

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

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<b>R.B., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 23-0395</b>
	)	<b>Issued: October 2, 2023</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. IMMIGRATION AND CUSTOMS</b>	)	
<b>ENFORCEMENT, Lords Valley, PA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 17, 2023 appellant filed a timely appeal from an August 25, 2022 merit decision and a December 22, 2022 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.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability commencing July 6, 2022, causally related to his accepted January 7, 2005

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

<sup>2</sup> The Board notes that following the December 22, 2022 decision and on appeal, OWCP received additional evidence. 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.*

employment injury; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On January 10, 2005 appellant, then a 37-year-old immigration enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2005 he sustained back and neck injuries when he fell on ice in the parking lot while in the performance of duty. He stopped work on January 10, 2005. OWCP accepted the claim for sprain/strain of neck; sprain/strain of back, thoracic region; other syndromes affecting cervical region; brachial neuritis or radiculitis; pain in limb; cervicocranial syndrome; degeneration of cervical intervertebral disc; intervertebral disc disorder with myelopathy, cervical region; and occipital neuralgia. It paid appellant wage-loss compensation on the supplemental rolls from March 28 through May 14, 2005, and on the periodic rolls from May 15, 2005.

On July 26, 2011 appellant underwent OWCP-authorized surgery for cervical spondylosis with disc herniation at C5-6 and C6-7, anterior cervical discectomy, instrument fusion with polyetheretherketone (PEEK) cage and Atlantis plate, and microdissection.

Following successful participation in the vocational rehabilitation process, appellant returned to full-time work on August 5, 2019 with the Veterans Health Administration (VHA) as a medical support assistant. Thereafter OWCP paid appellant wage-loss compensation based on his loss of wage-earning capacity.

In a February 28, 2020 medical report, Dr. Mahesh Chhabria, a neurologist, related that appellant was doing well, and had begun work at the Department of Veterans Affairs; however, two weeks prior, appellant began experiencing pain on the right lumbar region, occasionally radiating down the right leg, but otherwise denied any motor or sensory symptoms in the lower extremities. He indicated that prior to this recurrence, appellant had discontinued medication and muscle relaxers. Dr. Chhabria noted that appellant had a history of cervical postlaminectomy syndrome, experienced constant neck pain, and had recovered from a right shoulder replacement. He diagnosed lumbosacral strain with recent worsening and chronic cervical strain. Dr. Chhabria opined that appellant's back and neck pain were related to a work injury that occurred several years prior.

In a memorandum of telephone call (Form CA-110) dated July 8, 2022, appellant notified OWCP that his condition had worsened, and he was off work.

By development letter dated July 8, 2022, OWCP advised appellant that it appeared that he was claiming a disability due to a material change or worsening of his accepted work-related conditions. It explained that its records indicated that on September 29, 2019, he was reemployed as a medical support assistant at the VHA. OWCP informed appellant of the definition of a recurrence of disability and requested that he provide medical evidence supporting that his accepted condition had worsened such that he was disabled from employment or required additional medical treatment. It also provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a July 6, 2022 report, Dr. Rajkumar Katara, a neurologist Board-certified in sleep medicine, noted that appellant was seen for neck and low back conditions and noted that he had a history of cervical postlaminectomy syndrome, right shoulder replacement, and midback pain. He related that appellant had been working on a computer and was able to manage, but in the prior several months had experienced worsening neck pain radiating to both arms, with associated numbness and tingling sensation, and also had midback pain, and was unable to sit in front of the computer and work. Dr. Katara diagnosed cervical radiculopathy, chronic thoracic spine pain, and cervical postlaminectomy syndrome. He recommended a magnetic resonance imaging (MRI) scan, an electromyography (EMG), and a pain management regimen.

In a July 20, 2022 report, Dr. Sanket Pathak, Board-certified in anesthesiology and pain medicine, noted that appellant was treated for chief complaints of neck tightness, burning thoracic pain, and pain down the bilateral upper extremities, described as numbness and tingling. He indicated that there was no inciting event. Dr. Pathak noted that in 2011 appellant had anterior cervical discectomy and fusion at C5-6 and C6-7, and he was “ok” until the last six months when he started to have increased pain in the neck and pain in the arms. He related that appellant reported fine motor issues in the fingertips, pressure pain in the neck, and burning pain in the thoracic area. Dr. Pathak diagnosed cervical paraspinal muscle spasm, cervical radiculopathy, cervical postlaminectomy syndrome, myofascial pain syndrome, and chronic pain syndrome.

