# United States Department of Labor
# Employees' Compensation Appeals Board

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| **F.H., Appellant** | ) | |
| **and** | ) | **Docket No. 18-1238** |
| **DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Portsmouth, VA, Employer** | ) | **Issued: January 18, 2019** |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### *JURISDICTION*

On June 4, 2018 appellant, through counsel, filed a timely appeal from a March 29, 2018 merit decision and an April 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUES*

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include the additional conditions of right hip

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

osteoarthritis, cervical myelopathy with radiculopathy, and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury; and (2) whether OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

## ***FACTUAL HISTORY***

On January 8, 2016 appellant, then a 64-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2015 he sustained a bruised right hip in the performance of duty when he tripped and fell, landing on a two-way radio in his right pocket.

Appellant's supervisor completed a medical referral form dated December 10, 2015 noting that appellant had "slight pain" in his right thigh and that it was occupational in nature.

On December 18, 2015 an emergency department nurse diagnosed a thigh bruise.[3]

An August 2, 2016 magnetic resonance imaging (MRI) scan study of the lumbar spine revealed foraminal stenosis from L3 to S1, central canal stenosis, and grade one anterolisthesis from L3 to L5 with advanced facet arthropathy. A cervical spine MRI scan dated November 15, 2016 revealed advanced cervical degenerative disc disease with cord impingement, findings suggestive of myelomalacia, and high-grade foraminal stenosis with nerve root impingement bilaterally.

In a November 16, 2016 form report, Dr. Karl F. Bowman, Jr., a Board-certified orthopedic surgeon, diagnosed right foot drop, right hip osteoarthritis, and lumbar facet arthropathy. He related that appellant's symptoms began on April 5, 2016 and found that he was disabled from employment.

In a December 7, 2016 duty status report (Form CA-17), Dr. Bowman diagnosed facet arthropathy of the lumbar spine, lumbar spinal stenosis and spondylosis, and right hip osteoarthritis. He indicated that appellant was unable to work.

In December 7, 2016 and January 17, 2017 attending physician's reports (Form CA-20), Dr. Bowman diagnosed lumbar spine pain and facet arthropathy, cervical radiculopathy, bilateral carpal tunnel syndrome, right hip osteoarthritis, and stenosis of the lumbar spine. He did not respond to the question on the form regarding whether the diagnosed conditions resulted from an employment activity.[4]

In a December 13, 2016 Form CA-20, Dr. Mark B. Kerner, a Board-certified orthopedic surgeon, diagnosed cervical myelopathy and checked a box marked "yes" that the condition was caused or aggravated by employment, noting that appellant's symptoms began after an employment injury. In a subsequent January 20, 2017 Form CA-20, he diagnosed cervical myelopathy and radiculopathy and again checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of a fall at work. Dr. Kerner related

[3] On January 11, 2016 Dr. Mark Haggerty, an osteopath, advised that appellant could return to work on January 12, 2016 with restrictions on climbing stairs.

[4] In a December 13, 2016 Form CA-17 and work note, Dr. Bowman found that appellant was totally disabled.

that after the incident appellant experienced increasing neck pain and arm pain with numbness. He indicated that the contusion resulted in a spinal cord injury with "central cord syndrome."

In a March 9, 2017 development letter, OWCP advised appellant that it had paid a limited amount of medical expenses as his injury appeared minor and had not been controverted. It informed him that it was now formally adjudicating his claim and requested that he submit additional factual and medical information, including a rationalized report from his attending physician addressing the causal relationship between a diagnosed condition and the identified work incident. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, appellant submitted unsigned chart notes from Dr. Bowman dated May through August 2016. On May 16, 2016 Dr. Bowman discussed complaints of neck and upper extremity pain and right hip and leg stiffness. He advised that appellant described "no particular injury." Dr. Bowman diagnosed lumbar facet arthropathy, low back pain, cervical radiculopathy, bilateral carpal tunnel syndrome, and right hip osteoarthritis.

In a November 22, 2016 report, Dr. Kerner noted that appellant experienced increasing neck pain and arm pain and numbness after a fall at work. He found that appellant had severe cervical stenosis and "areas of gliosis, clearly myelopathic with ongoing cervical stenosis with a cord contusion causing what appears to be a cord injury with central cord syndrome." Dr. Kerner recommended a decompression and fusion.

On December 2, 2016 Dr. Kerner performed an anterior cervical discectomy and fusion and multiple levels.[5]

Dr. Kerner, in a December 13, 2016 Form CA-17, diagnosed cervical myelopathy and checked a box marked "yes" that the history provided by appellant corresponded to that on the form of a neck injury in a fall.

