

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

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**S.F., Appellant**

**and**

**DEPARTMENT OF LABOR, MINE SAFETY  
& HEALTH ADMINISTRATION,  
Barbourville, KY, Employer**

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**Docket No. 17-0463  
Issued: September 8, 2017**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 28, 2016 appellant filed a timely appeal from a September 28, 2016 merit decision and a December 7, 2016 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 to consider the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish an injury causally related to his accepted factors of his federal employment; and (2) whether OWCP

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

<sup>2</sup> The Board notes that, following the December 7, 2016 decision, OWCP received additional evidence. Appellant also submitted evidence with his appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

abused its discretion in denying appellant's request for a telephonic hearing before an OWCP hearing representative.

### **FACTUAL HISTORY**

On June 7, 2016 appellant, then a 57-year-old coal mine health and safety inspector, filed an occupational disease claim (Form CA-2) alleging that on March 9, 2015 he first realized that his right shoulder rotator cuff tear, cervical disc fusion, torn right and left knee menisci, right carpal tunnel syndrome, and lower back pain had been caused or aggravated by factors of his federal employment. He stopped work on April 13, 2016.

In support of his claim appellant submitted a May 18, 2016 report by Dr. James C. Owen, a Board-certified emergency room physician. Dr. Owen noted appellant's medical and employment histories. Appellant informed him that he had been an underground miner for 28½ years before becoming a mine inspector. Dr. Owen reported that appellant was no longer working due to his inability to pass an employment physical. Appellant's primary complaints were low back, shoulder, knee, and neck pain; carpal tunnel syndrome; and shortness of breath. Dr. Owen reviewed a magnetic resonance imaging (MRI) scan taken in 2015 which revealed neck degenerative disc disease and rotator cuff tear. He also reviewed the MRI scan of appellant's knees which showed bilateral torn menisci. Dr. Owen noted that appellant had a history of carpal tunnel syndrome and had undergone right carpal tunnel surgery in 2012. With respect to appellant's low back problem, he reported that appellant sustained an injury when a rock jarred him severely while operating a scoop many years ago. Dr. Owen also noted that appellant had been diagnosed with chronic obstructive pulmonary disease (COPD) after he failed a breathing test in 2015.

Based on examination findings and review of medical and treatment records, Dr. Owen diagnosed persistent low back pain status post discectomy, no definitive evidence of cervical radiculopathy, persistent severe degenerative disc and joint disease associated with C5-6 fusion, bilateral carpal tunnel syndrome, rotator cuff injury and shoulder pain, bilateral knee pain, bilateral knee meniscal tears, and COPD. He checked a box marked "yes" that the diagnosed conditions were caused or aggravated by appellant's employment. Dr. Owen noted that appellant's neck, shoulder, and knee pains were associated with accumulative-type trauma which he found due to appellant's duties as a coal miner and inspector. Specifically, he referenced the duties of bending, stooping, using his upper extremities, and prolonged walking. He also opined that appellant's COPD was attributable to his work as a coal miner.

By letter dated June 18, 2016, OWCP advised appellant that the evidence of record was insufficient to establish his claim. It advised him as to the medical and factual evidence required and afforded him 30 days to submit the requested information.

In response to OWCP's request for additional information, appellant submitted additional medical and factual evidence.<sup>3</sup>

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<sup>3</sup> The medical evidence submitted also included diagnostic tests including x-ray interpretations, MRI scans, electrocardiograms, an electromyograph and a color deficiency test covering the period March 9 to June 20, 2015.

In an undated statement, appellant provided an employment history and description of his duties as a coal mine inspector. He explained that there was no specific start date for his conditions as they had evolved overtime due to his work as a coal miner for 28½ years and 10 years as a coal mine inspector.

In a May 13, 2015 report, Dr. April L. Hall, an osteopathic physician specializing in internal medicine, provided a medical history and physical examination findings. She diagnosed lower leg, shoulder, and knee pain; carpal tunnel syndrome, dyspnea, unspecified peripheral neuropathy, cervicalgia, anemia, Vitamin B12 deficiency, and hyperlipidemia.

In June 10 and August 5, 2015 reports, Dr. Hall reported that appellant was seen for bilateral knee pain, carpal tunnel syndrome, and hyperlipidemia with an onset date of October 20, 2011. Based on physical examination findings and review of MRI scans, she diagnosed cervicalgia, lumbago, unspecified myalgia and myositis, and pain in the upper arm joint pain, shoulder, and knee. Dr. Hall concluded that appellant was unable to return to work based on review of the MRI scans.

