



## **FACTUAL HISTORY**

On May 30, 2014 appellant, then a 37-year-old customs and border protection (CBP) officer, filed a traumatic injury claim (Form CA-1) alleging a left ear injury and headaches that arose in the performance of duty on May 28, 2014. He explained that he was working at a booth at the Los Indios International Bridge when lightning struck a flagpole approximately 45 yards away. The sound of the lightning strike reportedly caused pain and ringing in appellant's left ear, as well as headaches. That same day, he was treated in the Valley Baptist Harligen Emergency Department and diagnosed with otalgia.<sup>3</sup> Appellant was released to return to work without restrictions. In July 2014, OWCP accepted his traumatic injury claim for left otitic barotrauma, left otalgia, and left traumatic arthropathy (head and neck myofascial pain). Beginning in August 2014, appellant accepted a series of light-duty assignments that limited his exposure to loud noises.

Dr. Audrey L. Jones, a Board-certified family practitioner, initially examined appellant on May 18, 2015 for complaints of left-sided face pain, neck pain, left shoulder pain, hearing loss, and ringing in his ears, that was reportedly due to a work-related traumatic accident. She indicated that appellant informed her that he had been working as a CBP officer on May 28, 2014 when the booth he was in was struck by lightning. Appellant further reported that he "was thrown against the wall and fell to the floor," and briefly (less than a minute) lost consciousness. When he regained consciousness, appellant reportedly walked inside the office building and requested assistance. At the time, he reportedly had pain to the left side of his face, neck pain, left shoulder pain, hearing loss, and ringing in his ears. Almost a year after the May 28, 2014 incident, appellant continued to report complaints with respect to his face, neck, left shoulder, and hearing/ears. Dr. Jones reviewed appellant's past medical history, diagnostic studies, and provided physical examination findings. She diagnosed left otitic barotrauma, left otalgia, left traumatic arthropathy, headaches, sensorineural hearing loss, tinnitus, neck sprain, left shoulder/upper arm sprains/strains, and cervical intervertebral disc displacement without myelopathy. Dr. Jones attributed all of the above-noted diagnoses to appellant's May 28, 2014 work-related injury.

In a May 26, 2015 report, Dr. Jones requested that appellant's claim be expanded to include sensorineural hearing loss, tinnitus, neck sprain, and left shoulder/upper arm sprains/strains. She noted that appellant suffered from a work-related injury to the left ear, left side of face, neck, and left shoulder. Dr. Jones explained that on May 28, 2014 appellant was performing regular duties as a CPB officer when he began to have increasing problems with his left ear, left side of face, neck, and left shoulder.

A June 1, 2015 left shoulder x-ray was reported as normal. Appellant's June 1, 2015 cervical magnetic resonance imaging (MRI) scan revealed posterior central disc protrusions/herniations at C3-4 and C4-5, with nerve root impingement bilaterally, which was slightly worse at C3-4.

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<sup>3</sup> The May 28, 2014 emergency department records reflected that, while at work earlier that afternoon, appellant was standing next to his booth when lightning struck a flagpole. At the time, appellant was not wearing any protection to shield him from the loud noise. He presented to the emergency department with complaints of ear pain and tinnitus.

In a September 10, 2015 report, Dr. Jones again requested that the claim be expanded to include sensorineural hearing loss, tinnitus, neck sprain, and left shoulder/upper arm sprains/strains. She indicated that appellant sustained injuries to his cervical spine and left shoulder on May 28, 2014 when the booth he was working in was struck by lightning and appellant “was thrown against the wall and fell to the floor,” and briefly lost consciousness. Dr. Jones reported that appellant could not perform his activities of daily living without significant limitations. She advised as to the benefits of left shoulder, neck, and cervical spine rehabilitation.

