United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 22-1067**
	)	**Issued: April 20, 2023**
U.S. POSTAL SERVICE, DOMINICK V. DANIELS PROCESSING & DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On July 12, 2022 appellant, through counsel, filed a timely appeal from a January 25, 2022 merit 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.[3]

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[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.*

[3] The Board notes that following the January 25, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for authorization for lumbar decompression surgery.

FACTUAL HISTORY

On October 24, 2015 appellant, then a 53-year-old 204B-manager, filed a traumatic injury claim (Form CA-1) alleging that on October 23, 2015 she experienced pain in her back and elbows when a bulk mail container (BMC) struck her while in the performance of duty. She stopped work on that date. By decision dated June 7, 2016, OWCP accepted appellant's claim for other cervical disc displacement and temporary aggravation of other lumbar intervertebral disc degeneration. It paid her wage-loss compensation on the supplemental rolls, effective December 8, 2015, and placed her on the periodic rolls, effective July 24, 2016.

Appellant continued to receive medical treatment. On April 3, 2018 she underwent an electromyography (EMG) and nerve conduction velocity (NCV) study conducted by Dr. Mark A. P. Filippone, a Board-certified physiatrist. Dr. Filippone indicated that EMG of the right lower extremity showed evidence of a right L3-L4-L5-S1 lumbosacral polyradiculopathy, which he also noted in the left lower extremity. He opined that this was directly and solely the result of injuries sustained while at work for the employing establishment.

In a September 11, 2018 report, Dr. A.R. Bakhaty, an anesthesiologist specializing in pain management, recounted appellant's complaints of severe recurrent lower back pain. He reviewed appellant's medical records and noted that she had previous lumbar surgery with good results. Dr. Bakhaty indicated that a February 1, 2018 lumbar spine magnetic resonance imaging (MRI) scan was consistent with right lateral disc bulge encroaching at the lower foramen of L3-4 with foraminal herniation.[4] On physical examination, he observed antalgic gait favoring the right side. Dr. Bakhaty reported lumbar examination findings of tenderness and spasm along paraspinal muscle L3 through S1 evident bilaterally and localized over the mid and lower facet joint with less tenderness, sensation, and had denervation a few months ago. Straight leg raise testing was positive. Dr. Bakhaty diagnosed status-post work-related injuries on October 23, 2015 with multiple injuries most marked at the lower back and neck with persistent complaints despite a prolonged course of conservative measures, post-traumatic lumbar disc herniation and annular tears most significant and symptomatic at L3-4 and L4-5 with evidence of foraminal narrowing at the right L3-4 and left L4-5, post-traumatic lumbar radiculopathy at right L5-S1 by EMG, post-traumatic cervical radiculopathy and status-post laminectomy at L5-S1 with good recovery at that level. He reported that all diagnoses were causally and directly related to the work accident. Dr. Bakhaty recommended that appellant undergo selective disc decompression at both L3-4 and L5-S1 with foraminotomy at right L3-4 and L4-5 and annuloplasty. He explained that he recommended the surgery because appellant had evidence of disc herniation, bulges, and annular tears at both levels.

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[4] A February 1, 2018 lumbar MRI scan report showed minimal right posterior lateral disc bulging at L2-3 with slight right neural foraminal encroachment, mild right posterior lateral disc bulging at L3-4 with mild right neural foraminal encroachment, small annular fissure tear, mild lumbar facet arthrosis at L2-3 & L5-S1, likely vertebral body hemangioma body of L3, and mild straightening of the normal lumbar lordotic curvature nonspecific.

On December 10, 2018 OWCP received a request for authorization for lumbar decompression surgery.

In a December 14, 2018 development letter, OWCP notified appellant that her request for authorization of lumbar spinal decompression surgery could not be approved at that time. It advised appellant that a decision would be issued once a district medical adviser (DMA) reviewed her case.

