

APPENDIX A TITLE PAGE

**APPENDIX A
NINTH CIRCUIT DOCUMENTS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 23 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDERICK W. RICHARDSON,

Plaintiff - Appellant,

v.

**UNITED STATES DEPARTMENT OF
LABOR, Office of Workers Compensation
Programs (OWCP); SANDRA E. TYUS,
Claims Examiner; TRACY A. JOHNSON,
OWCP Chief of Operations; CRAIG
DUNN; JANE DOE; JOHN DOE; JONAS
MALM,**

Defendants - Appellees.

No. 23-3130

D.C. No. 2:20-cv-00923-LK

MEMORANDUM*

**Appeal from the United States District Court
for the Western District of Washington
Lauren J. King, District Judge, Presiding**

Submitted May 21, 2025**

Before: SILVERMAN, LEE, and VANDYKE, Circuit Judges.

Frederick W. Richardson appeals pro se from the district court's judgment

*** This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.**

**** The panel unanimously concludes this case is suitable for decision
without oral argument. See Fed. R. App. P. 34(a)(2).**

"Appendix A"
A1

dismissing his action alleging that delays by the Office of Workers' Compensation Programs ("OWCP") deprived him of his right to procedural due process. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Crowe v. Or. State Bar*, 989 F.3d 714, 724 (9th Cir. 2021) (sovereign immunity); *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010) (failure to state a claim under Fed. R. Civ. P. 12(b)(6)); *Council of Ins. Agents & Brokers v. Molasky-Aramn*, 522 F.3d 925, 930 (9th Cir. 2008) (standing). We affirm.

The district court properly determined that Richardson lacked standing for his claims for injunctive relief because Richardson failed to allege facts sufficient to show a likelihood of future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (explaining that a plaintiff's standing to seek injunctive relief depends on whether he is likely to suffer future injury from the actions complained of).

The district court properly dismissed Richardson's claim for damages against OWCP because those claims are barred by sovereign immunity. *See Balser v. Dep't of Just., Off. of the U.S. Tr.*, 327 F.3d 903, 907 (9th Cir. 2003) (explaining that the "United States . . . is immune from suit unless it has waived its immunity").

To the extent Richardson sought to bring claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against OWCP employees in their individual capacities, the district court properly dismissed these claims because a *Bivens* remedy is not available. See *Egbert v. Boule*, 596 U.S. 482, 491-93 (2022) (explaining that recognizing a cause of action under *Bivens* is a “disfavored judicial activity” and that the presence of “an alternative remedial structure” precludes recognizing a *Bivens* cause of action in a new context (citations omitted)).

We do not consider allegations raised for the first time on appeal. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 13 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FREDERICK W. RICHARDSON,

Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF
LABOR, Office of Workers Compensation
Programs (OWCP); et al.,

Defendants - Appellees.

No. 23-3130

D.C. No. 2:20-cv-00923-LK

Western District of Washington,
Seattle

ORDER

Before: SILVERMAN, LEE, and VANDYKE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 19) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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D.C. No.

2:20-cv-00923-LK

Western District of Washington,
Seattle

MANDATE

The judgment of this Court, entered May 23, 2025, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to
Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX B TITLE PAGE

**APPENDIX B
DISTRICT COURT DOCUMENTS**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK W. RICHARDSON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
LABOR et al.,

Defendants.

CASE NO. 2:20-cv-0923-LK

ORDER GRANTING MOTION TO
DISMISS SECOND AMENDED
COMPLAINT

This matter comes before the Court on Defendants' motion to dismiss Mr. Richardson's second amended complaint. Dkt. No. 60. For the reasons set forth below, the Court grants the motion.

I. BACKGROUND

Mr. Richardson, a former custodian with the United States Postal Service, injured his knee on the job in 1991. Dkt. No. 61 at 1. He filed a claim with the Office of Workers' Compensation Programs ("OWCP") for benefits under the Federal Employees Compensation Act ("FECA"), 5

1 U.S.C. § 8101, *et seq.* Dkt. No. 61 at 1.¹ OWCP granted his claim, and Mr. Richardson “has been
2 receiving temporary total disability payments on the periodic rolls since February 1, 2010. OWCP
3 has also been paying medical expenses for all accepted medical conditions since the date of injury.”
4 Dkt. No. 61 at 2. Over the years, Mr. Richardson has sought to expand his claim to add other
5 conditions and related medical expenses. Dkt. No. 45 at 2–3.

6 Unsatisfied by OWCP’s delay in adjudicating his requests, Mr. Richardson filed this action
7 in 2020 alleging that OWCP and its employees “negligently handled his FECA claim for benefits
8 in a way that violated his due process rights and caused physical and mental injuries.” Dkt. No. 17
9 at 1. Defendants moved to dismiss the complaint. Dkt. No. 8. Noting that FECA prohibits judicial
10 review of OWCP benefits adjudications unless a complaint alleges a constitutional violation that
11 is not “insubstantial,” the Court found that it lacked subject matter jurisdiction because Mr.
12 Richardson’s “due process challenges to OWCP’s conduct are insubstantial as presently alleged.”
13 Dkt. No. 17 at 6–7. The Court granted leave to amend, and Mr. Richardson filed an amended
14 complaint. *Id.*; *see* Dkt. No. 23.

15 Defendants filed a motion to dismiss the amended complaint. Dkt. No. 36. United States
16 Magistrate Judge J. Richard Creatura issued a Report and Recommendation (“R&R”)
17 recommending that the Court deny the motion to dismiss because Mr. Richardson alleges a years-
18 long delay in the processing of his benefits claim, and “an unreasonably and egregiously lengthy
19 administrative process” can state a “substantial violation of procedural due process[.]” Dkt. No.
20 45 at 9.

21
22
23 ¹ FECA provides that “[t]he United States shall pay compensation . . . for the disability or death of an employee
24 resulting from personal injury sustained while in the performance of his duty[.]” 5 U.S.C. § 8102(a). OWCP is
responsible for administering FECA. *See* 20 C.F.R. § 10.1.