By decision dated April 17, 2017, OWCP denied appellant's traumatic injury claim. It found that the medical evidence submitted was insufficient to establish that he sustained a diagnosed condition caused or aggravated by the accepted employment incident.

Subsequent to OWCP's decision, appellant submitted additional unsigned chart notes from Dr. Bowman. In a March 23, 2017 chart note, he evaluated appellant for cervical radiculopathy and carpal tunnel syndrome. Dr. Bowman noted that his symptoms began after a work fall, but that "he was uncertain whether the fall had caused his symptoms or whether it was due to a preexisting condition." He advised that diagnostic studies showed a chronic condition which "may have been acutely exacerbated" by appellant's employment injury.

In an April 27, 2017 report, Dr. Bowman related that he initially evaluated appellant on May 16, 2016 for cervical radiculopathy, cervical arthritis, and carpal tunnel syndrome. He noted that an x-ray showed advanced cervical arthritis that compressed the spinal cord necessitating surgery. Dr. Bowman discussed appellant's history of a fall on December 10, 2015 at work. He indicated that diagnostic studies revealed that he had preexisting cervical arthritis, but opined that

[5] Dr. Kerner provided progress reports subsequent to the surgery on January 20 and May 16, 2017.

the "fall certainly could have aggravated his preexisting medical condition to the point that it would have exceeded a symptom threshold requiring an intervention for his resolution of neurological symptoms."

On May 23, 2017 appellant requested reconsideration. He submitted the first page of the December 18, 2015 emergency department Care Nurse Triage report which noted that he had fallen seven days earlier with a two-way radio in his pocket and had pain in his right upper leg.

In a July 27, 2017 CA-20 form, Dr. Kerner diagnosed cervical myelopathy and radiculopathy and checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of a fall at work. He found that the injury to the spinal cord resulted in central cord syndrome.

By decision dated August 21, 2017, OWCP denied modification of its April 17, 2017 decision. It found that appellant had not submitted sufficient evidence to establish that he sustained a diagnosed condition causally related to the December 10, 2015 employment incident.[6]

In a January 30, 2018 report, Dr. David D. Alcantara, a Board-certified physiatrist, noted that appellant had experienced an employment-related fall on December 10, 2015 causing cervical myelopathy due to severe cord compression treated with a decompression and fusion at multiple levels.[7] Subsequent to the injury, he "presented as myelopathic, meaning an upper motor neuron injury, concordant with [a] neck injury, resulting in signs of decreased strength, sensation, and hyperflexia." Dr. Alcantara related that appellant had preexisting cervical spinal stenosis that was often an asymptomatic condition. He asserted that his fall caused a nerve injury, noting that the "forces sustained during a fall combined with central stenosis can compress and/or strike the spinal cord with sufficient force to injure it." Dr. Alcantara indicated that appellant had symptoms in all the extremities, but less on the left lower extremity, which suggested an injury to the right central cervical spine. He related, "In short, his impairment/disability is related directly to the injury sustained by his fall. Degenerative and genetic factors predisposed to this injury. There are other aforementioned factors that contribute to his full breadth of symptoms, but their contribution is limited and for all intents and purposes can be disregarded."

Dr. Bowman, on February 1, 2018, noted that he had treated appellant for a right leg and hip injury after he tripped and fell on December 10, 2015, landing on a two-way radio in his right front pocket. He experienced pain in his right hip and difficulty with ambulation. Dr. Bowman noted that appellant's symptoms had progressed. He related:

> "It is of my opinion that his persistent right hip pain, weakness, disturbance of gait, and his limp requiring the use of a cane in his left hand can be directly attributed to the work injury he sustained while at [the employing establishment] on December 10, 2015. I feel that the diagnosis is likely a significant high-grade tear

[6] In its decision, OWCP referred to the reports from Dr. Bowman as completed by Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon and an associate of Dr. Bowman.

[7] Dr. Alcantara, on July 24, 2017, evaluated appellant for right lower extremity weakness, noting that he complained of weakness on the right side after a fall.

> of [the] hip abductor musculature as well as a permanent exacerbation of preexisting right hip osteoarthritis."

Appellant, through counsel, on February 8, 2018 requested reconsideration.

By decision dated March 29, 2018, OWCP modified in part and affirmed in part its August 21, 2017 decision. It accepted that appellant sustained a contusion of the right thigh. OWCP found, however, that the medical evidence of record was insufficient to establish that he sustained right hip osteoarthritis, cervical myelopathy with radiculopathy, or lumbar radiculopathy causally related to his December 10, 2015 employment injury.