On January 4, 2019 Dr. Franklin M. Epstein, a Board-certified neurological surgeon serving as the DMA, reviewed the statement of accepted facts (SOAF) and the medical evidence of record and opined that the proposed surgery was neither reasonable nor medically necessary. He explained that the surgery was unwarranted as the diagnostic findings showed normal, age-related disc degeneration with no spinal cord or foraminal encroachment. Dr. Epstein further noted that the surgery proposed by Dr. Bakhaty was extensive and should not be performed by a physician without surgical training.

On February 13, 2019 OWCP referred appellant, the case file, an amended SOAF, and a series of questions to Dr. Paul G. Teja, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's employment-related disability and authorization for lumbar surgery. In a March 19, 2019 report, Dr. Teja noted his review of the SOAF and recounted appellant's complaints of ongoing pain. On physical examination, he observed that appellant ambulated normally with no antalgic gait. Dr. Teja reported that examination of the thoracolumbar spine demonstrated no tenderness to palpation and no pain on range of motion. Sensation was intact in the bilateral lower extremities. Dr. Teja diagnosed resolved cervical strain, resolved bilateral elbow contusion, and aggravation of preexisting lumbar disc disease. He opined that the medical evidence of record did not support the requested spinal cord decompression surgery. Dr. Teja explained that appellant had lumbar degenerative disc disease, but there was no objective evidence of radiculopathy to recommend decompression of the spinal cord. He provided a work capacity evaluation (Form OWCP-5c) with work restrictions.

By decision dated May 8, 2019, OWCP denied appellant's request for surgery. It found that the medical evidence of record was insufficient to establish that the requested surgery was medically necessary to treat her October 23, 2015 employment injury.

On May 16, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 21, 2019.

In reports dated May 9 and 29, 2019, Dr. Filippone reviewed appellant's cervical spine MRI scan[5] and indicated that the posterior disc herniations at all the noted levels were exerting pressure on the ventral aspect of the spinal cord. On examination of appellant's cervical spine, he observed pain, guarding, spasm, and limited range of motion due to pain. Dr. Filippone reported that radicular complaints in the upper extremities persisted. He opined that appellant needed "extensive orthopedic spinal surgery to avoid becoming paraplegic."

[5] A May 29, 2018 cervical spine MRI scan revealed posterior disc herniations at C2-3, C3-4, C4-5, and C5-6, cerebellar tonsils at the level of the foramen magnum, and reversal of the normal lordotic curvature of the cervical spine.

In a June 1, 2019 report, Dr. Filippone indicated that he had reviewed the May 8, 2019 decision and disagreed with it. He noted that appellant's lumbar spine MRI scan had revealed disc herniations at multiple levels. Dr. Filippone opined that appellant was unable to work and had not reached maximum medical improvement.

By decision dated September 23, 2019, OWCP's hearing representative affirmed the May 8, 2019 decision.

In a September 25, 2019 report, Dr. Joel Meer, a Board-certified physiatrist, described the October 23, 2015 employment injury and recounted appellant's complaints of cervical, lumbar, and bilateral shoulder pain. On examination of appellant's low back, he observed pain on range of motion and tenderness to palpation. Neurological examination demonstrated sensation to pain. Dr. Meer diagnosed herniated nucleus pulposus, other cervical disc displacement at C4-5 and C5-6, cervicalgia, disc bulges at L2-3, L3-4, low back pain, back muscle spasm, right shoulder pain, and left shoulder pain.

On October 23, 2019 OWCP found a conflict in the medical opinion evidence between Dr. Meer, appellant's treating physician, and Dr. Teja, the second opinion examiner, regarding appellant's medical conditions and work capacity. It referred appellant, the medical record, a SOAF, and a series of questions to Dr. George Burak, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion to resolve the conflict. In a December 17, 2019 report, Dr. Burak reviewed the medical record and SOAF. He recounted appellant's complaints of neck and bilateral shoulder pain. On examination of appellant's cervical spine, Dr. Burak observed no evidence of muscle spasm or sensory deficits throughout both upper extremities. Examination of appellant's lumbar spine showed significant pain on palpation and a moderate degree of paravertebral muscle spasm. Range of motion testing revealed significant pain. Dr. Burak opined that on October 23, 2015 appellant sustained a permanent aggravation of her preexisting low back injury. He explained that examination findings were positive for paravertebral muscle spasm and limited range of motion. Dr. Burak also reported that appellant remained totally disabled due to her October 23, 2015 employment injury.

