision dated February 15, 2023, OWCP denied modification. It found that appellant failed to provide a medical opinion based on objective findings regarding his disability and that Dr. Kisilewicz' opinion was based on subjective complaints which alone are not compensable. OWCP also noted that Dr. Kisilewicz referred to an intervening right hip injury and that appellant provided no medical evidence to support expansion of the claim to include any additional conditions.

On February 14, 2024 appellant requested reconsideration. In his submission he noted that he was unable to work from December 6, 2019 and continuing, and was forced to retire as of February 28, 2022. He summarized his claim and argued that his inability to work was due to his accepted conditions and the employing establishments failure to provide an ergonomic work chair. Appellant alleged a recurrence of his accepted work conditions. He contended that Dr. Kisilewicz and Dr. Dorsey had submitted probative medical reports in support of his disability claim.

OWCP received letters of medical necessity and prescription requests for medical supplies and equipment.

By decision dated February 20, 2024, 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.<sup>2</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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>3</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>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</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.<sup>6</sup>

## ANALYSIS

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).

In his February 14, 2024 reconsideration request, appellant argued that his inability to work was due to a recurrence of his accepted work-related conditions and that he had submitted probative medical evidence in support of his claim. However, he did not explain how OWCP erroneously applied or interpreted a specific point of law in its February 15, 2023 decision. Furthermore, appellant did not advance a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a); *see L.J.*, Docket No. 22-0348 (issued April 28, 2023); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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>4</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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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>5</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>7</sup> *See D.B.*, Docket No. 22-1241 (issued April 27, 2023); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

In his reconsideration request, appellant provided a summary of his claim and conclusions regarding the evidence of record. His lay opinion, however, does not constitute probative medical evidence,<sup>8</sup> *i.e.*, whether the medical evidence establishes that he was disabled after December 6, 2019 due to his accepted employment-related conditions.<sup>9</sup> OWCP also received letters of medical necessity and prescription requests for authorization of medical supplies and equipment. However, this was not relevant and pertinent new medical evidence. The issue is medical in nature and no new relevant and pertinent medical evidence was submitted with the February 14, 2024 reconsideration request regarding appellant's disability claim. The Board has held that the submission of evidence or argument which does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>10</sup> Therefore, appellant was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>11</sup>

The Board, accordingly, finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>12</sup>

### **CONCLUSION**

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).

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<sup>8</sup> See *K.D. (L.D.)*, Docket No. 22-0485 (issued December 6, 2022); *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *E.C.*, Docket No. 13-1396 (issued January 17, 2014); *James A. Long*, 40 ECAB 538 (1989).

<sup>9</sup> *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

<sup>10</sup> *A.D.*, Docket No. 24-0411 (issued June 20, 2024); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*; 31 ECAB 224, 225 (1979).

<sup>11</sup> See *supra* note 4 at § 10.606(b)(3)(iii).

<sup>12</sup> See *D.M.*, Docket No. 21-1224 (issued March 15, 2023); *J.C.*, Docket No. 21-0453 (issued December 8, 2021); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b), OWCP will deny the request without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 20, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2024  
Washington, DC

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

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

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