OWCP received appellant’s statement in response to its questionnaire and an initial pain questionnaire dated July 21, 2022. Appellant noted that for the prior three months, he experienced a lot of pain and numbness in his neck, spine, and arms. He related that his condition worsened with sitting at the computer for eight hours per day, working as a call center medical support assistant at the VHA. Appellant explained that he was able to work the first 24 months with his disability; however, his original injury worsened such that the symptoms were continuous. He explained that his injury never went away and sitting for long periods of time and typing on the computer caused his condition.

In an undated attending physician’s report (Form CA-20), Dr. Katara reiterated his diagnoses of cervical radiculopathy and postlaminectomy syndrome. In response to the question of whether he believed the conditions were caused or aggravated by an employment activity, Dr. Katara noted that it was “possible.”

OWCP received a July 22, 2022 EMG scan of appellant’s bilateral upper extremities read by Dr. James Kerrigan, a Board-certified neurologist. The scan revealed abnormal findings of a localized neuropathic process involving the ulnar nerve at the elbow bilaterally consistent with bilateral cubital tunnel syndrome, as well as concomitant entrapment of the ulnar at the wrist bilaterally, left greater than right. Dr. Kerrigan also noted that a more diffuse peripheral neuropathy was suspected, and there were chronic denervation changes in the C6-7 distribution bilaterally.

By decision dated August 25, 2022, OWCP denied appellant’s claim for a recurrence of disability, finding that he did not establish disability due to a material change or worsening of his accepted January 7, 2005 employment-related conditions.

Appellant submitted additional evidence following the August 25, 2022 decision, including a notice of recurrence (Form CA-2a) alleging a recurrence of the accepted January 7, 2005

employment injury as of July 6, 2022; a request for authorization for multiple procedures to the neck and spine, and progress notes, medical reports, and diagnostic tests dated July to October 24, 2022.

On December 5, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 27, 2022, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration and the submission of new evidence supporting that he had sustained a recurrence of disability.

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

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>3</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.<sup>4</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness, rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>5</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, based on a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

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<sup>3</sup> 20 C.F.R. § 10.5(x); *see A.H.*, Docket No. 22-0978 (issued January 24, 2023); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>4</sup> *Id.*

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

injury, and supports that conclusion with medical reasoning.<sup>6</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>7</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing July 6, 2022, causally related to his accepted January 7, 2005 employment injury.

In a February 28, 2020 report, Dr. Chhabria diagnosed lumbosacral strain with recent worsening and chronic cervical strain. He opined that appellant's back and neck pain were related to a prior work-related injury. However, this report predates the alleged recurrence of disability commencing July 6, 2022, and does not address the relevant claimed time period. As such, the Board finds that Dr. Chhabria's report is insufficient to establish appellant's recurrence claim.<sup>8</sup>

The July 6, 2022 report from Dr. Katara noted that appellant had been working on a computer at the VHA, and during the prior several months had experienced worsening neck pain and midback pain and was unable to sit in front of the computer and work. He diagnosed cervical radiculopathy, chronic thoracic spine pain, and cervical postlaminectomy syndrome. However, Dr. Katara did not provide an opinion regarding the cause of appellant's conditions or disability commencing July 6, 2022. The Board has held that 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>9</sup> As noted, a claim for recurrence requires evidence that appellant's current conditions are not the result of an intervening injury, and a recurrence does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>10</sup> For these reasons, the Board finds that Dr. Katara's report is insufficient to establish appellant's recurrence claim.

Dr. Katara's remaining undated report reiterated his diagnoses of cervical radiculopathy and postlaminectomy syndrome. In response to a question regarding causality, he noted that it was "possible" that the diagnosed conditions were related to an employment injury. The Board has

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<sup>6</sup> *C.Y.*, Docket No. 22-0474 (issued November 14, 2022); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>7</sup> *L.C.*, Docket No. 20-1679 (issued October 20, 2022); *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

<sup>8</sup> *See P.R.*, Docket No. 20-0596 (issued October 6, 2020); *M.L.*, Docket No. 18-1058 (issued November 21, 2019); *A.P.*, Docket No. 19-0446 (issued July 10, 2019); *D.J.*, Docket No. 18-0200 (issued August 12, 2019).