1 The Court adopted the background facts and procedural history in the R&R. Dkt. No. 48
2 at 2. However, the Court found that Mr. Richardson's amended complaint did not identify what
3 relief he seeks in this action despite Rule 8(a)'s requirement to include "a demand for the relief
4 sought[.]" *Id.* at 2 (internal quotation marks omitted). The Court explained that "[t]he absence of
5 a demand for relief is more than just a pleading deficiency" because "[w]ithout knowing what
6 remedy Mr. Richardson seeks, the Court cannot evaluate whether it has jurisdiction to grant it or
7 whether—as Defendants contend, Dkt. No. 46 at 1, 4—he has received all of the relief he seeks or
8 could obtain in this lawsuit." *Id.* The Court also noted that the amended complaint named several
9 individuals as Defendants, but failed to "specify the nature or basis of th[e] claims" against those
10 Defendants. *Id.* Therefore, the Court could not determine whether the claims against the
11 individuals were cognizable. *Id.*

12 Mr. Richardson filed a second amended complaint—the current operative complaint—
13 naming as Defendants the OWCP, several of its employees, and two "Doe" defendants. Dkt. No.
14 49 at 1–4. Mr. Richardson notes that in January 2016, he submitted a letter to OWCP requesting
15 to add post-operative atrial fibrillation ("Afib") and "associated heart issue(s)" to his claim for
16 benefits. *Id.* at 7. In 2018, he requested that his "left shoulder associated conditions [be] added to
17 he claim." *Id.* at 18. In 2019, he sought an atrial fibrillation ablation procedure and "Watchman
18 device" related to his cardiac condition, but "OWCP did not make a decision on [his] 1/15/2016
19 response/request letter until March 21, 2022[,] over 7 years later." *Id.* OWCP does not dispute
20 those facts. It states that Mr. Richardson's January 2016 letter was misfiled in its system due to a
21 clerical error; the letter requested to add Afib to his claim; he requested that OWCP update his
22 claim to include a "left shoulder and neck injury"; he sought authorization for an atrial fibrillation
23 ablation procedure and a Watchman device related to his post-op Afib claim in July 2019; and on
24 March 21, 2022, "OWCP issued a decision denying Plaintiff's claim for post-op Afib, and related

1 requests for [an] atrial fibrillation ablation procedure and a Watchmen device." Dkt. No. 61 at 3–
2 5, 8.

3 Mr. Richardson's second amended complaint avers that "OWCP violated [his] due process,
4 and Constitutional Rights repeatedly for approximately 7 years, ignoring many requests related to
5 [his] claim" and denied him "proper and timely treatment/duty of care that aggravated and caused
6 physical and mental injuries." Dkt. No. 49 at 5. As relief, Mr. Richardson seeks \$855,000; an
7 "[i]nvestigation into how the [FECA] law and its provisions for injured workers were deviated
8 from for years by those entrusted to administer it"; "Recertification/Training for the responsible
9 parties"; and "such other relief as the Court deems proper." *Id.* at 6. Defendants moved to dismiss
10 all claims. Dkt. No. 60.

11 II. DISCUSSION

12 Defendants seek dismissal of all claims in Mr. Richardson's second amended complaint
13 for the following reasons:

14 (1) [T]his Court lacks jurisdiction to hear a challenge to the OWCP's denial of
15 Plaintiff's claims; (2) the OWCP has responded to and adjudicated all of Plaintiff's
16 claims; (3) Plaintiff has been given all the due process he is entitled to and any due
17 process claim is moot; (4) even if Plaintiff could state a live due process claim, the
18 Court cannot grant him the relief he requests; and (5) Plaintiff has failed to identify
19 a cognizable legal claim against the individual defendants and he cannot bring a
20 *Bivens* claim against federal government employees for alleged violations of
21 constitutional rights in adjudicating a claim for FECA benefits.

22 Dkt. No. 60 at 2. As explained below, the Court agrees that it lacks jurisdiction to hear a challenge
23 to OWCP's benefits decision. Although the Court does have jurisdiction over constitutional claims
24 that are not "insubstantial" and "appear to be more than mere allegations included in the complaint
to create jurisdiction where none would exist otherwise," *Rodriguez v. Donovan*, 769 F.2d 1344,
1348 (9th Cir. 1985), even assuming that Mr. Richardson has stated such a claim, his claim is
moot, and the Court cannot afford him the relief he seeks. Finally, to the extent Mr. Richardson

1 intends to bring a claim against the individual Defendants in their personal capacities, he has not
2 stated a claim against them.

3 **A. The Court Lacks Jurisdiction to Review the Decision Denying Benefits**

4 Defendants raise a factual challenge to jurisdiction and argue that the Court lacks
5 jurisdiction to hear a challenge to OWCP's denial of Mr. Richardson's requests to expand his
6 claim. Dkt. No. 60 at 3–4. In reviewing a factual challenge, the court may consider materials
7 beyond the complaint, *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir.
8 2003), “weigh the evidence[,] and satisfy itself as to the existence of its power to hear the case,”
9 *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). The Court may look
10 to “extra-pleading material” to decide whether it has jurisdiction “even if it becomes necessary to
11 resolve factual disputes.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). The Court
12 has considered the Declaration of Jennifer Valdivieso, Dkt. No. 61, for background purposes, but
13 there are no factual disputes to resolve because, as set forth above, the parties agree on the relevant
14 facts.