Dr. Hall, in an August 24, 2015 report, noted that she had been treating appellant for past few years for multiple conditions. The conditions included hyperlipidemia, diffuse arthropathy, hypertension, carpal tunnel syndrome, sleep apnea, cervicalgia, chronic lumbago, and chronic shoulder pain. A review of recent MRI scans revealed severe cervical degenerative changes, a partial thickness right shoulder supraspinatus subscapularis and infraspinatus tearing, partial bicep injury, early medial bicep subluxation, moderate acromioclavicular joint arthritic changes, right knee advance chondromalacia, severe right knee osteoarthritic changes, left knee complex meniscal tear, and left knee moderate chondromalacia. Dr. Hall concluded that, based on appellant's multiple conditions, he was unable to perform his usual job duties, but was capable of performing sedentary/desk work.

In a September 14, 2015 medical surveillance program report, Dr. Teddi Eisen, a Board-certified occupational medicine physician, provided work restrictions based on conditions that he related were not caused by appellant's work.

In a January 13, 2016 letter, the employing establishment noted appellant's March 9, 2015 periodic physical examination and other medical evidence had been reviewed. It informed him that it had been determined that he no longer met the requirements to perform the job of Mine Safety and Health Inspector due to his medical restrictions and conditions. Appellant was advised that he was entitled to request reasonable accommodation and noted that he might be eligible for discontinued service retirement or disability retirement.

On April 12, 2016 the employing establishment advised appellant that based on medical documentation it had been determined that he no longer was capable of performing his job as a mine health and safety inspector. It also informed him that the temporary light-duty job assignments that had been provided were no longer available and they were no longer able to accommodate his work restrictions effective April 18, 2016.

OWCP received an August 8, 2016 report from Dr. Hall opining that appellant was totally disabled due to multiple medical conditions and limited capacity. The diagnosed conditions included hypertension, severe cervicalgia, bilateral carpal tunnel syndrome,

generalized fatigue, bilateral knee pain, chronic myalgias, bilateral shoulder pain, and seasonal allergies.

By decision dated September 18, 2016, OWCP denied appellant's occupational disease claim. It found the medical evidence of record was insufficient to establish a causal relationship between the diagnosed conditions and identified employment factors.

On November 15, 2016 OWCP received an appeal request form from appellant dated November 9, 2016 requesting a telephonic hearing before an OWCP hearing representative. Appellant also submitted factual and medical evidence including diagnostic tests and medical reports covering the period March 17, 1999 to May 18, 2016.

By decision dated December 7, 2016, OWCP denied appellant's request for a telephonic hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124. It informed him that his case had been considered in relation to the issues involved and that the request was further denied as the issue in this case could be equally addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

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

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

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>7</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>8</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on

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

<sup>5</sup> C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>7</sup> *D.U.*, Docket No. 10-0144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

<sup>8</sup> *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>10</sup>

### ANALYSIS -- ISSUE 1

Appellant alleged that his right shoulder rotator cuff tear, cervical disc fusion, torn right and left knee menisci, right carpal tunnel syndrome, and lower back pain were caused or aggravated by his duties as a coal mine inspector. By decision dated September 18, 2016, OWCP denied his claim as it found none of the medical evidence established that the diagnosed conditions had been caused or aggravated by his employment duties.

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to factors of his federal employment.

In a May 18, 2016 report, Dr. Owen diagnosed low back pain post discectomy, C5-6 degenerative disc and joint disease, bilateral carpal tunnel syndrome, rotator cuff injury, bilateral knee, and shoulder pain and, bilateral meniscal tears were due to appellant's years as a coal miner and inspector. He responded "yes" to the question of whether the diagnosed conditions were the cause of appellant's symptoms. The Board has held that when a physician's opinion on causal relationship consists only of checking a box marked "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.<sup>11</sup> Dr. Owen attributed appellant's neck, shoulder, and knee pain to the accumulative-type trauma associated with the job duties of a coal miner and inspector. However, the findings of the physician are of no probative value as he was describing a symptom rather than a clear diagnosis of the medical condition.<sup>12</sup> The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.<sup>13</sup> While Dr. Owen's report contained an affirmative statement of causation and employment injury history, it did not contain a sufficient explanation of how appellant's job as a mine and health inspector for 10 years physiologically caused or aggravated the diagnosed conditions. Medical conclusions unsupported by rationale are of little probative value.<sup>14</sup> Thus, Dr. Owen's report is insufficient to establish that the diagnosed conditions were caused or aggravated by appellant's federal employment.

