



## **FACTUAL HISTORY**

On October 26, 2010 appellant, then a 55-year-old tractor-trailer operator, filed a traumatic injury claim alleging that he sustained back and left leg pain that day when he pushed an all-purpose container that was rendered immobile by a broken wheel. He stopped work immediately and did not return.<sup>3</sup>

In Part B of a Form CA-16 (“Attending Physician’s Report”) dated October 27, 2010, Dr. Douglas K. Bullington, a family practitioner, related that appellant, who injured his lower back while pushing a cart on October 26, 2010, would be disabled from October 27 to November 2, 2010 and thereafter limited to light duty for two weeks. He noted that appellant previously underwent back surgery. Dr. Bullington diagnosed sciatica and checked the “yes” box in response to a form question asking whether this condition was caused or aggravated by employment activity.<sup>4</sup> In a November 1, 2010 duty status report, he added that he elicited a positive left straight leg raise test and sciatic notch tenderness on examination.<sup>5</sup>

Dr. William J. Thoman, a neurosurgeon, remarked in a November 8, 2010 report that appellant underwent multiple lumbar discectomies and anterior/posterior L4-5 and L5-S1 fusion surgery in 1987. He was pushing a heavy cart on October 26, 2010 when one of the wheels broke. When appellant tried to grab hold of the cart before it tipped over, he experienced back and left leg pain. A few days later, the pain radiated to the right leg. On examination, Dr. Thoman observed lumbar paraspinal muscle tenderness, bilateral plantar flexor weakness and a positive Patrick’s test. A computerized tomography (CT) scan of the lumbar spine exhibited L3-4 degenerative disc disease and L4-5 pseudoarthrosis.<sup>6</sup> Dr. Thoman diagnosed industrial lower back and leg pain.

In a November 16, 2010 report, Dr. Jose C. Vitto, a Board-certified anesthesiologist to whom appellant was referred by Dr. Thoman, reviewed appellant’s medical history. Physical examination findings were unremarkable. Dr. Vitto diagnosed L3-4 spinal stenosis, degenerative disc disease, lumbago and possible lumbar radiculopathy.

OWCP informed appellant in a December 6, 2010 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a medical report from a qualified physician explaining how the October 26, 2010 employment incident caused or contributed to a diagnosed condition.<sup>7</sup>

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<sup>3</sup> Appellant retired effective March 31, 2011.

<sup>4</sup> Appellant’s supervisor signed Part A of the Form CA-16 on October 26, 2010.

<sup>5</sup> The case record also contains Dr. Bullington’s notes for the period October 27 to November 30, 2010, which essentially incorporated the above-mentioned findings.

<sup>6</sup> The case record contains a November 4, 2010 CT scan report from Dr. Mary E. Below, a Board-certified diagnostic radiologist.

<sup>7</sup> OWCP pointed out that the claim was originally received as a simple, uncontroverted case resulting in minimal or no lost time from work and payment was approved for limited medical expenses without formal adjudication.

In a December 23, 2010 report, Dr. Thoman opined that appellant experienced “a flare-up from his known history of back pain” that “could be partially irritation of the S1 nerve from his previous fusion when he hurt himself at work.”

By decision dated January 14, 2011, OWCP denied appellant’s claim, finding the medical evidence insufficient to demonstrate that the accepted October 26, 2010 employment incident caused or aggravated a back and bilateral leg condition.

Appellant requested reconsideration on February 3, 2011, asserting that OWCP did not properly consider the medical evidence and that the October 26, 2010 work event aggravated a preexisting industrial back injury sustained on August 4, 1984.<sup>8</sup> He pointed out that he was asymptomatic prior to the flareup.

On April 21, 2011 OWCP denied modification of the January 14, 2011 decision.

Appellant requested reconsideration on April 16, 2012, but did not present any additional evidence or legal argument. By decision dated April 24, 2012, OWCP denied his request on the grounds that it did not receive new and relevant evidence warranting further merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>9</sup> OWCP’s regulations provide that the evidence or argument submitted by a claimant must either: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>10</sup> Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>11</sup>

### **ANALYSIS**

By decisions dated January 14 and April 21, 2011, OWCP denied appellant’s traumatic injury claim on the grounds that the medical evidence did not sufficiently establish that the accepted October 26, 2010 employment incident caused or aggravated a back and bilateral leg condition. Appellant requested reconsideration on April 16, 2012, but did not submit any additional evidence or legal argument before the issuance of the April 24, 2012 nonmerit decision. Because he failed to meet one of the standards enumerated under section 8128(a) of FECA, he was not entitled to further merit review of his claim.

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<sup>8</sup> OWCP File No. xxxxxx557.

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> *E.K.*, Docket No. 09-1827 (issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

Appellant contends on appeal that he offered medical documentation and legal contentions in support of his April 16, 2012 reconsideration request. The Board notes that the case record does not contain such evidence.<sup>12</sup> Therefore, OWCP properly denied the application without reopening the case for a review on the merits.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> The Board notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c).