15 Mr. Richardson alleges that OWCP denied him “proper and timely treatment/duty of care
16 that aggravated and caused physical and mental injuries,” and that “[b]oth of [his] shoulders are
17 still in need of surgery due to associated injuries of [his] right knee accepted condition.” Dkt. No.
18 49 at 5 (emphasis omitted). But as the Court has already held, “FECA prohibits judicial review of
19 OWCP benefit determinations.” Dkt. No. 17 at 5; *see* 5 U.S.C. § 8128(b) (“The action of the
20 Secretary or his designee in allowing or denying a payment . . . is . . . final and conclusive for all
21 purposes with respect to all questions of law and fact; and . . . [is] not subject to review by . . . a
22 court by mandamus or otherwise.”). Mr. Richardson concedes this point and notes that “he cites
23 the ultimate decision on his requests [for benefits] only as background information.” Dkt. No. 64
24 at 25. To the extent that Mr. Richardson asserts a claim premised on the denial of his request to

1 expand his benefits, the Court lacks jurisdiction to hear it. *See, e.g., Markham v. United States*,
 2 434 F.3d 1185, 1187 (9th Cir. 2006) ("Section 8128(b) explicitly provides that the courts do not
 3 have jurisdiction to review FECA claims challenging the merits of benefit determinations[.]");
 4 *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) ("When all that a claimant is
 5 seeking is benefits on the basis of an error of fact or law by the administering agency, judicial
 6 review is barred altogether."). Therefore, the Court has no jurisdiction to review OWCP's decision
 7 or to grant additional benefits.²

8 **B. This Case Is Now Moot**

9 Despite the statutory prohibition on reviewing the validity of coverage determinations,
 10 courts have jurisdiction to consider substantial due process challenges arising out of the processing
 11 of FECA claims. *Rodrigues*, 769 F.2d at 1348. Mr. Richardson contends that Defendants denied
 12 him due process by ignoring his requests to update his FECA claim "for over 7 years[.]" Dkt. No.
 13 49 at 5. The parties contest whether that protracted delay rises to the level of a due process
 14 deprivation. Defendants argue that despite the delay, Mr. Richardson has received all the process
 15 he was due because OWCP adjudicated his claim and issued a decision with appeal rights. Dkt.
 16 No. 60 at 11-15. Mr. Richardson responds that "even if a claim is ultimately denied, procedural
 17 due process requires that the agency not unreasonably delay its determination." Dkt. No. 64 at 22.

18 The Court need not decide whether Mr. Richardson has stated a substantial claim for
 19 violation of his due process rights because even if he has, his claim is now moot. Article III of the
 20 Constitution restricts federal courts to deciding only "actual, ongoing controversies." *Honig v.*

21
 22 _____
 23 ² Mr. Richardson also complains about Defendants' allegedly "negligent" claims processing that violated the "duty of
 24 care," Dkt. No. 49 at 7, 13, but the Court previously dismissed his claim under the Federal Tort Claims Act, Dkt. No.
 17 at 1, 7. His second amended complaint asserts only a due process claim, Dkt. No. 49 at 5, so the allegations of
 "negligence" therein appear to be made in support of the due process claim rather than an attempt to resurrect the
 negligence claim.

1 *Doe*, 484 U.S. 305, 317 (1988); *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)
2 (explaining that if a claim becomes moot, the Court lacks jurisdiction because there is no longer a
3 live case or controversy as required by Article III of the U.S. Constitution). “Even where litigation
4 poses a live controversy when filed . . . a federal court [must] refrain from deciding it ‘if events
5 have so transpired that the decision will neither presently affect the parties’ rights nor have a more-
6 than-speculative chance of affecting them in the future.’” *Clarke v. United States*, 915 F.2d 699,
7 701 (D.C. Cir. 1990) (quoting *Transwestern Pipeline Co. v. F.E.R.C.*, 897 F.2d 570, 575 (D.C.
8 Cir. 1990)). In other words, “[t]he requisite personal interest that must exist at the commencement
9 of litigation (standing) must continue throughout its existence[.]” *Hernandez v. Cnty. of Monterey*,
10 70 F. Supp. 3d 963, 970–71 (N.D. Cal. 2014) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S.
11 388, 397 (1980)); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1253 (9th Cir. 2007) (“[A] live
12 controversy must exist at all stages of the litigation, not simply at the time plaintiff filed the
13 complaint.”). As the party invoking the Court’s subject matter jurisdiction, the plaintiff bears the
14 burden of establishing that the Court has the power to grant the relief requested. *See Kokkonen v.*
15 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

16 Here, the action has become moot—and the Court consequently lacks jurisdiction—
17 because even if the Court were to rule in Mr. Richardson’s favor, “there is no further relief the
18 Court can provide.” *Gill v. Mayorkas*, C20-939-MJP, 2022 WL 425343, at *2 (W.D. Wash. Feb.
19 11, 2022); *see also Rodrigues*, 769 F.2d at 1349 (stating that “[i]f reinstatement of benefits pending
20 a hearing is the only relief that Rodrigues seeks and a hearing has been held, it may be that this
21 case is now moot.”); *Magassa v. Mayorkas*, 52 F.4th 1156, 1167 (9th Cir. 2022) (noting that the
22 doctrine of standing requires plaintiffs to show that their injury “is likely to be redressed by a
23 favorable decision” (internal quotation marks omitted)). Although OWCP has not provided all the
24 benefits Mr. Richardson seeks, the Court cannot provide the relief he requests. Mr. Richardson

1 seeks \$855,000, Dkt. No. 49 at 6, but the United States has not waived its sovereign immunity for
 2 a claim for monetary damages for procedural due process violations. *Czerkies*, 73 F.3d at 1438
 3 (“If [the plaintiff] is seeking damages or other monetary relief he is barred by sovereign
 4 immunity[.]”). And “[a] violation of procedural rights requires only a procedural correction, not
 5 the reinstatement of a substantive right to which the claimant may not be entitled on the merits.”
 6 *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir. 1991); *Miranda v. City of Casa Grande*, 15
 7 F.4th 1219, 1227 (9th Cir. 2021) (same); *see also Czerkies*, 73 F.3d at 1442 (explaining that “a
 8 conclusion that the claimant had been denied due process of law [would not] entitle him to benefits.
 9 It would entitle him only to a fair procedure for adjudicating his claim to benefits.”).³ The Court
 10 in *Czerkies* explained that a “decision as to whether the statute administered by the agency in
 11 question entitled [the plaintiff] to benefits would remain that of the agency—and not subject to
 12 judicial review.” 73 F.3d at 1442. Following those principles, even if Mr. Richardson could
 13 establish a due process violation, the Court could only grant him a procedural remedy, not
 14 additional benefits or damages. But OWCP has already adjudicated Mr. Richardson’s claim, and
 15 he is not seeking a procedural remedy. Dkt. No. 49 at 6 (listing relief requested).

