

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

On August 23, 2017 appellant, then a 37-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he strained his middle back when trying to close a bag while in the performance of duty. OWCP, by decision dated July 6, 2018, accepted his claim for sprain and strain of the lumbar and thoracic areas of the spine. Appellant stopped work on August 23, 2017.

On August 19, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Sean Lager, a Board-certified orthopedist, for a second opinion evaluation regarding the status of his employment-related conditions. In a September 8, 2020 report, Dr. Lager reviewed appellant's history of injury and noted physical examination findings. He diagnosed lumbar sprain/strain and thoracic sprain/strain. Dr. Lager opined that appellant was not suffering from disabling residuals of the accepted conditions. He found no evidence to support that the work-related conditions were active and causing objective findings. Dr. Lager concluded that the work-related conditions resolved. He opined that, based on clinical presentation, there was no disability secondary to the employment injury and appellant could return to work without restrictions. Dr. Lager noted that based on the physical examination performed on September 8, 2020 and a review of the medical records, appellant could return to work full time without restrictions.

In a September 25, 2020 addendum, Dr. Lager reiterated his earlier opinion that appellant was capable of returning to full-time employment without restrictions.

On October 23, 2020 OWCP notified appellant of its proposed termination of his wage-loss compensation and medical benefits because his August 23, 2017 employment injury had resolved. It found that the weight of medical evidence rested with the September 8 and 25, 2020 medical reports of Dr. Lager, OWCP's second opinion physician, who found that appellant no longer had any residuals or disability causally related to his accepted August 23, 2017 employment injury.

In a statement dated November 13, 2020, appellant disagreed with the proposed termination. He submitted additional medical evidence, including reports from Dr. Leonid Reyfman, a pain medicine specialist, and Dr. Joseph P. Campisi, a chiropractor, who both opined that appellant was capable of performing light-duty work due to the effects of the accepted August 23, 2017 employment injury.

By decision dated February 25, 2021, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective February 26, 2021. It found that the weight of the medical evidence rested with Dr. Lager, the second opinion physician, who determined in his September 8 and r 25, 2020 reports that appellant did not have disability or residuals due to the accepted August 23, 2017 employment injury.

On April 28, 2021 appellant requested reconsideration.

Appellant submitted additional evidence. In an attending physician's report (Form CA-20) dated February 16, 2021, Dr. Vitaliy Chivotenko, an osteopath and Board-certified neurologist, diagnosed myalgia, thoracic disc disorder, and spondylosis, and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity.

On May 3, 2021 Dr. Reyfman, evaluated appellant for middle back pain that developed after an employment injury on August 23, 2017. He diagnosed myalgia, intervertebral disc disorders with radiculopathy, and spondylosis without myelopathy. Dr. Reyfman reviewed Dr. Lager's reports and disagreed with his findings regarding appellant's ability to work. He indicated that appellant could not return to regular duty but was able to work light duty with restrictions on lifting over 25 pounds and no standing, walking or sitting continuously for more than 30 minutes. In a form report of even date, Dr. Reyfman diagnosed myalgia, intervertebral disc disorder with radiculopathy, and spondylosis without myelopathy. He noted that appellant was not currently working.

By decision dated July 20, 2021, OWCP denied modification of its February 25, 2021 termination decision.

A magnetic resonance imaging (MRI) scan of the thoracic spine dated March 4, 2021 revealed persistent thoracic discopathy, re-demonstrated T12-L1 annular bulge, spinal canal encroachment, and mild levoscoliosis.

On April 22, 2021 Dr. Campisi treated appellant for a work-related back injury that occurred on August 23, 2017. He diagnosed severe disc derangement as noted on the MRI scan of the thoracic spine, vertebral subluxation complex at multiple levels in the lumbar and thoracic spine associated with lumbar radiculitis, and paravertebral muscle spasms. On April 23, 2021 Dr. Campisi reviewed the September 8, 2020 report from Dr. Lager and disagreed with his findings. He opined that Dr. Lager ignored the March 4, 2021 MRI scan findings that revealed disc injury and residual complications of his condition and inaccurately concluded that appellant had no residuals.

In a report dated September 27, 2021, Dr. Victor Katz, a Board-certified orthopedist, treated appellant for persistent left lower thoracic back pain that began after a work-related accident on August 23, 2017. He diagnosed lower thoracic spine bulge at T12-L1, muscle spasm of paraspinal muscle/left T10-T12 facets arthralgia, subluxation of the thoracic rib joint at T1-L2, scoliosis, thoracic spondylosis, and facets syndrome. Dr. Katz opined that appellant's condition and symptoms were causally related to the August 23, 2017 employment injury when he twisted his middle and lower back while pushing and pulling a heavy bag and sprained/strained his thoracolumbar muscles and tendons as well as causing facets joint and rib joint subluxation and dysfunction. He noted these findings were consistent with the March 4, 2021 MRI scan. Dr. Katz indicated that appellant was not a surgical candidate at this time.

On October 18, 2021 appellant requested reconsideration.

By decision dated December 21, 2021, OWCP denied modification of the decision dated July 20, 2021.

On January 19, 2022 appellant requested reconsideration and submitted additional medical evidence.

In a January 10, 2022 report, Dr. Katz noted his treatment of appellant for persistent left lower thoracic back pain that began after a work-related accident that occurred on August 23, 2017. He diagnosed lower thoracic spine bulge at T12-L1, muscle spasm of paraspinal muscle/left T10-T12 facets arthralgia, subluxation of the thoracic rib joint at T1-L2, scoliosis, thoracic spondylosis, and facets syndrome. Dr. Katz opined that appellant's condition and symptoms directly related to the work-related accident on August 23, 2017. He noted these findings were consistent with the March 4, 2021 MRI scan and returned appellant to light-duty work.

Appellant subsequently submitted reports from Dr. Reyfman dated May 3, 2021, previously of record. By decision dated April 19, 2022, 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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the

³ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

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).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant 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).⁸

In support of his request for reconsideration, appellant resubmitted reports from Dr. Reyfman dated May 3, 2021. As these reports repeat evidence already in the case record, they are cumulative and do not constitute relevant and pertinent new evidence. Appellant also submitted a January 10, 2022 report from Dr. Katz. While this evidence is new, it is substantially similar to a September 27, 2021 report from Dr. Katz previously considered by OWCP. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.⁹ As such, this evidence is insufficient to warrant merit review. Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁰

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.

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).

⁷ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

⁹ *J.L.*, Docket No. 21-1373 (issued March 27, 2023); *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁰ *See* 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 27, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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