<sup>9</sup> *J.V.*, Docket No. 22-1347 (issued May 1, 2023); *A.H.*, *supra* note 3; *K.G.*, Docket No. 22-0970 (issued February 24, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>10</sup> *Supra* note 5.

long held that medical opinions that are speculative or equivocal are of diminished probative value.<sup>11</sup> Thus, the Board finds that this evidence is insufficient to meet appellant's burden of proof.

The July 20, 2022 report from Dr. Pathak found that there was no inciting event for appellant's diagnosed conditions of cervical paraspinal muscle spasm, cervical radiculopathy, cervical postlaminectomy syndrome, myofascial pain syndrome, and chronic pain syndrome. Dr. Pathak did not however, provide a rationalized opinion explaining with objective findings why appellant's accepted conditions caused a recurrence of disability as of July 6, 2022.<sup>12</sup> Therefore, the Board finds this evidence is insufficient to establish appellant's burden of proof.

The record also contains a July 22, 2022 EMG scan of the bilateral upper extremities read by Dr. Kerrigan. The Board has held that diagnostic reports, standing alone, lack probative value on the issue of causal relationship, as they do not address whether the accepted employment injuries resulted in appellant's claimed disability.<sup>13</sup> Consequently, this evidence is insufficient to establish appellant's recurrence claim.

As appellant has not submitted any rationalized medical evidence establishing a recurrence of disability commencing July 6, 2022, causally related to his accepted January 7, 2005 employment injury, the Board finds that he 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.

### **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>14</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>15</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>16</sup> Although there is no right to a review of the written record or an oral hearing if not requested

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<sup>11</sup> *M.D.*, Docket No. 21-0080 (issued August 16, 2022); *R.B.*, Docket No. 19-0204 (issued September 6, 2019); *see N.B.*, Docket No. 19-0221 (issued July 15, 2019).

<sup>12</sup> *H.C.*, Docket No. 22-0844 (issued December 5, 2022); *L.A.*, Docket No. 18-1570 (issued May 23, 2019).

<sup>13</sup> *A.D.*, Docket No. 22-1264 (issued May 15, 2023); *B.W.*, Docket No. 21-0721 (issued February 14, 2023); *O.C.*, Docket No. 20-0514 (issued October 8, 2020); *R.J.*, Docket No. 19-0179 (issued May 26, 2020).

<sup>14</sup> 5 U.S.C. § 8124(b).

<sup>15</sup> 20 C.F.R. §§ 10.616, 10.617, and 10.618.

<sup>16</sup> *Id.* at § 10.616(a).

within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>17</sup>

### 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(b).

On December 5, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.<sup>18</sup> However, this request was made more than 30 days after OWCP's August 25, 2022 decision. Section 8124(b)(1) is unequivocal on the time limitation for filing a request for a hearing.<sup>19</sup> As such, the Board finds that the request was untimely filed, and appellant was not entitled to an oral hearing as a matter of right.<sup>20</sup>

The Board further finds that OWCP, in its December 27, 2022 decision, properly exercised its discretionary authority, by explaining that it had considered the matter and denied appellant's request for an oral hearing as the issue in the case could be equally well addressed through a request for reconsideration, 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>21</sup> The Board finds that the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for an oral hearing.<sup>22</sup>

### CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing July 6, 2022, causally related to his accepted January 7, 2005 employment

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<sup>17</sup> *G.H.*, Docket No. 22-0122 (issued May 20, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>18</sup> Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request, if available. Federal (FECA) Procedure Manual, Part 2 – Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011). Otherwise, the date of the letter itself should be used. See *J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001), citing *William J. Kapfhammer*, 42 ECAB 271 (1990); see also *Douglas McLean*, 42 ECAB 759 (1991).

<sup>19</sup> 5 U.S.C. § 8124(b); see *V.S.*, Docket No. 22-1325 (issued December 16, 2022); *K.N.*, Docket No. 22-0647; *G.H.*, *supra* note 17; *William F. Osborne*, 46 ECAB 198 (1994).

<sup>20</sup> See *S.N.*, Docket No. 22-1048 (issued April 3, 2023); *D.R.*, Docket No. 22-0361 (issued July 8, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, *supra* note 17.

<sup>21</sup> See *S.I.*, Docket No. 22-0538 (issued October 3, 2022); *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>22</sup> *S.N.*, *supra* note 20; *J.G.*, Docket No. 19-0555 (issued March 14, 2019).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25 and December 27, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 2, 2023  
Washington, DC

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

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

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