

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

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**D.A., Appellant** )

**and** )

**U.S. POSTAL SERVICE, LOUDON POST** )  
**OFFICE, Loudon, TN, Employer** )  
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**Docket No. 21-0939**  
**Issued: November 22, 2021**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 8, 2021 appellant filed a timely appeal from January 14 and May 3, 2021 merit decisions and a March 3, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 her burden of proof to establish a medical condition causally related to the accepted November 28, 2017 employment incident; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 28, 2017 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained the right side of her lower back when loading a vehicle while in the performance of duty. She stopped work on November 28, 2017.

Appellant was treated in the emergency department on November 28, 2017 by Brandon Brooks, a physician assistant, who diagnosed acute myofascial lumbar strain and provided discharge instructions for muscle spasm. An x-ray of the lumbar spine of even date revealed mild degenerative disc disease and moderate hypertrophic facet arthropathy.

On December 1, 2017 appellant was treated by Deserie Cook, a physician assistant, for lumbar pain she attributed to a work injury on November 28, 2017. She reported injuring her back while lifting mail at work. Ms. Cook diagnosed low back pain, pain in the right leg, and cervicalgia and released appellant to work with restrictions.

Dr. Eric Poston, a Board-certified internist, treated appellant on August 4, September 3, and October 5, 2020 and excused her from work on August 4 and September 20 through October 5, 2020. Similarly, appellant was treated by Dr. David H. Hauge, a Board-certified neurosurgeon, on September 29, 2020, who excused her from work from September 29 through October 5, 2020. On October 12, 2020 he excused appellant from work until her next scheduled reevaluation on November 2, 2020.

In a November 4, 2020 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her as to the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In reports dated October 12 and November 6, 2020, Dr. Hauge treated appellant in follow-up examinations for low back pain radiating into the lateral aspect of the right leg associated with L3-4 and L4-5 extraforaminal disc herniations. He reviewed magnetic resonance imaging (MRI) scans of the lumbar spine dated January 29 and August 24, 2018. An MRI scan of the lumbar spine dated September 15, 2020 revealed moderate-to-severe spinal stenosis at L4-5, severe facet irritation at L4-5, right lateral disc protrusion at L3-4 and L4-5, and foraminal component at L4-5, which may impinge upon the exiting L4 nerve root. The scan was noted as unchanged from the August 2018 MRI scan study. An MRI scan of the cervical spine of even date revealed mild degenerative changes most notably on the right C4-5 and C5-6. Dr. Hauge diagnosed lumbar disc herniation with radiculopathy. He noted conservative measures failed and recommended right L3-4 and L4-5 transpedicular discectomies. On December 11, 2020 Sean Blanton, a physician assistant, treated appellant one week status post right L3-4, L4-5 decompression/discectomy and reported that appellant was progressing well. In a work excuse note of even date, Dr. Hauge noted that appellant was off work until her next reevaluation on February 9, 2021.

Appellant was treated by Dr. Poston on November 4, 2020 who excused her from work from November 3 through December 3, 2020.

In a January 5, 2021 duty status report (Form CA-17), Dr. Hauge noted clinical findings of residual axial soreness and diagnosed lumbar disc herniation. Dr. Hauge noted that appellant could

return to work with restrictions on January 6, 2021. In a work excuse note of even date, appellant returned appellant to work with restrictions on January 6, 2021.

By decision dated January 14, 2021, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish causal relationship between her diagnosed conditions and the accepted November 28, 2017 employment incident.

On February 16, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 3, 2021, OWCP denied appellant's request for an oral hearing as untimely filed, finding that her request was not made within 30 days of the January 14, 2021 OWCP decision as it was received on February 16, 2021. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

OWCP received additional evidence. Dr. Poston treated appellant on July 25, 2017 for a gradual onset of radiating lumbar back pain occurring six to eight weeks prior to the office visit. An x-ray of the lumbar spine revealed mild left convex scoliotic curvature and minimal degenerated disc changes.

Emergency department notes dated November 28, 2017 signed by Mr. Brooks, a physician assistant, indicate appellant was treated for an acute onset of low back pain that occurred four hours prior. Appellant reported lifting mail trays into her vehicle when she twisted to set the trays down and felt a sharp pain in her lower right back. She indicated that she had not experienced similar symptoms in the past. He diagnosed acute myofascial lumbar strain.

Dr. Poston treated appellant in follow-up on January 22 and February 5, 2018 for chronic lumbar pain with associated radiation to the posterior thighs bilaterally. He noted findings on examination of lumbar spasm. A recent MRI scan of the lumbar spine revealed facet arthropathy and moderate-to-severe lumbar spinal stenosis.<sup>2</sup> Dr. Poston diagnosed lumbar degenerative disc disease, lumbar spinal stenosis, radiculopathy, hyperlipidemia, and obesity.

On February 27 and May 29, 2018 appellant underwent transforaminal epidural steroid injections.<sup>3</sup>

In an October 22, 2019 report, Dr. Poston treated appellant for a four- or five-day history of lumbar pain radiating into the posterior thighs. He diagnosed lumbar pain, spinal stenosis, radiculopathy, hypertension, hyperlipidemia, and depression. In an October 30, 2019 report, Dr. Poston evaluated appellant for improving lumbar pain. He diagnosed hypertension, lumbar

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<sup>2</sup> An MRI scan of the lumbar spine dated January 29, 2018 revealed moderate-to-high grade central canal stenosis and moderate right and mild left neural foraminal narrowing at L4-5 due to broad posterior disc bulge and bilateral facet arthropathy, moderate central canal stenosis and mild bilateral neural foraminal narrowing at L3-4 due to a mild annular disc bulge and bilateral facet arthropathy, minor annular disc bulge at L2-3, and diffuse lumbar facet arthropathy at L3-4 and L4-5.