Effective October 13, 2015, appellant was released to resume his regular duties as a CBP officer.<sup>4</sup>

Appellant claimed to have reinjured his neck while in the performance of duty on October 18, 2015. He indicated that he heard a pop and then felt pain in the back of his neck while trying to open a trunk lid that did not have pneumatic supports. OWCP assigned File No. xxxxxx292 to appellant’s new traumatic injury claim. By decision dated December 4, 2015, OWCP denied the claim in File No. xxxxxx292 because appellant failed to establish that the October 18, 2015 incident occurred as alleged. It also found that appellant had not established a medical diagnosis in connection with the alleged October 18, 2015 employment incident.

In a January 13, 2016 report, Dr. Jones requested an expansion of appellant’s accepted conditions to include cervical sprain, left shoulder sprain, and cervical disc displacement -- cervicothoracic region. She indicated that appellant had reinjured his neck and left shoulder on October 18, 2015 after he had returned to regular duty. Appellant was seen on October 20, 2015 for the reinjury, but was told by the employing establishment to file a new claim as his neck and left shoulder were not covered under the current claim, OWCP File No. xxxxxx646. Dr. Jones reported the history of the May 28, 2014 injury. She noted that appellant had been working light duty for one year and had attended a functional capacity evaluation and work hardening prior to his case being transferred to her office. Appellant was initially seen on May 18, 2015 and diagnosed with neck sprain, sprain of left shoulder joint, and other cervical disc displacement, cervicothoracic region. In a follow-up on October 13, 2015, he continued to feel mild pain 2/10 of the left neck/shoulder (trapezius) area. Appellant indicated that he had passed his fitness-for-duty examination on September 15, 2015 and wanted to return to full duty.

Dr. Jones’ January 13, 2016 report further noted that on October 18, 2015, appellant was reinjured at work. Appellant indicated that he went through weapons and defensive tactics and was permitted to qualify and work although he had struggled with some moves and his left shoulder bothered him. He started working customs behind a desk, which did not bother him too much. Appellant was then switched to work the inspection booth area outside, where he had to inspect vehicles and look in trucks and under hoods. He felt pain and struggled to open and close trucks and hoods. On October 18, 2015 appellant had inspected six vehicles and one vehicle had no spring and was heavy to lift. He felt a snap sensation in the middle of the neck area as he lifted, but continued to work. Appellant could not turn his head to the right due to pain and felt his left arm go numb and left hand tingle.

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<sup>4</sup> Hilda R. Baesa, a certified physician assistant (PA-C), signed the October 13, 2015 duty status report (Form CA-17).

The January 13, 2016 report also noted that Dr. Jones reevaluated appellant on October 20, 2015, and obtained a new cervical MRI scan. The requested expanded diagnoses included sprain of ligaments of the cervical spine, other sprain of left shoulder joint, and other cervical disc displacement -- cervicothoracic region. Dr. Jones indicated that appellant had been evaluated by an orthopedist, who had diagnosed cervical and lumbar degenerative disc disease with cervical and lumbar strain. She reported that he was working light duty four hours a day. Dr. Jones also noted that the employing establishment had recently advised appellant that his OWCP File No. xxxxxx292 had been denied for his neck and left shoulder conditions. She noted that he was given restrictions as he was not ready to return to full duty because of personal safety and the safety of others. Dr. Jones indicated that appellant had been complaining and that they tried to get his case approved for his neck and left shoulder since his initial visit.

In a February 8, 2016 follow-up report, Dr. Jones noted that the requested expansion of the claim to include the conditions of neck and left shoulder sprain had been denied. She indicated that an individual named Lourdis Galindo called and informed her that appellant's previously denied case was closed and considered a personal injury. Dr. Jones noted that she was unaware that the previous case was considered a personal injury. She indicated that appellant needed to follow-up with his primary care physician. Dr. Jones also noted that the U.S. Department of Labor (DOL) had denied the requested upgraded diagnoses of sprain of ligaments of cervical spine, other sprain of left shoulder joint, and other cervical disc displacement -- cervicothoracic region.