Appellant also submitted reports from Dr. Hall covering the period May 13 to August 8, 2016 diagnosing a number of conditions, review of objective tests, and examination findings.

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<sup>9</sup> *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

<sup>10</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>11</sup> *Sedi L. Graham*, 57 ECAB 494 (2006).

<sup>12</sup> *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

<sup>13</sup> *Id.*

<sup>14</sup> *C.B.*, Docket No. 08-2268 (issued May 22, 2009); *S. Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Willa M. Frazier*, 55 ECAB 379 (2004).

The conditions diagnosed included lower leg, shoulder, and knee pain; carpal tunnel syndrome, dyspnea, cervicgia, diffuse arthropathy, unspecified peripheral neuropathy, cervicgia, arthropathy, sleep apnea, hyperlipidemia, cervical degenerative changes, a partial thickness right shoulder supraspinatus subscapularis and infraspinatus tearing, partial bicep injury, early medial bicep subluxation, moderate acromioclavicular joint arthritic changes, right knee advance chondromalacia, severe right knee osteoarthric changes, left knee complex meniscal tear, and left knee moderate chondromalacia. However, Dr. Hall offered no opinion as to the cause of the diagnosed conditions. The Board has consistently held that medical evidence which offers no opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>15</sup>

The remaining medical evidence, including a September 14, 2015 report by Dr. Eisen x-rays, MRI scans, and test results, which do not contain an opinion as to the cause of appellant's diagnosed conditions, are of limited probative value.<sup>16</sup>

In the instant case, the record lacks rationalized medical evidence establishing a causal relationship between appellant's federal employment duties as a mine and health safety inspector and the diagnosed back, shoulder, neck, hand, and knee conditions. Thus, appellant has failed to meet 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**

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.<sup>17</sup> A request for a hearing or review on the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>18</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>19</sup> Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.<sup>20</sup> Similarly, the Branch of Hearings and Review may exercise its

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<sup>15</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *A.F.*, 59 ECAB 714 (2008); *Willie M. Miller*, 53 ECAB 697 (2002).

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

<sup>17</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

<sup>18</sup> *Id.* at 10.616(a).

<sup>19</sup> *Id.*

<sup>20</sup> *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

discretion to conduct a hearing or review the written record where a claimant requests a second hearing or review on the written record on the same issue.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

By decision dated September 28, 2016, OWCP found that appellant failed to establish any diagnosed medical conditions caused or aggravated by his accepted employment duties. Appellant requested a telephonic hearing before an OWCP hearing representative using the appeal request form that accompanied OWCP's September 28, 2016 merit decision. His request was dated and postmarked November 9, 2016, and received by OWCP on November 15, 2016. By decision dated December 7, 2016, the Branch of Hearing and Review denied appellant's request for a telephonic hearing as his request had not been made within 30 days after issuance of the September 28, 2016 decision. Thus, OWCP found that he was not entitled to a telephonic hearing before an OWCP hearing representative as a matter of right. The Board finds that appellant was not entitled to telephonic hearing before an OWCP hearing representative as a matter of right as he submitted an untimely request.<sup>22</sup>

OWCP properly exercised its discretion in denying appellant's request a telephonic hearing before an OWCP hearing representative by determining that the issue in the case could be equally well addressed by requested reconsideration and submitting new evidence relevant to the issue at hand.<sup>23</sup> The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.<sup>24</sup> There is no evidence in the current case that OWCP abused its discretion in denying appellant's request for a telephonic hearing under these circumstances. The Board finds that OWCP acted properly in denying appellant's November 9, 2016 request for a telephonic hearing before an OWCP hearing representative.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish an injury causally related to the accepted factors of his federal employment. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed.

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<sup>21</sup> *Supra* note 18.

<sup>22</sup> 20 C.F.R. § 10.616(a).

<sup>23</sup> *Hubert Jones, Jr.*, *supra* note 20; *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>24</sup> *See M.C.*, Docket No. 09-2314 (issued August 20, 2010); *Claudia Vazquez*, 52 ECAB 496 (2001); *Daniel J. Perea*, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 7 and September 28, 2016 are affirmed.

Issued: September 8, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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