On April 9, 2018 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

By decision dated April 26, 2018, OWCP denied appellant's request for a telephone hearing under 5 U.S.C. § 8124(b). It found that he had previously requested reconsideration under 5 U.S.C. § 8128(a) and thus was not entitled to a hearing as a matter of right. OWCP considered the matter within its discretion and determined that the issue could be equally well addressed by appellant submitting a request for reconsideration with evidence supporting that the claimed conditions were causally related to the December 10, 2015 employment injury.

## ***LEGAL PRECEDENT -- ISSUE 1***

An employee seeking benefits under FECA[8] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[9]

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.[10] To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[11] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by

[8] *See supra* note 2.

[9] *See C.W.*, Docket No. 17-1636 (issued April 25, 2018); *Tracey P. Spillane*, 54 ECAB 608 (2003).

[10] *See T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[11] *See S.A.*, Docket No. 18-0399 (issued October 16, 2018).

the claimant.[12] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include the additional conditions of right hip osteoarthritis, cervical myelopathy with radiculopathy, or lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury.

As noted, if a claimant alleges that a condition not accepted or approved by OWCP resulted from an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[13]

Appellant submitted chart notes from Dr. Bowman dated May 16, 2016 through March 23, 2017. In a May 16, 2016 chart note, Dr. Bowman discussed his complaints of neck and upper extremity pain and stiffness in his right hip and leg. He advised that appellant related that he had not experienced a specific injury. Dr. Bowman diagnosed multiple conditions, including cervical radiculopathy. As he did not attribute appellant's condition to the December 10, 2015 employment injury, his opinion is of diminished probative value.[14]

In a March 23, 2017 chart note, Dr. Bowman noted that appellant had informed him that his symptoms began after a fall at work. He indicated that he had a chronic condition that may have been aggravated by the work injury. Dr. Bowman's finding, however, that appellant's fall may have aggravated or exacerbated his condition is speculative in nature and thus of little probative value.[15]

Dr. Bowman, in a November 16, 2016 form report, diagnosed right foot drop, right hip osteoarthritis, and lumbar facet arthropathy, noting that appellant's symptoms began on April 4, 2016. In CA-20 reports dated December 7, 2016 and January 17, 2017, he diagnosed lumbar facet arthropathy, cervical radiculopathy, bilateral carpal tunnel syndrome, right hip osteoarthritis, and lumbar stenosis. Dr. Bowman did not respond to the questions on the forms with regard to causation. Medical evidence that does not offer an opinion on the cause of an

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[12] *See P.M.*, Docket No. 18-0287 (issued October 11, 2018).

[13] *See supra* note 11.

[14] *See C.H.*, Docket No. 17-0266 (issued May 17, 2018).

[15] *See M.D.*, Docket No. 18-0195 (issued September 13, 2018) (the Board has held that medical opinion that are speculative or equivocal in character are of diminished probative value).

employee's condition is of no probative value on the issue of causal relationship.[16] Thus, these reports are insufficient to meet appellant's burden of proof regarding expansion of his claim.[17]

On November 22, 2016 Dr. Kerner noted that appellant had experienced neck and arm pain with numbness subsequent to a fall at work. He diagnosed severe cervical stenosis and a cord contusion causing central cord syndrome. While Dr. Kerner indicated that appellant's neck and arm pain began after an employment-related fall, he did not specifically attribute the cervical stenosis and central cord syndrome to the accepted December 10, 2015 work injury and thus his opinion is of little probative value.[18]

Dr. Kerner, in a December 13, 2016 Form CA-20, diagnosed cervical myelopathy and checked a box marked "yes" that the condition was caused or aggravated by employment. He provided as a rationale that the symptoms began after an employment injury. In a Form CA-17 dated December 13, 2016, Dr. Kerner diagnosed cervical myelopathy and checked a box marked "yes" that the history provided by appellant corresponded to that on the form of a neck injury after a fall. In January 20 and July 27, CA-20 forms, he diagnosed cervical myelopathy and radiculopathy and again checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of a fall at work. Dr. Kerner noted that following the incident appellant had experienced worsening neck pain and arm pain and numbness. He opined that he sustained a spinal cord injury and central cord syndrome. The Board has held, however, that a report that addresses causal relationship with a checkmark, without medical rationale explaining how the employment incident caused the alleged injury, is of diminished probative value and insufficient to establish causal relationship.[19] While Dr. Kerner noted that appellant's symptoms began after a work injury, an opinion that a condition is causally related to an incident because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[20]

On April 27, 2017 Dr. Bowman noted that appellant had fallen at work on December 10, 2015 and that diagnostic studies showed cervical arthritis compressing the spinal cord. He opined that the fall at work "could have" aggravated his preexisting cervical arthritis. Dr. Bowman's opinion on causation is speculative and thus, as previously noted, of diminished probative value.[21]

Dr. Alcantara, in a January 30, 2018 report, reviewed appellant's history of a fall at work on December 10, 2015 with a subsequent diagnosis of cervical myelopathy due to severe cord compression requiring a decompression and fusion at multiple levels. He advised that after the injury, appellant experienced symptoms of an upper motor neuron injury. Dr. Alcantara diagnosed preexisting cervical spinal stenosis. He opined that appellant's fall resulted in a nerve injury to

[16] *See O.C.*, Docket No. 17-1175 (issued October 29, 2018); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[17] *See supra* note 12.