In her February 29, 2016 report, Dr. Jones stated that appellant's headaches and left otalgia had resolved and that he needed a referral to a hearing specialist for an impairment rating regarding his accepted diagnosis of left otitic barotrauma. She reiterated that DOL had denied the requested upgraded diagnoses of cervical sprain, left shoulder joint sprain, and cervical disc displacement -- cervicothoracic region.

By decision dated March 7, 2016, OWCP declined to expand appellant's claim and denied authorization for medical treatment with respect to his cervical and left shoulder conditions.<sup>5</sup>

On April 8, 2016 OWCP received appellant's request for review of the written record. He submitted the appeal request form that accompanied the March 7, 2016 decision. The hearing request was dated April 7, 2016.

In a March 10, 2016 report, Dr. Jones diagnosed left ear otitis media, which she indicated was not covered under workers' compensation. She also reported the accepted diagnoses were left otitic barotrauma, left otalgia -- resolved, left traumatic arthropathy, and headache -- resolved.

In an April 21, 2016 nonmerit decision, the Branch of Hearings and Review denied appellant's request as untimely. The hearing representative also exercised its discretion and denied the hearing as appellant could file a request for reconsideration.

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<sup>5</sup> OWCP also advised appellant to pursue his appeal rights under File No. xxxxxx292.

## LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA<sup>6</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.<sup>7</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.<sup>8</sup> The second component is whether the employment incident caused a personal injury.<sup>9</sup> An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.<sup>10</sup>

An injured employee is entitled to receive all medical services, appliances, or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.<sup>11</sup> OWCP has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on its authority being that of reasonableness.<sup>12</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.<sup>13</sup>

While OWCP is obligated to pay for treatment of work-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of a work-related injury or condition.<sup>14</sup> Proof of causal relationship must include rationalized

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<sup>6</sup> *Supra* note 1.

<sup>7</sup> 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

<sup>8</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>9</sup> *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

<sup>10</sup> *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>11</sup> 5 U.S.C. § 8103(a); 20 C.F.R. § 10.310(a).

<sup>12</sup> *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

<sup>13</sup> *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>14</sup> *Debra S. King*, 44 ECAB 203, 209 (1992).

medical evidence.<sup>15</sup> In addition to demonstrating causal relationship, the injured employee must show that the requested services, appliances or supplies are medically warranted.<sup>16</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted appellant's May 28, 2014 traumatic injury claim for left otitic barotrauma, left otalgia, and left traumatic arthropathy. In May 2015, appellant's treating physician, Dr. Jones, requested that OWCP expand the claim to include, *inter alia*, neck sprain and left shoulder/upper arm sprains/strains. She subsequently requested on behalf of appellant that OWCP also accept the claim for cervical disc displacement -- cervicothoracic region. Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>17</sup>

When Dr. Jones initially examined appellant on May 18, 2015, she noted a history of injury on May 28, 2014 when appellant was reportedly inside a booth that was struck by lightning. Appellant was also reportedly thrown against the wall, fell to the floor, and lost consciousness for less than a minute. Dr. Jones subsequently reviewed a June 1, 2015 cervical MRI scan that revealed posterior central disc protrusions/herniations at C3-4 and C4-5. Her injury-related diagnoses included left otitic barotrauma, left otalgia, left traumatic arthropathy, headaches, sensorineural hearing loss, tinnitus, neck sprain, left shoulder/upper arm sprains/strains, and cervical intervertebral disc displacement without myelopathy. A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>18</sup> Additionally, the opinion must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).<sup>19</sup> Although Dr. Jones opined that appellant's additional conditions of neck sprain, left shoulder strain, and cervical intervertebral disc displacement were caused by the May 28, 2014 work injury, she did not provide sufficient medical rationale supporting this conclusion based on an accurate factual history.<sup>20</sup> Appellant's physician's reported history of injury differs significantly from the history appellant provided in his May 30, 2014 Form CA-1 form, as well as the history noted in the May 28, 2014 emergency department treatment records. On his Form CA-1 appellant indicated that lightning struck a flagpole located approximately "45 yards away from the booth [he] was working at." Contrary to what Dr. Jones reported, appellant was not inside the booth, nor was the booth struck by lightning. Also, at the time of the May 28, 2014 employment incident, appellant had not reported having been thrown against the wall of the

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<sup>15</sup> *Supra* note 12.