16 Mr. Richardson also seeks injunctive relief, but he is not entitled to that either. Specifically,
 17 Mr. Richardson seeks an investigation into how FECA’s provisions “were deviated from” in his
 18 case and recertification and training “for the responsible parties.” *Id.* The plaintiff “bears the
 19 burden of showing that he has standing for each type of relief sought,” including an injunction.
 20 *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). When plaintiffs seek injunctive relief,
 21 they must allege some likelihood of future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95,

22
 23 ³ Although nominal damages are available to redress some due process violations, *Carey v. Piphus*, 435 U.S. 247, 266
 24 (1978), the United States has not waived its sovereign immunity for claims for monetary damages—including nominal
 damages—arising from alleged due process violations. *See, e.g., Magassa v. Wolf*, 487 F. Supp. 3d 994, 1007–08
 (W.D. Wash. 2020).

1 105-06 (1983). But Mr. Richardson has not alleged any likelihood of future injury. His second
2 amended complaint does not state that he is filing additional FECA claims, that if he did so he
3 would again encounter protracted delays, or allege any other basis to suggest a likelihood of future
4 injury. Mr. Richardson has thus failed to show an entitlement to injunctive relief. *See, e.g.,*
5 *Guerrero-Smith v. Solis*, 10 F. Supp. 3d 154, 156-57 (D.D.C. 2014) (denying the plaintiff's request
6 to compel OWCP to "[p]rocess any future payment paperwork in a timely fashion" because she
7 failed to present any evidence that the agency "may not respond to hypothetical future workers'
8 compensation claims in a timely manner." (internal quotation marks omitted)). Because the Court
9 cannot award further relief and there is no live controversy, this case is moot.

10 Mr. Richardson does not argue that any of the exceptions to the mootness doctrine apply,
11 nor does it appear that any exceptions apply here. Although "a defendant's voluntary cessation of
12 a challenged practice does not deprive a federal court of its power to determine the legality of the
13 practice," *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007) (internal
14 quotation marks omitted) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289
15 (1982)), a case is still moot "if subsequent events ma[k]e it absolutely clear that the allegedly
16 wrongful behavior could not reasonably be expected to recur," *Native Vill. of Nuiqsut v. Bureau*
17 *of Land Mgmt.*, 9 F.4th 1201, 1215 (9th Cir. 2021) (cleaned up). Here, OWCP has issued a decision
18 and Mr. Richardson does not allege that he has filed additional claims, and there is no indication
19 that the allegedly wrongful behavior will recur. For the same reasons, the mootness exception for
20 "wrongs capable of repetition yet evading review" is inapplicable. *Ctr. for Biological Diversity*,
21 511 F.3d at 965 (holding that "there must be a reasonable expectation that the same complaining
22 party will be subject to the same injury again" (cleaned up)). A third exception exists where a
23 plaintiff "would suffer collateral legal consequences if the actions being appealed were allowed to
24 stand," *Pub. Utils. Comm'n v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 2007), but as set forth

1 above, the Court is unable to alter OWCP's benefits decision even if it were to find a due process
2 violation.

3 Therefore, the case must be dismissed as moot.

4 **C. Mr. Richardson Has Not Stated a Claim Against the Individual Defendants**

5 Defendants move to dismiss the claims against the individual Defendants because Mr.
6 Richardson has failed to state a claim against them. Dkt. No. 60 at 16. Dismissal under Rule
7 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient
8 facts alleged under a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622
9 F.3d 1035, 1041 (9th Cir. 2010). The Court accepts as true all factual allegations in the complaint
10 and construes them in the light most favorable to the nonmoving party. *Skilstaf, Inc. v. CVS*
11 *Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012).

12 The Court's prior Order noted that Mr. Richardson's amended complaint did not specify
13 the nature or basis of any claims against the individual Defendants. Dkt. No. 48 at 2. Mr.
14 Richardson's second amended complaint does not cure that deficiency. *See generally* Dkt. No. 49.

15 The second amended complaint does not specify whether Mr. Richardson is suing the
16 individual Defendants in their personal or official capacities, but either way, he fails to state a
17 claim. If Mr. Richardson is suing the individual Defendants in their official capacities, that claim
18 duplicates the claim against OWCP and fails for the same reasons. This is because the Court treats
19 official capacity claims as claims against the entity that employs the official—here, OWCP. *See*
20 *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (explaining that “an official-capacity suit is, in all
21 respects other than name, to be treated as a suit against the entity,” and “the real party in interest
22 is the entity”); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (“[O]fficial-capacity
23 suits generally represent only another way of pleading an action against an entity of which an
24 officer is an agent[.]”). And an individual capacity claim is untenable because the Ninth Circuit

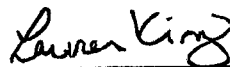
1 has declined to recognize a *Bivens* claim against federal government employees for alleged
2 violations of constitutional rights in adjudicating a claim for FECA benefits. *Ponce v. U.S. Gov't*,
3 667 F. App'x 921, 923 (9th Cir. 2016).

4 Finally, Mr. Richardson has not requested, and the Court will not grant, further leave to
5 amend the complaint. District courts may dismiss a complaint without leave to amend if "the
6 allegation of other facts consistent with the challenged pleading could not possibly cure the
7 deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
8 1986)); *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (explaining that a
9 district court may deny leave to amend when amendment would be futile). Here, the allegations of
10 additional facts will not save Mr. Richardson's claims. In addition, Mr. Richardson has been
11 granted leave to amend twice before, Dkt. Nos. 17, 48, but the amendments have not remedied his
12 claims' shortcomings. Leave to amend may be denied due to "repeated failure to cure deficiencies
13 by amendments previously allowed[.]" *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accordingly,
14 the Court grants the motion to dismiss without further leave to amend.

15 III. CONCLUSION

16 Although the Court sympathizes with Mr. Richardson, the Court is without authority to
17 grant him the relief he seeks. For the foregoing reasons, the Court GRANTS Defendants' motion
18 to dismiss. Dkt. No. 60.

