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

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| **J.H., Appellant** | ) | |
| **and** | ) | **Docket No. 23-0250** |
| | ) | **Issued: December 19, 2023** |
| **DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTER FOR MEDICARE & MEDICAID SERVICES, Santa Ana, CA, Employer** | ) | |

*Appearances:*
*Brett E. Blumstein, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On December 8, 2022 appellant, through counsel, filed a timely appeal from a June 21, 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]

[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 June 21, 2022 decision, OWCP received additional evidence. 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 appellant has met his burden of proof to establish a medical condition causally related to the accepted August 4, 2021 employment incident.

## ***FACTUAL HISTORY***

On September 3, 2021 appellant, then a 76-year-old health insurance fraud investigator, filed a traumatic injury claim (Form CA-1) alleging that, on August 4, 2021, he injured his neck, back, right hip, and right leg while in the performance of duty.[4] He indicated that he tried to sit down on a chair in his home office, which rolled out from under him and caused him to fall onto his right hip and buttock. Appellant stopped work on the date of injury.

In an August 4, 2021 emergency department note, Dr. Glen Shook, a Board-certified emergency medicine specialist, noted that appellant related complaints of diffuse neck and back pain and right hip pain after falling onto his right hip and buttock while attempting to sit in a rolling chair in his home office. He noted a history of chronic low back pain and right hip replacement in 2007 with revision in 2020. On examination, Dr. Shook found diffuse tenderness to palpation of the posterior cervical and lumbar spine, swelling of the right lower extremity, and tenderness to palpation of the right hip and along the proximal femur. He indicated that he could not perform range of motion testing of the right hip due to pain. Dr. Shook reviewed x-rays of the lower back and right hip obtained that day, which revealed straightening related to muscle spasm, moderately extensive degenerative arthropathy, and a probable acute right proximal femoral/greater trochanteric fracture and/or postsurgical deformity. He diagnosed acute right proximal femoral/ greater trochanteric fracture, admitted appellant to the hospital, and referred him for an orthopedic consultation. Dr. Shook opined that "given the exam[ination] and swelling this is most likely an acute fracture."

In an emergency department orthopedic consultation report of even date, Dr. Kyle Low, a Board-certified orthopedic surgeon, indicated that appellant related an acute onset of pain in the right lateral hip and an inability to bear weight on the right leg after falling onto his buttocks while trying to sit in a chair. He noted a history of chronic low back pain, which was unchanged by the August 4, 2021 fall. Dr. Low further noted a history of bilateral total hip replacements and a revision right hip replacement on January 15, 2020 by Dr. Andrew Luu, a Board-certified orthopedic surgeon and joint replacement specialist. On physical examination, he documented tenderness to palpation over the lateral right hip and midline of the lower back. Dr. Low reviewed appellant's x-rays and indicated that the right hip implant did not appear to be grossly loose. He recommended that he remain nonweight bearing and referred him to pain management.

In a letter dated August 23, 2021, Dr. Luu indicated that appellant had been seen on that date and advised that he was totally disabled from all work for the period August 4 through November 4, 2021.

[4] OWCP assigned the present claim OWCP File No. xxxxxx293. OWCP previously accepted an October 24, 2019 traumatic injury claim for a lumbar sprain and a temporary aggravation of lumbar spondylosis and spinal stenosis under OWCP File No. xxxxxx524. The hearing representative directed that, upon return of the case file, these two files should be administratively combined.

In a letter dated September 13, 2021, L.P., an employing establishment human resources specialist, controverted appellant's claim. She also noted that she verbally advised him of the potential for a light-duty assignment.

In a September 16, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required to establish his claim and provided a questionnaire for his completion. In a separate letter of even date, OWCP requested that the employing establishment address the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

In a September 17, 2021 response to OWCP's questionnaire, appellant indicated that he began working remotely in his home office at 5:30 a.m. on August 4, 2021. At approximately 8:45 a.m., he left his office to use the bathroom and when he returned and tried to sit in his chair to continue working, it rolled out from under him, which caused him to fall onto a hardwood floor. Appellant indicated that he struck his back, neck, right leg, and right hip and experienced excruciating pain in those areas. He related that he screamed for help and his wife and son came to his aid and helped him off the floor. Appellant's grandson then arrived and helped him into his car and his wife transported him to the emergency room where he was admitted until August 7, 2021.

OWCP also received a copy of appellant's telework agreement with the employing establishment, various e-mails, and correspondence from appellant to Dr. Luu requesting a narrative report.