<sup>3</sup> The healthcare provider was not identified.

pain, spinal stenosis, and hyperlipidemia. Dr. Poston continued work restrictions of no lifting over 35 pounds.

Dr. Poston related in a September 3, 2020 progress report that appellant was still having lumbar and cervical pain associated with tingling in her hands. He diagnosed cervical radiculopathy, lumbar spinal stenosis, worsening back pain, right leg weakness, and elevated blood pressure due to pain. An x-ray of the lumbar spine dated September 3, 2020 revealed mild degenerative disc disease and moderate facet arthropathy. On September 28, 2020 Dr. Poston noted a September 15, 2020 MRI scan of the cervical spine revealed disc/osteophyte complex at C4-6 with foraminal narrowing and an MRI scan of the lumbar spine revealed disc osteophyte complex at L3-5 with associated foraminal narrowing/spinal canal stenosis. He diagnosed hypertension, cervical and lumbar degenerative disc disease, radiculopathy, and hyperlipidemia. Appellant was seen again on September 29, 2020 with cervical and right lumbar pain that began after squatting outside the prior day. Dr. Poston noted severe lumbar spasm and diagnosed lumbar spasm, strain, degenerative disc disease, spinal stenosis, hypertension, and hyperlipidemia. He continued to treat appellant on October 5 and November 4, 2020 for persistent lumbar pain and lumbar spasm radiating to the posterior thighs. Dr. Poston diagnosed chronic lumbar pain, degenerative disc disease, spinal stenosis, and hypertension.

On March 16, 2021 appellant requested reconsideration.

By decision dated May 3, 2021, OWCP denied modification.

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

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>5</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

employment incident at the time, place, and in the manner alleged. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>8</sup>

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment incident identified by the employee.<sup>10</sup>

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

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 28, 2017 employment incident.

Dr. Poston treated appellant on August 4, September 3, October 5, and November 4, 2020 and excused her from work on August 4 and from September 20 through December 3, 2020. On September 29, October 12, 2020, and January 5, 2021 Dr. Hauge treated appellant and excused her from work for the period beginning September 29 through February 9, 2021. However, Drs. Poston and Hauge did not offer an opinion on causal relationship. As the Board has held, medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>11</sup> Thus, the Board finds that these reports are insufficient to meet appellant's burden of proof.

Dr. Poston treated appellant from January 22, 2018 through November 4, 2020 for chronic lumbar and cervical pain with associated radiation to the posterior thighs bilaterally and tingling in her hands. He diagnosed cervical and lumbar degenerative disc disease, radiculopathy, lumbar spinal stenosis, worsening back pain, right leg weakness, hyperlipidemia, and obesity. Likewise, in reports dated October 12 and November 6, 2020, Dr. Hauge treated appellant for low back pain radiating into the lateral aspect of the right leg associated with L3-4 and L4-5 extraforaminal disc herniations. He diagnosed lumbar disc herniation with radiculopathy and performed a right L3-4, L4-5 decompression/discectomy. However, Drs. Poston and Hauge did not specifically relate the diagnosed conditions to the accepted November 28, 2017 employment incident. As stated above, the Board has held that medical evidence that does not offer an opinion regarding the cause of a diagnosed condition or disability is of no probative value on the issue of causal relationship.<sup>12</sup> Therefore, the Board finds that these reports are insufficient to meet appellant's burden of proof.

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<sup>8</sup> *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>10</sup> *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>11</sup> *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>12</sup> *Id.*

Other reports from Dr. Poston dated July 25, 2017 are of no probative value in establishing the claimed conditions since they predate the time of the claimed condition of November 28, 2017.<sup>13</sup>

Appellant submitted reports from physician assistants. However, certain healthcare providers such as physician assistants<sup>14</sup> are not considered “physician[s]” as defined under FECA.<sup>15</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.<sup>16</sup>

Appellant submitted multiple diagnostic testing reports. The Board has held that diagnostic studies, standing alone, are of limited probative value as they do not address whether the employment incident caused any of the diagnosed conditions.<sup>17</sup>

As the record lacks rationalized medical evidence establishing causal relationship between appellant’s diagnosed low back condition and the accepted November 28, 2017 employment incident, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence 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.

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

Section 8124(b)(1) of FECA provides that “a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”<sup>18</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>19</sup> A claimant is entitled to a hearing or review of the written record

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<sup>13</sup> See generally, *T.G.*, Docket No. 17-17445 (issued February 5, 2018); *R.G.*, Docket No. 16-0271 (issued May 18, 2017).

<sup>14</sup> *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (a physician assistant is not a physician as defined under FECA).

<sup>15</sup> Section 8101(2) of FECA provides that physician “includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners are not considered physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

<sup>16</sup> *Id.*

<sup>17</sup> *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

<sup>18</sup> 5 U.S.C. § 8124(b)(1).

<sup>19</sup> 20 C.F.R. §§ 10.616, 10.617.

as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>20</sup> Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.

### ANALYSIS – ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought.<sup>21</sup> Because appellant's hearing request was received February 16, 2021, it post-dated OWCP's January 14, 2021 decision by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.<sup>22</sup>

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.<sup>23</sup> The Board finds that, in the March 3, 2021 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

The Board has held that the only limitation on OWCP's authority is reasonableness. An 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 established facts.<sup>24</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted November 28, 2017 employment incident. The Board further finds that OWCP properly denied her request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

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<sup>20</sup> *Id.* at § 10.616(a).

<sup>21</sup> *Supra* note 21; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020).

<sup>22</sup> *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, March 3, and January 14, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 22, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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