19 Dated this 29th day of September, 2023.

20 

21 Lauren King
22 United States District Judge
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK W. RICHARDSON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
LABOR et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER 2:20-cv-0923-LK

- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

For the reasons set forth in the Court's September 29, 2023 Order, Dkt. No. 67, judgment is entered in favor of Defendants and against Plaintiff.

Dated September 29, 2023.

Ravi Subramanian
Clerk of Court

/s/Natalie Wood
Deputy Clerk

APPENDIX C TITLE PAGE

**APPENDIX C
MAGISTRATE JUDGE DOCUMENTS**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FREDERICK W. RICHARDSON,

Plaintiff,

v.

US DEP'T OF LABOR, *et al.*,

Defendants.

CASE NO. 2:20-cv-00923-LK

REPORT AND RECOMMENDATION

NOTED FOR: July 1, 2022

The District Court has referred the motion to dismiss the amended complaint to the undersigned, pursuant to 28 U.S.C. § 636(b). Dkt. 36. Plaintiff, a federal employee who claims that he injured his knee on the job in 1991, has filed an amended complaint under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8101, *et seq.* He asserts that the Director of the Office of Workers' Compensation Programs ("OWCP") violated due process by ignoring his requests to add a left shoulder and neck injury, atrial fibrillation, and post-traumatic stress disorder ("PTSD") to his FECA claim after initially accepting the claim related to his knee.

Defendants move to dismiss plaintiff's complaint for lack of subject matter jurisdiction.

1 They argue that a portion of FECA barring federal courts from hearing such claims prevents the
2 exercise of subject matter jurisdiction here. However, plaintiff's evidence that for years, OWCP
3 ignored various requests related to his claim creates a substantial claim of a procedural due
4 process violation, so that plaintiff fits within an exception from the bar on this Court's
5 jurisdiction. The District Court should deny the motion to dismiss. Dkt. 36.

6 BACKGROUND

7 Plaintiff initiated this matter in June 2020. Dkt. 1. Plaintiff brought suit under the
8 Federal Tort Claims Act against the OWCP and various other, individual defendants, claiming
9 that OWCP negligently handled his FECA claim for benefits in a way that violated his due
10 process rights and caused physical and mental injuries. *See generally* Dkt. 1.

11 The District Court dismissed the complaint with leave to amend, on defendants' motion
12 for dismissal on the basis of lack of subject matter jurisdiction. Dkt. 17. The Court summarized
13 plaintiff's allegations about his right knee injuries, surgery, and treatment; his request for atrial
14 fibrillation to be added as a related condition; and his claim that he suffered additional injuries
15 and sought authorization for a left shoulder surgery, related to which he claimed that he had
16 received no response. *See* Dkt. 17, at 1–5. The Court explained that a portion of the FECA, 5
17 U.S.C. § 8128(b), prohibited judicial review of OWCP benefits determinations unless a
18 complaint brought claims of a constitutional violation that were not “insubstantial.” *See* Dkt. 17,
19 at 6. And the Court concluded that as alleged, plaintiff's due process challenges were
20 “insubstantial” so that the Court lacked subject matter jurisdiction. Dkt. 17, at 7. The Court
21 allowed leave to amend related to plaintiff's claims of “failure to respond to his July 2019
22 request for authorization for left shoulder surgery” because it could be “possible for plaintiff to
23
24

1 allege a viable due process claim” in this regard. Dkt. 17, at 7.

2 The Court allowed plaintiff to file the operative, amended complaint. Dkt. 23. Plaintiff
3 alleges the following in that amended complaint.

4 First, according to plaintiff, in December 2015, a claims examiner requested additional
5 evidence related to plaintiff’s right knee revision/replacement, and in January 2016, he replied
6 with additional evidence and a request for atrial fibrillation to be added to his claim and to have
7 physical therapy approved. Dkt. 23, at 3. He did not receive a response. Dkt. 23, at 3. He
8 claims that he was able to find his letter in his OWCP file, even though OWCP personnel
9 claimed that they had no record of his letter. Dkt. 23, at 3.

10 Second, in September 2018, plaintiff renewed his request to have atrial fibrillation added
11 to his claim and requested the addition of a left shoulder and neck injury and aggravated PTSD.
12 Dkt. 23, at 7. An October 19, 2018, letter denied the request related to PTSD and directed him to
13 submit requested evidence within 30 days. Dkt. 23, at 7–8. In November, plaintiff responded
14 and reiterated his requests to add the atrial fibrillation, left shoulder and neck treatment, and
15 PTSD, noting that his left shoulder-related requests had not been addressed. Dkt. 23, at 8. He
16 asserts that he did not receive any further response. Dkt. 23, at 8.

17 Third, on July 22, 2019, he requested authorization for an atrial fibrillation ablation
18 procedure and “Watchman Device.” Dkt. 23, at 8. He again claims that he did not receive a
19 response from OWCP. Dkt. 23, at 9.

20 Fourth, on July 29, 2019, he requested authorization for left shoulder surgery and, again,
21 for his left shoulder condition to be added to his claim. Dkt. 23, at 9. He again alleges that he
22 did not receive a response. Dkt. 23, at 9.

23 Plaintiff generally alleges that these various delays or failures to respond denied him
24

1 “proper and timely treatment” and also violated his right to due process. *See* Dkt. 23, at 3, 8–9.

2 Since the filing of the amended complaint, the District Court has scheduled this matter
3 for a jury trial to commence February 13, 2023. Dkt. 34. Defendants have filed the motion to
4 dismiss, which is ripe for decision. Dkt. 36. The undersigned has also stayed discovery until a
5 final ruling on the motion to dismiss. Dkt. 43.

6 DISCUSSION

7 I. Legal Principles—FECA and Judicial Review

8 “FECA establishes a comprehensive and exclusive workers’ compensation scheme for
9 federal employees.” *Markham v. United States*, 434 F.3d 1185, 1187 (9th Cir. 2006). “The
10 Secretary has the authority to administer and decide all questions under FECA, 5 U.S.C. § 8145,
11 and may formulate rules and regulations necessary to administer the Act, 5 U.S.C. § 8149.” *Id.*

12 Title 5, section 8128(b) explicitly forbids courts from exercising jurisdiction over cases
13 challenging the merits of benefits determinations:

14 The action of the Secretary or his designee in allowing or denying a payment under
this subchapter is--

- 15 (1) final and conclusive for all purposes and with respect to all questions of law and
16 fact; and
17 (2) not subject to review by another official of the United States or by a court by
mandamus or otherwise.

