United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, WILLIAM S. MIDDLETON MEMORIAL VETERANS' HOSPITAL, Madison, WI, Employer	)	**Docket No. 22-0536** **Issued: January 11, 2023**

Appearances:
Appellant, pro se
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 February 28, 2022 appellant filed a timely appeal from a November 9, 2021 merit decision and a February 15, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the February 15, 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*.

ISSUES

The issues are: (1) whether appellant has established a medical condition causally related to the accepted February 5, 2020 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 12, 2020 appellant, then a 48-year-old medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that on February 5, 2020 he sustained bruises to his back and knees when the elevator he was riding in dropped from the seventh to the fifth floor while in the performance of duty. He explained that he was delivering sterile carts to the operating room at the time. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured while in the performance of duty, but challenged the factual basis of the claim because appellant was working the overnight shift and there were no witnesses. Appellant stopped work on February 5, 2020 and returned on February 7, 2020.

In a March 27, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary, and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received an April 1, 2020 statement from C.G., an employing establishment human resources management specialist, noting that the elevator company indicated that the elevator he was riding in could have lurched, but it was unlikely to fall two floors, as appellant alleged, due to safety features preventing free fall. C.G. also stated that elevator maintenance staff were onsite later on the date of injury for routine maintenance and there was no evidence of elevator malfunction.

By decision dated May 1, 2020, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted February 5, 2020 employment incident. It concluded, therefore, that he had not met the requirements to establish an injury as defined under FECA.

Appellant subsequently submitted a February 5, 2020 emergency department note signed by Dr. Kelly A. Lavin, Board-certified in internal medicine, who related that appellant was riding down an elevator when it suddenly dropped. He reported immediate pain in his left anterior knee below the kneecap, which increased with weightbearing. Dr. Lavin's examination of the left knee revealed some crepitus on range of motion (ROM) testing but no other abnormalities. She diagnosed a knee injury with differential diagnoses including knee sprain and ligament sprain and advised that appellant could return to work. In a February 16, 2020 emergency department note, Dr. Lavin noted that appellant's left knee pain continued after the February 5, 2020 employment

incident and was constant. Her examination of the left knee revealed no abnormalities. Dr. Lavin diagnosed knee sprain and again released appellant for work.[3]

In an emergency department note, dated March 31, 2020, Dr. Deval A. Patel, a Board-certified physician, and Dr. Jeremy D. Kratz, a Board-certified oncologist, related that appellant had increased pain in his knees and back since the February elevator incident. They noted that appellant had chronic low back pain and that his current pain was consistent with the usual pain. An April 4, 2020 emergency department note from Dr. Patel and Dr. Peter C. Kleinschmidt, a Board-certified internist, related that appellant's chronic back pain occasionally radiated to the right leg. Their physical examination revealed no reproducible back pain to palpation, and they diagnosed chronic low back pain and history of degenerative joint disease.

A May 14, 2020 report signed by Dr. Ayesha Bashir, Board-certified in internal medicine, indicated that appellant had left knee pain, which he believed was caused by a workplace incident at the employing establishment, though they had told him there had been no elevator malfunction on the date of injury. Dr. Bashir reviewed March 3, 2020 x-rays of appellant's knees which revealed no abnormalities.

In a May 19, 2020 report, Dr. Eric J. Lee, an orthopedic surgery resident, and Dr. John K. Wollaeger, a Board-certified orthopedic surgeon, related appellant's history of injury, including immediate left knee pain after the elevator incident, which had not improved. Appellant also reported that two weeks after the elevator fall, his knee gave out, causing him to fall. Dr. Lee and Dr. Wollaeger's examination of the left knee revealed mild tenderness to palpation just medial to the patellar tendon insertion and of the antero-medial joint line, as well as mild discomfort on the medial joint line with active knee extension. They reviewed x-rays of the left knee taken that day, which revealed no fractures, well-maintained joint space without loose bodies, and no joint effusion.[4] Drs. Lee and Wollaeger indicated that potential etiologies of appellant's pain included fracture, patellofemoral pain/instability, ligamentous injury, and meniscal tear.[5]

A September 10, 2020 emergency department note from Dr. Corey J. Sadd, a resident physician, and Dr. Kratz related that appellant's chronic pain had flared up the night before primarily in his right hip, but also in his neck and left knee. Physical examination revealed no abnormalities. Drs. Sadd and Kratz diagnosed a chronic pain flair.