OWCP received a letter by Dr. Bakhaty who expressed disagreement with Dr. Teja's March 19, 2019 report. Dr. Bakhaty indicated that he was providing the July 21, 2014 lumbar operative report so that Dr. Teja could determine the culpable disc levels of clinical significance that was not included in the preexisting surgery. He also asserted that EMG/NCV studies in the record undermined Dr. Teja's assertion that there was no evidence of lumbar radiculopathy. Dr. Bakhaty opined that appellant's current pathology, diagnostic tests, and examination findings all correlated well with appellant's ongoing symptoms and her need for decompression and annuloplasty at L3-4 and L4-5.

A February 19, 2020 lumbar spine MRI scan demonstrated posterior disc herniation at L3-4 with annular tear, posterior disc herniation at L2-3, and straightening of the normal lordotic curvature suggestive of muscle spasm and lumbar myalgia.

In a July 7, 2020 report and duty status report (Form CA-17), Dr. Laura E. Ross, an osteopath Board-certified in orthopedic surgery, indicated that appellant was evaluated for cervical spine, lumbar spine, and bilateral shoulder injuries, which she sustained during an October 23, 2015 employment injury. On examination of appellant's lumbar and cervical spines, she observed decreased sensation in right L5 and paravertebral muscle spasm throughout her neck and back.

Dr. Ross discussed appellant's recent MRI scan and diagnosed rupture of lumbar intervertebral disc, right shoulder impingement syndrome, right shoulder rotator cuff tear, rupture of cervical intervertebral disc, and left shoulder impingement syndrome. She recommended that appellant undergo surgical intervention for her lumbar spine and opined that the treatment was medically necessary and causally related to the above incident.

On August 11, 2020 appellant, through counsel, requested reconsideration.

In a September 3, 2020 addendum report, Dr. Burak indicated that he had reviewed the additional medical records and opined that the proposed surgery by Dr. Bakhaty was not indicated. He explained that appellant's current issues were the result of two incidents -- the back injury that required surgery and the October 23, 2015 employment injury, which caused an aggravation of the previous underlying problem. Dr. Burak reported that it was an extremely aggressive surgery and the diagnostic studies showed that the proposed surgery was not indicated.

In a September 24, 2020 report, Dr. Bakhaty noted his disagreement with Dr. Teja's report denying authorization for surgery. He provided examination findings and reported his previous diagnoses. Dr. Bakhaty reiterated his previous recommendation for lumbar disc decompression at right L3-4 and L4-5, preferably by minimally invasive approach. He indicated that the treatment was proposed according to appellant's desire to avoid a more aggressive surgery.

In a supplemental November 13, 2020 report, Dr. Burak indicated that appellant was not capable of returning to any type of gainful employment and that vocational rehabilitation would not result in reemployment in the future. He explained that examination findings showed significant low back issues, including spasm of the lumbar spine, extreme pain with range of motion, and a moderate degree of paravertebral muscle spasm. Dr. Burak noted that appellant would require conservative medical treatment with a pain management specialist. He opined that surgical intervention would be extremely dangerous and noted that diagnostic test results did not confirm the need for the proposed surgery. Dr. Burak further explained that the proposed surgery involved multiple disc involvement and surgical stabilizations, which could put appellant in more jeopardy than she is now.