18 There is a narrow exception from § 8128(b), however, that allows a court to consider a
19 constitutional challenge. *Markham*, 434 F.3d at 1187. The Ninth Circuit has explained that this
20 exception should not be broadly applied: “[a] cognizable due process claim must be more than
21 an ephemeral and insubstantial denial of benefits to which a plaintiff does not claim entitlement.”
22 *Id.* at 1188. Thus, whether the Court has subject matter jurisdiction over this case turns on the

1 substantiality of plaintiff's procedural due process claim.

2 **II. Discussion**

3 A Rule 12(b)(1) motion may be "facial" or "factual." "In a facial attack, the challenger
4 asserts that the allegations contained in a complaint are insufficient on their face to invoke
5 federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the
6 allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for
7 Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see also Savage v. Glendale Union
8 High Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003) (explaining that a moving party may convert
9 a facial attack to a factual attack by relying on affidavits or other evidence).

10 Here, plaintiff's claims center on allegations regarding the lack of response to his
11 requests in January 2016, November 2018, and July 2019 regarding atrial fibrillation and left
12 shoulder and neck injury. In support of their motion to dismiss, defendants rely on evidence that
13 they responded in April 2016 (after plaintiff wrote his Congressional representatives), other
14 evidence about their correspondence with plaintiff regarding his various claims, and evidence
15 that they denied the claims related to atrial fibrillation, left shoulder and neck injury, and PTSD
16 in March 2022. *See generally* Dkt. 36. Because they rely on extrinsic evidence to the amended
17 complaint and because they do not otherwise provide authority for construing their motion as a
18 facial attack, the Court construes the motion as a factual attack on jurisdiction.

19 Moreover, the threshold inquiry into jurisdiction in this case intertwines with the merits
20 of the case because both issues require analyzing whether plaintiff can show a procedural due
21 process violation. A court must exercise care when deciding a factual attack on subject matter
22 jurisdiction that is intertwined with the merits of the case in this manner. "[W]hen the
23 jurisdictional issue and the merits are 'intertwined,' or when the jurisdictional question is
24

1 dependent on the resolution of factual issues going to the merits, the district court must apply
2 the summary judgment standard in deciding the motion to dismiss.” *Miller v. Lifestyle*
3 *Creations, Inc.*, 993 F.2d 883 (9th Cir. 1993); *see also Leite v. Crane Co.*, 749 F.3d 1117, 1122
4 n.3 (9th Cir. 2014) (“[A] court must leave the resolution of material factual disputes to the trier
5 of fact when the issue of subject-matter jurisdiction is intertwined with an element of the merits
6 of the plaintiff’s claim.”). Thus, the Court takes as true plaintiff’s evidence in response to the
7 motion, in the analysis herein, and does not resolve issues of fact, such as whether there was an
8 unreasonable delay in responding to plaintiff’s requests.

9 Claims of entitlement to federal disability payments are a government created property
10 interest. *Raditch v. United States*, 929 F.2d 478, 480 (9th Cir. 1991). “When a government-
11 created property interest is at stake, due process principles require at least notice and an
12 opportunity to respond in some manner, whether in writing or at an oral hearing, before
13 termination of that interest.” *Id.*

14 The crux of defendants’ argument for dismissal is that plaintiff’s claim is insubstantial
15 because defendants did, indeed, respond to plaintiff’s various requests—defendants acknowledge
16 a “misfiling” but assert that OWCP took corrective action and issued a decision on all claims.
17 Dkt. 36, at 5. Defendants do not contend that they responded to plaintiff’s January 2016 letter
18 (indeed, they acknowledge that they misfiled it). They provide evidence that after plaintiff wrote
19 to Congress and the Secretary of Labor in April 2016, they responded to him and requested that
20 he send a letter to his claims examiner. *See* Dkt. 36, at 3. However, plaintiff provides evidence
21 that in May 2016, rather than following up on his request regarding atrial fibrillation, defendant
22 Tracy Johnson stated that plaintiff’s request had been forwarded to a medical advisor. *See* Dkt.
23 42, at 12, 74; *see also Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (*a pro se*
24

1 plaintiff's verified complaint may be taken as evidence in support of his claims to the extent his
2 allegations are made on personal knowledge). Plaintiff asserts that he did not receive any further
3 response related to atrial fibrillation, despite another letter to defendant Johnson in May 2016.
4 See Dkt. 42, at 12, 72, 78; see also Dkt. 42, at 114–17 (defendant Taylor's letter and medical
5 advisor's opinion that a right knee replacement surgery would not be approved but not discussing
6 atrial fibrillation). Finally, defendants do not assert that they responded to the late 2018 requests
7 inasmuch as they related to left shoulder and neck injury and reiterated the atrial fibrillation
8 request or this his July 2019 request. See Dkt. 36, at 4–5. Again, defendants simply rely on the
9 March 21, 2022, decision denying the claims for atrial fibrillation, left shoulder and neck injury,
10 and PTSD. See Dkt. 36, at 5.

11 Defendants argue that now that there is a decision on the claims, plaintiff cannot show a
12 due process violation because he received notice and an opportunity to be heard and because he
13 may now take an administrative appeal from that decision. See Dkt. 36, at 6. But defendants do
14 not cite any case that holds that if a claim is ultimately denied, the agency may take as long as it
15 wishes to process an application. In fact, even if a claim is ultimately denied, procedural due
16 process requires that the agency not unreasonably delay its determination. In *Rodrigues v.*
17 *Donovan*, 769 F.2d 1344, 1345, 1348 (9th Cir. 1985), for example, the Ninth Circuit held that
18 where OWCP suspended benefits without responding to a request for a hearing and took four
19 years to issue a final decision adverse to plaintiff, there was a cognizable due process violation.