In an October 6, 2020 orthopedic surgery outpatient note, Dr. Laura A. Lins, an orthopedic surgery resident, and Dr. Wollaeger related that on February 4, 2020 appellant was in an elevator

[3] On March 3, 2020 appellant underwent a lumbosacral spine x-ray, which demonstrated degenerative disc disease and bilateral knee x-rays that revealed no abnormalities.

[4] Appellant also underwent a cervical spine x-ray on the same day, which demonstrated degenerative-type changes.

[5] Appellant underwent a magnetic resonance imaging (MRI) scan of the cervical spine on June 2, 2020, which demonstrated multilevel cervical degenerative changes with alignment reversal and multilevel retrolisthesis which, with disc osteophytes and uncovertebral joint hypertrophy, contributes to moderate spinal canal stenosis at C4-C5, C5-C6, and C6-C7 with associated mild-to-moderate multilevel neural foraminal narrowing. A cervical spine x-ray taken on July 6, 2020 demonstrated degenerative disc disease changes in C3-4 through C7-T1 with disc narrowing and osteophyte formation.

that abruptly stopped, and he landed with his knees in extension. Appellant reported persistent left knee pain. Dr. Lins and Dr. Wollaeger's examination of the left lower extremity revealed mild tenderness to palpation along the medial joint line and the medial aspect of the patella, as well as difficulty performing the Thessaly test on the left side. They advised that there was no obvious cause for the left knee pain and that further assessment with MRI scan was appropriate.[6]

A January 13, 2021 report from Dr. Bashir related appellant's history of chronic joint, back, neck, shoulder, and knee pain and detailed the various treatments appellant had sought for his pain.

In a March 6, 2021 report, Dr. David L. Rebedew, a Board-certified family physician, diagnosed sciatica of the right side.

In a March 11, 2021 emergency department note, Dr. Scott Hetzel, Board-certified in internal medicine, and Dr. Lavin, related that appellant "jammed" his hip when he was riding in an elevator that abruptly dropped approximately one year prior. Appellant reported intermittent right hip discomfort since then, which had progressed to severe sharp pain in the medial right buttocks radiating to the thigh and worsened with prolonged walking and sitting. Dr. Hetzel and Dr. Lavin's physical examination revealed pain with passive ROM in all directions and pain to palpation directly over the right medial glut where the piriformis muscle is located. They diagnosed right piriformis syndrome and recommended physical therapy. In a report of even date, Dr. Hetzel diagnosed right piriformis syndrome and recommended physical therapy. He advised that appellant could return to work in two days but should avoid prolonged sitting or walking for two to four weeks.

On March 29, 2021 appellant requested reconsideration.

In a statement of even date, T.F., an employing establishment workers' compensation specialist, reviewed the medical evidence submitted by appellant and opined that it provided no diagnosis other than pain.

An April 30, 2021 emergency department note from Dr. Manju Goel, a Board-certified family physician, related that appellant experienced left groin pain and that he mentioned the February 2020 employment incident. An ultrasound of the left groin taken that day showed no inguinal hernia. A report of even date from Brenda Fritz, a certified physician assistant, noted that appellant had a long-standing work injury from the February 2020 elevator incident. Appellant reported daily low back and hip pain, which had worsened in the last day or two, concentrated in the left low buttock and left hip. Ms. Fritz's examination revealed positive soft tissue tenderness to palpation in the left low back into the left hip posterior lateral aspect, and she noted that appellant winced upon standing. She advised that appellant should be on sedentary-duty work pending clearance by an orthopedic specialist.[7]

[6] Appellant underwent an MRI scan of the left knee on October 27, 2020, which demonstrated edematous changes in the suprapatellar fat pad correlating clinically to fat pad syndrome.