<sup>16</sup> *Id.* at 460-61.

<sup>17</sup> *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>18</sup> *Victor J. Woodhams*, *supra* note 9.

<sup>19</sup> *Id.*

<sup>20</sup> *L.G.*, Docket No. 09-1692 (issued August 11, 2010); *James R. Taylor*, 56 ECAB 537 (2005) (medical opinions based on an incomplete or inaccurate history are of diminished probative value).

booth, or having fallen to the floor, or having briefly lost consciousness. The May 28, 2014 emergency department records are consistent with the information appellant provided on the Form CA-1, in that he was reported to have been “standing next to his booth” when “lighting struck a [flagpole].” Moreover, the emergency department records did not mention appellant having been thrown against a wall, or falling to the floor, or having lost consciousness. Not only is Dr. Jones’ reported history of injury inaccurate, she also failed to explain how the diagnosed cervical and left shoulder conditions were causally related to the May 28, 2014 employment incident. The Board has found that medical opinions unsupported by rationale and based on an inaccurate factual history are of little probative value.<sup>21</sup>

In a May 26, 2015 report, Dr. Jones requested that appellant’s claim be expanded to include additional cervical and left upper extremity conditions. She explained that on May 28, 2014 appellant was performing regular duties as a CPB officer when he began experiencing increased problems with his left ear, left side of face, neck, and left shoulder. However, Dr. Jones did not indicate or otherwise explain how appellant’s job duties either caused or contributed to his then-diagnosed neck and left shoulder sprains. The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.<sup>22</sup> Temporal relationship alone will not suffice.<sup>23</sup>

Appellant’s June 1, 2015 cervical MRI scan revealed posterior central disc protrusions/herniations at C3-4 and C4-5. However, the diagnostic report did not address causal relationship. The Board has found that medical evidence that does not offer an opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship.<sup>24</sup> Therefore, the June 1, 2015 cervical MRI scan is insufficient to establish causal relationship.

Dr. Jones’ September 10, 2015 report is also insufficient to establish causal relationship. She reiterated her request to upgrade appellant’s claim to include cervical and left upper extremity conditions. However, Dr. Jones continued to rely on an inaccurate May 28, 2014 history of injury that included appellant having worked inside a booth that was struck by lightning. She also reiterated that appellant “was thrown against the wall and fell to the floor,” and briefly lost consciousness. As noted, a physician’s opinion on causal relationship must be based on a complete and accurate factual background.<sup>25</sup>

The remaining medical evidence of record is insufficient to meet appellant’s burden of proof. As noted, effective October 13, 2015, appellant resumed his regular duties as a CBP officer. Thereafter, he reported a new injury of October 18, 2015, when he heard a pop then felt

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<sup>21</sup> *M.P.*, Docket No. 14-1289 (issued September 26, 2014); *F.T.*, Docket No. 09-0919 (issued December 7, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>22</sup> 20 C.F.R. § 10.115(e).

<sup>23</sup> *See D.I.*, 59 ECAB 158, 162 (2007).

<sup>24</sup> *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007); *supra* note 17.

<sup>25</sup> *Victor J. Woodhams*, *supra* note 9.

pain in the back of his neck while trying to open a trunk lid that did not have pneumatic supports. Appellant filed a separate traumatic injury claim (File No. xxxxxx292), which OWCP denied based upon his failure to establish fact of injury.