20 The Court explained—

21 Although a mere allegation of a constitutional violation would not be sufficient . . .
22 the record before us indicates that [plaintiff] may have cognizable due process
23 claims. [Plaintiff] does not make a facial attack on the constitutionality of the
24 FECA procedures themselves, but, instead, asserts that the procedures are
unconstitutional as applied to him. Given the Secretary's failure to provide a
hearing after the suspension of benefits, despite [plaintiff's] request for one, and

1 the Secretary's considerable delay in deciding [plaintiff's] claim, we do not find the
 2 due process challenges insubstantial. *See Cleveland Board of Education v.*
 3 *Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1496 . . . (1985) ("At some point, a
 4 delay in the post-termination hearing would become a constitutional violation."
 5 (citation omitted)); *Kelly v. Railroad Retirement Board*, 625 F.2d 486, 490-91 (3d
 6 Cir. 1980).

7 *Rodrigues*, 769 F.2d at 1348.

8 Similarly, in *Kelly v. Railroad Retirement Board*, an agency took more than three years
 9 and nine months to enter a final decision of "not disabled." 625 F.2d at 489. The Third Circuit
 10 held that the nearly four-year delay in issuing a final decision was "wholly inexcusable" where
 11 "no valid reason for the delay is given." *Id.* at 490; *see also Loudermill*, 470 U.S. at 547 ("At
 12 some point, a delay in the post-termination hearing would become a constitutional violation.");
 13 *Ponce v. U.S. Gov't*, No. 3:11-CV-172-AC, 2013 WL 6177812, at *1 (D. Or. Nov. 21, 2013).

14 Defendants cite *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)
 15 as authority that procedural due process requires only notice and an opportunity for a hearing,
 16 but the Supreme Court has also explained the Constitution requires "an opportunity which must
 17 be granted at a *meaningful time* and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S.
 18 545, 552 (1965) (emphasis added). Here, plaintiff asserts and has provided evidence that
 19 between January 2016 and March 2022, defendants failed to respond to his many requests related
 20 to atrial fibrillation and left shoulder and neck injury in a meaningful manner, instead delaying
 21 issuing a final decision on these requests until March 2022. *See* Dkt. 42, at 23. His evidence
 22 that there was a delay of years in responding to his various requests for no apparent reason
 23 beyond mishandling his file and overlooking certain of his requests is enough to show a
 24 cognizable claim of procedural due process violation.

Defendants also argue that plaintiff has a meaningful post-deprivation remedy because he
 can pursue his administrative remedies under FECA. Dkt. 36, at 6. The availability of a

1 the Secretary's considerable delay in deciding [plaintiff's] claim, we do not find the
 2 due process challenges insubstantial. *See Cleveland Board of Education v.*
 3 *Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1496 . . . (1985) ("At some point, a
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 22 that there was a delay of years in responding to his various requests for no apparent reason
 23 beyond mishandling his file and overlooking certain of his requests is enough to show a
 24 cognizable claim of procedural due process violation.

Defendants also argue that plaintiff has a meaningful post-deprivation remedy because he
 can pursue his administrative remedies under FECA. Dkt. 36, at 6. The availability of a

1 meaningful post-deprivation remedy can prevent even an improper deprivation of benefits from
2 amounting to a procedural due process violation. *See Hudson v. Palmer*, 468 U.S. 517, 533
3 (1984); *Raditch*, 929 F.2d at 481. But here, plaintiff asserts that he did not have a meaningful
4 opportunity to challenge the decisions on his requests because defendant ignored multiple
5 requests that he made over the course of years. Even where a post-deprivation remedy exists, an
6 agency's extreme delay in providing that remedy can still support the existence of a due process
7 violation. *See, e.g., Loudermill*, 470 U.S. at 547 (noting that delay in a post-termination hearing
8 becomes a constitutional violation at some point); *Kraebel v. N.Y.C. Dep't of Hous. Pres. &*
9 *Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) ("[E]ven before the state makes a definitive decision as to
10 entitlement, the road to that determination must be paved by due process. Moreover, due process
11 requires that eligibility for a variety of benefits be processed within a reasonable time. . . . Stated
12 differently, delay in processing can become so unreasonable as to deny due process."); *Machado*
13 *v. Leavitt*, 542 F. Supp. 2d 185, 196 (D. Mass. 2008) ("delay without justification clearly falls
14 outside of constitutional bounds"); *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 388 (D.
15 Mass. 1995) (citing authorities that a tardy post-deprivation remedy may become a procedural
16 due process violation, at least in "extreme cases").

17 Finally, although defendants contend that plaintiff is simply disagreeing with the
18 decisions issued, review of his materials demonstrates that he cites the ultimate decision on his
19 requests only as background information. *E.g.*, Dkt. 42, at 1. The crux of his claim is a violation
20 of procedural due process based on an unreasonably and egregiously lengthy administrative
21 process.

22 In short, taking plaintiff's evidence as true, he has shown a substantial violation of
23 procedural due process related to defendants' handling of his claim, so that the motion to dismiss
24

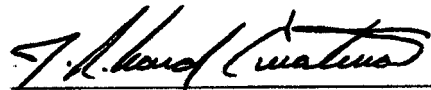
1 should be denied.

2 **CONCLUSION**

3 For the reasons set forth above, the Court recommends denying the motion to dismiss for
4 lack of subject matter jurisdiction. Dkt. 36.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
6 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
7 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*
8 review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those
9 objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v.*
10 *Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit
11 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on July 1, 2022,
12 as noted in the caption.

13 Dated this 15th day of June, 2022.

14 

15 J. Richard Creatura
16 Chief United States Magistrate Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK W. RICHARDSON,

Plaintiff,

v.

US DEP'T OF LABOR, *et al.*,

Defendants.

CASE NO. 2:20-cv-00923-LK

[PROPOSED] ORDER ADOPTING
REPORT AND
RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Judge J. Richard
Creatura, United States Magistrate Judge, and the relevant record, does hereby find and ORDER:

- (1) The Court adopts the Report and Recommendation.
- (2) The motion to dismiss (Dkt. 36) is denied.
- (3) The stay on discovery is lifted.