[7] Appellant underwent x-rays of the hip and pelvis on May 4, 2021, which demonstrated no acute abnormalities.

By decision dated June 21, 2021, OWCP modified the May 1, 2020 decision, finding that the evidence of record contained a medical diagnosis. The claim remained denied, however, as the evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted factors of her federal employment.[8]

On October 6, 2021 appellant requested reconsideration. In support of his request, he submitted a September 15, 2021 report from Dr. Wollaeger relating that appellant continued to have right hip pain, which appellant related to the February 2020 elevator incident, after which he developed new hip and back pain. Dr. Wollaeger's examination demonstrated pain after about 80 degrees of flexion and mild discomfort with rolling the leg. He noted that appellant had a good response to an intra-articular injection and opined that appellant may have some intra-articular pathology that would benefit from hip arthroscopy. Dr. Wollaeger recommended an MRI scan.

By decision dated November 9, 2021, OWCP affirmed the June 21, 2021 decision.

Appellant subsequently submitted an undated list of upcoming medical and physical therapy appointments.

On November 19, 2021 appellant requested reconsideration. OWCP also received a January 12, 2022 note from him indicating that he was waiting on a causation letter from his medical provider.

By decision dated February 15, 2022, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[9] has the burden of proof to establish the essential elements of his or her claim, including the fact 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 period of FECA,[10] 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.[11] These are the essential elements of each and every

[8] OWCP subsequently received the first page of a two-page diagnostic report dated September 28, 2021 indicating that appellant underwent an MRI scan of the right hip on September 26, 2021.

[9] *Supra* note 1.

[10] *S.S.*, Docket No. 19-1815 (issued June 26, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[11] *M.H.*, Docket No. 19-0930 (issued June 17, 2020); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[12]

To determine whether an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[13] The second component is whether the employment incident caused a personal injury.[14]

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[15] 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 factors identified by the employee.[16]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted February 5, 2020 employment incident.

In February 5 and 16, 2020 emergency department notes, Dr. Lavin related that appellant developed left knee pain after an elevator he was riding in suddenly dropped. On February 5, 2020 she diagnosed a knee injury with differentials including knee sprain and ligament sprain, and on February 16, 2020 she diagnosed a knee sprain. In a March 31, 2020 note, Drs. Patel and Kratz related that appellant's knee and back pain had been increasing since the February 5, 2020 elevator incident. In a May 19, 2020 orthopedic surgery consult note, Drs. Lee and Wollaeger related that appellant had immediate left knee pain after the elevator incident, which had not improved and indicated that potential etiologies of appellant's pain included fracture, patellofemoral pain/instability, ligamentous injury, and meniscal tear. In an October 6, 2020 orthopedic surgery outpatient note, Drs. Lins and Wollaeger related that appellant had persistent knee pain following the elevator incident. They advised that there was no obvious cause for the left knee pain and that further assessment with MRI scan was appropriate. In a March 11, 2021 emergency department note, Drs. Hetzel and Lavin, related that appellant had intermittent right hip discomfort since the elevator incident and diagnosed right piriformis syndrome and recommended physical therapy. Similarly, in a September 15, 2021 orthopedic surgery outpatient note, Dr. Wollaeger related that

[12] *S.A.*, Docket No. 19-1221 (issued June 9, 2020); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[13] *R.K.*, Docket No. 19-0904 (issued April 10, 2020); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[14] *Y.D.*, Docket No. 19-1200 (issued April 6, 2020); *John J. Carlone*, 41 ECAB 354 (1989).

[15] *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).