[18] *See L.A.*, Docket No. 15-1136 (issued March 2, 2016).

[19] *See R.A.*, Docket No. 17-1472 (issued December 6, 2017); *Sedi L. Graham*, 57 ECAB 494 (2006).

[20] *See J.R.*, Docket No. 18-0206 (issued October 15, 2018).

[21] *See K.M.*, Docket No. 18-0185 (issued September 7, 2018).

the right central spine from forces compressing or striking the spinal cord. Dr. Alcantara opined that his disability was due to his employment injury and that degenerative and genetic factors predisposed him to the injury. While he found that appellant's fall caused a compression injury to the spine, he did not provide a sufficient explanation of the mechanism of injury or address the delay in the onset of the cervical symptoms following the incident.[22] Such rationale is particularly important given his history of an underlying, preexisting cervical condition.[23]

On February 1, 2018 Dr. Bowman discussed his treatment of appellant for a right leg and hip injury after a December 10, 2015 fall at work. He diagnosed a tear of the hip abductor and an exacerbation of right hip osteoarthritis. Dr. Bowman, however, did not provide any rationale for his causation finding. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is insufficient to meet a claimant's burden of proof.[24]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence.[25] Appellant failed to provide reasoned medical evidence demonstrating that he sustained right hip osteoarthritis, cervical myelopathy with radiculopathy, and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury. Accordingly, the Board finds that he has failed to meet his burden of proof to establish expansion of the accepted conditions of his claim.[26]

Appellant may submit new evidence or argument with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[27] A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between

[22] *See S.F.*, Docket No. 18-0444 (issued October 4, 2018); *L.B.*, Docket No. 14-1687 (issued June 10, 2015).

[23] *See E.D.*, Docket No. 16-1854 (issued March 3, 2017).

[24] *See T.T.*, Docket No. 17-0681 (issued March 13, 2018).

[25] *See supra* note 11; *E.P.*, Docket No. 16-0153 (issued August 24, 2016).

[26] *Id*.

[27] 5 U.S.C. § 8124(b)(1).

two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[28]

A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carriers' date marking and before the claimant has requested reconsideration (whether or not reconsideration was granted).[29] Although there is no right to a review of the written record or an oral hearing as a matter of right if a claimant had previously sought reconsideration, OWCP may, within its discretionary powers, grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[30]

## ***ANALYSIS -- ISSUE 2***

The Board finds that OWCP properly denied appellant's request for a telephone hearing before an OWCP hearing representative under 5 U.S.C. § 8124(b)(1). As appellant had previously requested reconsideration on May 23, 2017 and February 8, 2018, he was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA.[31]

The Board further finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing.[32] The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.[33] OWCP advised appellant that his case could be equally well addressed by requesting reconsideration before OWCP and submitting new evidence not previously considered supporting that he sustained additional conditions as a result of his December 10, 2015 employment injury. The evidence of record does not support that OWCP abused its discretion in its denial of appellant's request for an oral hearing.[34] Accordingly, the Board finds that OWCP properly denied his request for an oral hearing.[35]

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include the additional conditions of right hip

[28] 20 C.F.R. § 10.615.

[29] *Id*. at 10.616(a); *L.S.*, Docket No. 18-0115 (issued May 10, 2018).

[30] 20 C.F.R. § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record,* Chapter 2.1601.2(a) (October 2011); *see also A.O.*, Docket No. 18-0558 (issued October 10, 2018).

[31] *See A.O.*, *supra* note 30.

[32] *See S.F.*, Docket No. 17-0463 (issued September 8, 2017).

[33] *See R.G.*, Docket No. 16-0994 (issued September 9, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006).

[34] *See L.S.*, *supra* note 29.

[35] *See C.A.*, Docket No. 17-0944 (issued May 15, 2018).

osteoarthritis, cervical myelopathy with radiculopathy, and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury. The Board further finds that OWCP properly denied his request for an oral hearing under 5 U.S.C. § 8124(b).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 26 and March 29, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 18, 2019
Washington, DC

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

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

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