In her January 13, 2016 letter, Dr. Jones noted appellant's medical course since his May 28, 2014 injury and that he had reinjured his neck and left shoulder on October 18, 2015 after he returned to regular duty.<sup>26</sup> She provided upgraded diagnoses of sprain of ligaments of cervical spine, other sprain of left shoulder joint, and other cervical disc displacement, cervicothoracic region. Dr. Jones also indicated that an orthopedist had evaluated appellant and diagnosed cervical and lumbar degenerative disc disease with cervical and lumbar strains. However, she did not provide an opinion on causal relationship. Reports lacking such an opinion are of diminished probative value.<sup>27</sup>

In her February 8 and 29, 2016 reports, Dr. Jones noted that DOL had denied the requested expansion of diagnoses of sprain of ligaments of cervical spine, other sprain of left shoulder joint, and other cervical disc displacement, cervicothoracic region. However, she did not provide an opinion on the causal relationship between the diagnosed conditions and the accepted employment injury.<sup>28</sup>

The Board finds that appellant has not met his burden of proof because the medical opinion evidence of record is insufficient to establish the critical element of causal relationship between appellant's cervical and left shoulder conditions and the accepted May 28, 2014 employment injury.

On appeal appellant contended that his current cervical and left shoulder conditions were the result of a separate work injury that occurred on October 18, 2015. Instead of adding additional conditions under the present claim (OWCP File No. xxxxxx646), appellant believed that his cervical and left shoulder conditions should have been accepted under the other claim (OWCP File No. xxxxxx292), which OWCP denied by decision dated December 4, 2015. As discussed above, the medical evidence of record does not establish causal relationship between the May 28, 2014 employment injury and appellant's diagnosed cervical and left shoulder conditions. The Board further notes that it does not have jurisdiction over OWCP's December 4, 2015 decision issued under File No. xxxxxx292.<sup>29</sup>

Appellant may submit new evidence and/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.

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<sup>26</sup> Dr. Jones continued to report that appellant had been injured on May 28, 2014 when the booth he was in was struck by lighting and he "was thrown against the wall and fell to the floor," and briefly lost consciousness.

<sup>27</sup> See *Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

<sup>28</sup> *Id.*

<sup>29</sup> In his application for review (AB-1), appellant did not specifically request that the Board review OWCP's December 4, 2015 decision under File No. xxxxxx292. See 20 C.F.R. § 501.3(c)(4).

## LEGAL PRECEDENT -- ISSUE 2

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP, may obtain a hearing by writing to the address specified in the decision.<sup>30</sup> The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.<sup>31</sup> The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>32</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.<sup>33</sup>

## ANALYSIS -- ISSUE 2

OWCP issued its latest merit decision on March 7, 2016. Appellant had 30 days to request a hearing, which the period ended on April 6, 2016. The appeal request form he submitted was dated April 7, 2016, and OWCP received it on April 8, 2016. The regulations specify that "[t]he hearing request must be sent within 30 days ... of the date of the decision for which a hearing is sought."<sup>34</sup> As appellant's April 7, 2016 request was untimely, he was not entitled to a hearing as a matter of right.<sup>35</sup> The Branch of Hearings and Review also denied appellant's request on the basis that the issue regarding the claimed cervical and left shoulder conditions could be equally well addressed by requesting reconsideration before OWCP. The Board finds that the hearing representative properly exercised his discretionary authority in denying appellant's request for review of the written record.<sup>36</sup>

## CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his diagnosed cervical and left shoulder conditions are causally related to his May 28, 2014 employment injury. The Board also finds that the Branch of Hearings and Review properly denied appellant's request for review of the written record.

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<sup>30</sup> 20 C.F.R. § 10.616(a).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>34</sup> 20 C.F.R. § 10.616(a).

<sup>35</sup> The scanned envelope did not reveal a legible postmark indicating that the hearing request had been mailed on or before April 6, 2016.

<sup>36</sup> *Mary B. Moss*, 40 ECAB 640, 647 (1989). Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts. See *André Thyratron*, 54 ECAB 257, 261 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 21 and March 7, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 21, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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