[16] *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).

appellant continued to have right hip pain, which appellant related to the February 2020 elevator incident, after which he developed new hip and back pain. Although each provider suggested a work-related cause for appellant's medical conditions, none provided a rationalized medical opinion relating a specific diagnosed condition to the February 5, 2020 employment incident. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.[17] Therefore, these reports are insufficient to establish appellant's traumatic injury claim.

In an April 4, 2020 emergency department note, Drs. Patel and Kleinschmidt related that appellant's back pain, which was typical of his chronic low back pain, occasionally radiated to the right leg, and they diagnosed chronic low back pain and history of degenerative joint disease. In a note dated May 14, 2020, Dr. Bashir related that appellant had left knee pain, which appellant related to the elevator incident. In a September 10, 2020 note, Drs. Sadd and Kratz related that appellant's chronic pain in the hip, neck, and left knee had flared up the night before and diagnosed a chronic pain flair. In a January 13, 2021 note, Dr. Bashir related appellant's history of treatment for chronic joint, back, neck, shoulder, and knee pain. In a March 6, 2021 visit summary, Dr. Rebedew diagnosed sciatica of the right side. In a March 11, 2021 visit summary, Dr. Hetzel diagnosed right piriformis syndrome. Finally, in an April 30, 2021 emergency department note, Dr. Goel related that appellant experienced left groin pain and that he mentioned the February 2020 employment incident. However, these providers did not offer opinions on causal relationship in any of this evidence. 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.[18] For this reason, this medical evidence is insufficient to meet appellant's burden of proof.

In support of his claim, appellant submitted an April 30, 2021 report from a nurse practitioner. However, certain healthcare providers such as nurse practitioners[19] are not considered "physician[s]" as defined under FECA.[20] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[21]

[17] *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[18] *S.J.*, Docket No. 19-0696 (issued August 23, 2019); *M.C.*, Docket No. 18-0951 (issued January 7, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[19] *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA).

[20] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *see also S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA).

[21] *Id*.

The remaining medical evidence consisted of various diagnostic imaging reports dated March 3, 2020 through September 28, 2021. The Board has held, however, that diagnostic testing reports, standing alone, lack probative value on the issue of causal relationship as they do not address the relationship between the accepted employment factors and a diagnosed condition.[22] For this reason, this evidence is also insufficient to meet appellant's burden of proof.

As appellant has not submitted rationalized medical evidence establishing that his medical condition is causally related to the accepted February 5, 2020 employment incident, the Board finds that he has not met his burden of proof to establish his claim.

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 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[23]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[24]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[25] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[26] If the request is timely, but fails to meet at least one

[22] *W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

[23] 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[24] 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id*.; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[25] 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id*. at Chapter 2.1602.4b.

[26] 20 C.F.R. § 10.608(a); *see also A.F.*, Docket No. 19-1832 (issued July 21, 2020); *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[27]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[28]

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue on reconsideration is whether appellant has met his burden of proof to establish a medical condition causally related to the accepted February 5, 2020 employment incident. This is a medical issue, which is addressed by relevant medical evidence not previously considered.[29]

In support of his request for reconsideration, appellant submitted an undated list of upcoming medical and physical therapy appointments and a January 12, 2022 statement indicating that he was waiting on a causation letter from his medical provider. However, neither the appointment list nor the statement constitute relevant and pertinent new evidence as they are not medical evidence.[30] The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[31] Therefore, OWCP properly determined that appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).[32]

The Board, accordingly, finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[33]

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[27] 20 C.F.R. § 10.608(b); *J.B.*, Docket No. 20-0145 (issued September 8, 2020); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[28] *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

[29] *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *Eugene F. Butler*, 36 ECAB 393 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[30] *See id*.

[31] *See T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000).

[32] *Supra* note 24.

[33] *J.B.*, *supra* note 27; *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted February 5, 2020 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2021 and February 15, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 11, 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