The Clerk is directed to send copies of this Order to counsel of record.

Dated this _____.

Lauren King
United States District Judge

APPENDIX D TITLE PAGE

**APPENDIX D
STATUTORY PROVISIONS INVOLVED**

5 U.S. Code § 8101 - Definitions
Legal Information Institute (LII)

For the purpose of this subchapter—

(1) "employee" means—

(A)

a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States;

(B)

an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual;

(C)

an individual, other than an independent contractor or an individual employed by an independent contractor, employed on the Menominee Indian Reservation in Wisconsin in operations conducted under a statute relating to tribal timber and logging operations on that reservation;

(D)

an individual employed by the government of the District of Columbia;

(E)

an individual appointed to a position on the office staff of a former President under section 1(b) of the Act of August 25, 1958 (72 Stat. 838);

(F)

an individual selected pursuant to chapter 121 of title 28, and serving as a petit or grand juror; and

(G)

an individual who is a System member of the National Urban Search and Rescue Response System during a period of appointment into Federal service pursuant to section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act;

but does not include—

(i)

a commissioned officer of the Regular Corps of the Public Health Service;

(ii)

a commissioned officer of the Reserve Corps [1] of the Public Health Service on active duty;

"Appendix D"
D1

(iii)

a commissioned officer of the Environmental Science Services Administration; or

(iv)

a member of the Metropolitan Police or the Fire Department of the District of Columbia who is pensioned or pensionable under sections 521-535 of title 4, District of Columbia Code; and

(2)

"physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist, and subject to regulation by the Secretary;

(3)

"medical, surgical, and hospital services and supplies" includes services and supplies by podiatrists, dentists, clinical psychologists, optometrists, chiropractors, osteopathic practitioners and hospitals within the scope of their practice as defined by State law. Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist, and subject to regulation by the Secretary;

(4)

"monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except when otherwise determined under section 8113 of this title with respect to any period;

(5)

"injury" includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services;

(6)

"widow" means the wife living with or dependent for support on the decedent at the time of his death, or living apart for reasonable cause or because of his desertion;

(7)

"parent" includes stepparents and parents by adoption;

(8)

"brother" and "sister" mean one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support, and include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers or married sisters;

(9)

"child" means one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children;

(10)

"grandchild" means one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support;

(11)

"widower" means the husband living with or dependent for support on the decedent at the time of her death, or living apart for reasonable cause or because of her desertion;

(12)

"compensation" includes the money allowance payable to an employee or his dependents and any other benefits paid for from the Employees' Compensation Fund, but this does not in any way reduce the amount of the monthly compensation payable for disability or death;

(13) "war-risk hazard" means a hazard arising during a war in which the United States is engaged; during an armed conflict in which the United States is engaged, whether or not war has been declared; or during a war or armed conflict between military forces of any origin, occurring in the country in which an individual to whom this subchapter applies is serving; from—

(A)

the discharge of a missile, including liquids and gas, or the use of a weapon, explosive, or other noxious thing by a hostile force or individual or in combating an attack or an imagined attack by a hostile force or individual;

(B)

action of a hostile force or individual, including rebellion or insurrection against the United States or any of its allies;

(C)

the discharge or explosion of munitions intended for use in connection with a war or armed conflict with a hostile force or individual;

(D)

the collision of vessels on convoy or the operation of vessels or aircraft without running lights or without other customary peacetime aids to navigation; or

(E)

the operation of vessels or aircraft in a zone of hostilities or engaged in war activities;

(14) "hostile force or individual" means a nation, a subject of a foreign nation, or an individual serving a foreign nation—

(A)

engaged in a war against the United States or any of its allies;

(B)

engaged in armed conflict, whether or not war has been declared, against the United States or any of its allies; or

(C)

engaged in a war or armed conflict between military forces of any origin in a country in which an individual to whom this subchapter applies is serving;

(15)

"allies" means any nation with which the United States is engaged in a common military effort or with which the United States has entered into a common defensive military alliance;

(16)

"war activities" includes activities directly relating to military operations;

(17) "student" means an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is—

(A)

a school or college or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof;

(B)

a school or college or university which has been accredited by a State or by a State-recognized or nationally recognized accrediting agency or body;

(C)

a school or college or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited; or

(D)

an additional type of educational or training institution as defined by the Secretary of Labor.

Such an individual is deemed not to have ceased to be a student during an interim between school years if the interim is not more than 4 months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of study or training during the semester or other enrollment period immediately after the interim or during

periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A student whose 23rd birthday occurs during a semester or other enrollment period is deemed a student until the end of the semester or other enrollment period;

(18)

"price index" means the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(19)

"organ" means a part of the body that performs a special function, and for purposes of this subchapter excludes the brain, heart, and back; and

(20)

"United States medical officers and hospitals" includes medical officers and hospitals of the Army, Navy, Air Force, Department of Veterans Affairs, and United States Public Health Service, and any other medical officer or hospital designated as a United States medical officer or hospital by the Secretary of Labor.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 532; Pub. L. 90-83, § 1(4), (48), Sept. 11, 1967, 81 Stat. 196, 209; Pub. L. 93-416, § 1, Sept. 7, 1974, 88 Stat. 1143; Pub. L. 96-499, title IV, § 421(b), Dec. 5, 1980, 94 Stat. 2608; Pub. L. 97-463, § 4, Jan. 12, 1983, 96 Stat. 2532; Pub. L. 102-54, § 13(b)(1), June 13, 1991, 105 Stat. 274; Pub. L. 114-326, § 2(b)(1), Dec. 16, 2016, 130 Stat. 1972.)

5 U.S. Code § 8128(b) - Review of award
Legal Information Institute (LII)

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may—

- (1)**
end, decrease, or increase the compensation previously awarded; or
- (2)**
award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—

- (1)**
final and conclusive for all purposes and with respect to all questions of law and fact; and
- (2)**
not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payments in accordance with that action.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 545.)

28 U.S. Code § 1254 (1) - Courts of appeals; certiorari; certified questions
Legal Information Institute (LII)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)