By decision dated October 25, 2021, OWCP denied appellant's claim, finding that he had not established that his injury was sustained in the performance of duty. Consequently, it concluded that the requirements had not been met to establish an injury or medical condition as defined by FECA.

On November 2, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearing and Review.

OWCP thereafter received an August 17, 2021 medical report by Dr. Luu, who evaluated appellant for a follow-up from a right nondisplaced periprosthetic greater trochanter fracture two weeks earlier. Dr. Luu noted that appellant had a history of falling and provided a date of injury of August 4, 2021 and a hospital discharge date of August 7, 2021. He performed a physical examination, which revealed tenderness to palpation over the right greater trochanter. Dr. Luu obtained x-rays, which revealed a nondisplaced periprosthetic greater trochanter fracture. He diagnosed periprosthetic right hip fracture and a history of revision of total replacement of the right hip. Dr. Luu recommended a front-wheel walker, no passive or active hip abduction, and to follow up in one month.

In a September 14, 2021 follow-up report, Dr. Luu advised that appellant was six weeks post a right nondisplaced periprosthetic greater trochanteric fracture and noted that he was using a walker for ambulation and avoiding all active or passive right hip abduction. He performed a physical examination and recommended physical therapy. Dr. Luu provided the same diagnoses.

In an October 12, 2021 follow-up report, Dr. Luu noted that appellant was no longer using any assistive devices for ambulation but was still having bilateral lower extremity pain consistent with lumbar stenosis.

On December 14, 2021 Dr. Luu indicated that appellant's x-rays showed a well-healed periprosthetic fracture of the right hip. He recommended magnetic resonance imaging (MRI) of the lumbar spine.

An oral hearing took place on April 14, 2022 and appellant testified regarding the events of August 4, 2021. He also submitted further statements dated August 23, 2021 and April 8, 2022 and a photograph of his office chair.

By decision dated June 21, 2022, OWCP's hearing representative modified the prior decision to find that the accepted August 4, 2021 employment incident occurred in the performance of duty. The claim remained denied, however, as the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed medical conditions and the accepted August 4, 2021 employment incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[5] 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,[6] 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.[7] 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.[8]

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. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[9]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, must

[5] *Supra* note 2.

[6] *C.B.*, Docket No. 21-1291 (issued April 28, 2022); *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).

[7] *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).

[8] *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).

[9] *S.H.*, Docket No. 23-0208 (issued June 26, 2023); *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *T.J.*, Docket No. 23-0237 (issued June 26, 2023); *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).

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.[11]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[12]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish a right hip condition causally related to the accepted August 4, 2021 employment incident.

In an August 4, 2021 emergency room report, Dr. Shook diagnosed acute right proximal femoral/greater trochanteric fracture and opined that "given the exam[ination] and swelling this is most likely an acute fracture." Similarly, in his August 4, 2021 orthopedic consultation report, Dr. Low opined that x-rays showed a "probable acute right proximal femoral/greater trochanteric fracture and/or postsurgical deformity." Neither Dr. Shook's nor Dr. Low's report explained a pathophysiological process of how the accepted August 4, 2021 employment incident caused or contributed to appellant's condition.[13] The Board has held that a medical opinion that does not offer a medically sound and rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions is of limited probative value.[14] Moreover, medical opinions that are speculative or equivocal in character are of diminished probative value.[15] Therefore, this evidence is insufficient to establish appellant's burden of proof.

Dr. Luu, in his reports dated August 17 through December 14, 2021, diagnosed periprosthetic facture of the right hip and lumbar stenosis but did not provide an opinion as to the cause of these conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[16] Therefore, the reports of Dr. Luu are insufficient to meet appellant's burden of proof.

[11] *P.C.*, Docket No. 20-0855 (issued November 23, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). *See R.V.*, Docket No. 21-0976 (issued July 18, 2023); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

[13] *J.D.*, Docket No. 19-1953 (issued January 11, 2021); *J.C.*, Docket No. 18-1474 (issued March 20, 2019); *M.M.*, Docket No. 15-0607 (issued May 15, 2015); *M.W.*, Docket No. 14-1664 (issued December 5, 2014).

[14] *J.B.*, Docket No. 21-0011 (issued April 20, 2021); *A.M.*, Docket No. 19-1394 (issued February 23, 2021).

[15] *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[16] *D.C.*, Docket No. 19-1093 (issued June 25, 2020); *see L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

As the medical evidence of record is insufficient to establish a right hip condition causally related to the accepted August 4, 2021 employment incident, the Board finds that appellant has not met his 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.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 21, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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