By decision dated April 8, 2021, OWCP denied modification of the September 23, 2019 decision. It found that the special weight of the medical evidence rested with the reports of Dr. Burak, the impartial medical examiner (IME), who determined that the proposed lumbar spine surgery was not medically necessary to treat appellant's October 23, 2015 employment injury.

In CA-17 forms and attending physician's reports (Form CA-20) dated April 13 through December 16, 2021, Dr. Ross noted diagnoses of lumbar disc herniation, right shoulder rotator cuff tear, and right shoulder impingement. She indicated that appellant was totally disabled.

In an April 18, 2021 letter, Dr. Bakhaty noted his disagreement with Dr. Epstein's January 4, 2019 and Dr. Burak's November 13, 2020 reports. He contended that he did not request extensive thoracic, anterior surgery, but had requested lumbar, posterior/posterolateral surgery done *via* minimally invasive approach using a small 6.5 mm endoscope. Dr. Bakhaty explained that this allowed for safe and effective surgical decompression at minimal tissue damage.

In an October 19, 2021 report, Dr. Bakhaty recounted that appellant reported significant relief following transforaminal epidurals that were done the past few months. He provided examination findings and reported his previous diagnoses.

In reports dated October 20 and December 15, 2021, Dr. Francis A. Pflum, an orthopedic surgeon, noted that he had last treated appellant three years ago and recounted her complaints of low back pain. He discussed appellant's November 10, 2021 diagnostic imaging results[6] and reported that it showed herniated disc on the right side at L3-4. On examination of the lumbosacral area, Dr. Pflum observed tenderness over the sacroiliac joints greater than the lumbosacral spine and decreased sensation in the entire right lower extremity, except the S1 dermatome. He requested authorization for a discectomy to be performed on the right side of L3-4 from a transforaminal, transpedicular approach with a foraminotomy and post-discectomy, annuloplasty.

On October 27, 2021 appellant, through counsel, requested reconsideration.

By decision dated January 25, 2022, OWCP denied modification of the April 8, 2021 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA[7] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[8] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.[9] 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. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10]

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[6] A November 10, 2021 lumbar spine MRI scan showed L1-2, disc bulging causing mild central canal stenosis and mild-to-moderate bilateral foraminal stenosis, L2-3 and L3-4 disc bulge with mild central stenosis, bilateral foraminal disc herniations with moderate bilateral foraminal stenosis and annular tears, L4-5 and L5-S1 disc bulges without central stenosis, no focal herniation, and no spinal mass.

[7] 5 U.S.C. § 8103(a).

[8] *Id.*; *see N.G.,* Docket No. 18-1340 (issued March 6, 2019); *see also Thomas W. Stevens*, 50 ECAB 288 (1999).

[9] *D.C.*, Docket No. 20-0854 (issued July 19, 2021); *C.L.,* Docket No. 17-0230 (issued April 24, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

[10] *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

For a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted.[11] Both of these criteria must be met in order for OWCP to authorize payment.[12]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.[13] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP determined that a conflict in medical opinion existed between Dr. Meer, appellant's treating physician, and Dr. Teja, OWCP's second opinion examiner, regarding appellant's accepted conditions and work capacity. It referred appellant to Dr. Burak, for an impartial medical examination to resolve the conflict. OWCP subsequently denied authorization for the proposed lumbar surgery, finding that the special weight of the medical evidence rested with the reports of Dr. Burak as the IME. The Board finds, however that, there was no conflict of medical opinion at the time of OWCP's referral to Dr. Burak regarding appellant's request for lumbar decompression surgery, because the conflict in medical opinion was about the issue of appellant's continuing disability. Even though the report of Dr. Burak is not entitled to special weight afforded to the opinion of an impartial medical examiner resolving a conflict in medical opinion, his report can still be considered for its own intrinsic value, and can still constitute the weight of the medical evidence regarding the issue of authorization for surgery.[16]

In a report dated December 17, 2019, Dr. Burak noted his review of the SOAF, and provided examination findings. He opined that on October 23, 2015 appellant sustained a permanent aggravation of her preexisting low back injury, and that she was totally disabled. In September 3 and November 13, 2020 addendum reports, Dr. Burak indicated that appellant would

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[11] *B.I.,* Docket No. 22-0090 (issued July 19, 2022); *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[12] *P.S.,* Docket No. 20-0075 (issued July 12, 2021); *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] 20 C.F.R. § 10.321.

[15] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[16] *M.H.* Docket No. 21-1014 (issued July 8, 2022); *see also Cleopatra McDougal-Saddler,* 47 ECAB 480 (1996); *Rosa Whitfield Swain,* 38 ECAB 368 (1987) (a physician was improperly designated as an impartial medical specialist, but his opinion nonetheless constituted the weight of the medical evidence).

require conservative medical treatment with a pain management specialist. He opined that the proposed lumbar surgery was not indicated based on the medical records and diagnostic tests. Dr. Burak further explained that the surgery would be extremely dangerous since it involved multiple discs and surgical stabilizations.

The Board finds, however that, the reports of Dr. Burak lacked sufficient medical rationale, and cannot be entitled the weight of medical evidence.[17] Dr. Burak opined that the proposed surgery was not recommended based on the medical records and diagnostic studies. He did not, however, refer to specific diagnostic studies nor examination findings to support his conclusory statements that the proposed lumbar surgery was not medically warranted.[18] The Board has held that a report is of limited probative value if a physician does not provide medical rationale explaining his or her conclusion on that matter.[19] Moreover, Dr. Burak appears to have denied authorization for surgery on the basis that it was aggressive and dangerous, not whether it was medically warranted to treat appellant's accepted lumbar injury. The Board, therefore, finds that Dr. Burak failed to provide sufficient medical rationale explaining why the proposed lumbar surgery was not medically necessary to treat appellant's accepted October 23, 2015 employment injury.[20]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[21] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[22] Accordingly, once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[23] In this case, Dr. Burak, an OWCP referral physician, has not adequately addressed whether the proposed lumbar surgery is medically warranted to treat appellant's accepted October 23, 2015 employment injury. Due to the deficiencies in his report, OWCP should have sought clarification or referred appellant for another second opinion evaluation.[24]

On remand OWCP shall request a supplemental report from Dr. Burak to obtain a rationalized medical opinion, based on specific findings, on whether appellant's request for authorization of lumbar decompression surgery is medically necessary due to appellant's accepted October 23, 2015 employment injury. If Dr. Burak is unavailable or unwilling to provide a

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[17] *M.T.,* Docket No. 20-0321 (issued April 26, 2021).

[18] *See D.T.,* Docket No. 20-0234 (issued January 8, 2021); *see also K.C.,* Docket No. 19-1251 (issued January 24, 2020).

[19] *L.G.,* Docket No. 19-0142 (issued August 8, 2019); *C.M.,* Docket No. 14-0088 (issued April 18, 2014).

[20] *D.G.,* Docket No. 20-1183 (issued May 26, 2021); *M.G.,* Docket No. 19-1791 (issued August 13, 2020).

[21] *N.L.,* Docket No. 19-1592 (issued March 12, 2020); *M.T.,* Docket No. 19-0373 (issued August 22, 2019); *B.A.,* Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.,* 49 ECAB 476 (1998).

[22] *C.L.,* Docket No. 20-1631 (issued December 8, 2021); *L.B.,* Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi,* 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[23] *T.K.,* Docket No. 20-0150 (issued July 9, 2020); *T.C.,* Docket No. 17-1906 (issued January 10, 2018).

[24] *M.S.,* Docket No. 19-0282 (issued August 2, 2019); *V.H.,* Docket No. 14-433 (issued July 3, 2014).

supplemental opinion, OWCP shall refer appellant, together with a SOAF and a series of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue.[25] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 20, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[25] *B.W.,* Docket No. 21-0785 (issued September 1, 2022); Docket No. 21-1266 (issued May 13, 2022).