

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

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**F.H., Appellant** )

**and** )

**DEPARTMENT OF THE NAVY, NAVAL  
SHIPYARD, Portsmouth, VA, Employer** )  
\_\_\_\_\_ )

**Docket No. 21-0579  
Issued: December 9, 2021**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 3, 2021 appellant, through counsel, filed a timely appeal from a February 8, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the February 8, 2021 decision, 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.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish that acceptance of his claim should be expanded to include cervical myelopathy with radiculopathy and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On January 8, 2016 appellant, then a 64-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2015 he bruised his right hip when he tripped and fell, landing on a two-way radio in his right pocket.

An August 2, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed foraminal stenosis from L3 to S1, central canal stenosis, and grade one anterolisthesis from L3 to 5 with advanced facet arthropathy. An MRI scan of the cervical spine dated November 15, 2016 revealed advanced cervical degenerative disc disease with cord impingement, findings suggestive of myelomalacia, and high-grade foraminal stenosis with nerve root impingement bilaterally.

In a December 7, 2016 duty status report (Form CA-17), Dr. Karl F. Bowman, Jr., a Board-certified orthopedic surgeon, diagnosed facet arthropathy of the lumbar spine, lumbar spinal stenosis and spondylosis, and right hip osteoarthritis. He indicated that appellant was unable to work.

In a December 13, 2016 attending physician's report (Form CA-20), Dr. Mark B. Kerner, a Board-certified orthopedic surgeon, diagnosed cervical myelopathy and checked a box marked "Yes" indicating that the condition was caused or aggravated by employment, noting that appellant's symptoms had begun after an employment injury.<sup>5</sup> In a January 20, 2017 CA-20 form, he diagnosed cervical myelopathy and radiculopathy and again checked a box marked "Yes" indicating that the condition was caused or aggravated by the described employment activity of a fall at work. Dr. Kerner related that after the incident appellant had experienced increasing neck pain and arm pain with numbness. He indicated that the cord contusion resulted in a spinal cord injury with "central cord syndrome."

On November 22, 2016 Dr. Kerner noted that appellant had complained of increasing neck and arm pain and numbness after a fall at work. He diagnosed severe cervical stenosis and "areas of gliosis, clearly myelopathic with ongoing cervical stenosis with a cord contusion causing what

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<sup>4</sup> Docket No. 18-1238 (issued January 18, 2019); *Order Remanding Case*, Docket No. 19-1801 (issued September 9, 2020).

<sup>5</sup> In December 7, 2016 and January 17, 2017 CA-20 forms, Dr. Bowman diagnosed lumbar spine pain and facet arthropathy, cervical radiculopathy, bilateral carpal tunnel syndrome, right hip osteoarthritis, and stenosis of the lumbar spine.

appears to be a cord injury with central cord syndrome.” Dr. Kerner recommended a decompression and fusion.

On December 2, 2016 Dr. Kerner performed an anterior cervical discectomy and fusion and multiple levels.<sup>6</sup>

By decision dated April 17, 2017, OWCP denied appellant’s traumatic injury claim. It found that the medical evidence was insufficient to establish a diagnosed condition caused or aggravated by the accepted employment incident.

In an April 27, 2017 report, Dr. Bowman related that he had initially evaluated appellant on May 16, 2016 for cervical radiculopathy, cervical arthritis, and carpal tunnel syndrome. He noted that x-rays revealed advanced cervical arthritis that compressed the spinal cord necessitating surgery. Dr. Bowman discussed appellant’s history of a fall on December 10, 2015 at work. He opined that the “fall certainly could have aggravated [appellant’s] preexisting medical condition to the point that it would have exceeded a symptom threshold requiring an intervention for his resolution of neurological symptoms.”

On May 23, 2017 appellant requested reconsideration.

In a July 27, 2017 CA-20 form, Dr. Kerner diagnosed cervical myelopathy and radiculopathy and checked a box marked “Yes” indicating that the condition was caused or aggravated by the described employment activity of a fall at work. He found that the injury to the spinal cord had caused in central cord syndrome.

By decision dated August 21, 2017, OWCP denied modification of its April 17, 2017 decision.

In a January 30, 2018 report, Dr. David D. Alcantara, a Board-certified physiatrist, noted that appellant had experienced an employment-related fall on December 10, 2015 causing cervical myelopathy due to severe cord compression treated with a decompression and fusion at multiple levels.<sup>7</sup> Subsequent to the injury, he “presented as myelopathic, meaning an upper motor neuron injury, concordant with [a] neck injury, resulting in signs of decreased strength, sensation, and hyperreflexia.” Dr. Alcantara related that appellant had preexisting cervical spinal stenosis that was often an asymptomatic condition. He asserted that appellant’s fall had caused a nerve injury, noting that the “forces sustained during a fall combined with central stenosis can compress and/or strike the spinal cord with sufficient force to injure it.” Dr. Alcantara indicated that appellant had symptoms in all the extremities, but less on the left lower extremity, which was suggestive of an injury to the right central cervical spine. He related, “In short, [appellant’s] impairment/disability is related directly to the injury sustained by his fall. Degenerative and genetic factors predisposed

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<sup>6</sup> Dr. Kerner provided progress reports subsequent to the surgery on January 20 and May 16, 2017. In a December 13, 2016 Form CA-17, he diagnosed cervical myelopathy and checked a box marked “Yes” that the history provided by appellant corresponded to that on the form of a neck injury in a fall.

<sup>7</sup> Dr. Alcantara on July 24, 2017 evaluated appellant for right lower extremity weakness, noting that appellant complained of weakness on the right side after a fall.

to this injury. There are other aforementioned factors that contribute to his full breadth of symptoms, but their contribution is limited and for all intents and purposes can be disregarded.”

On February 8, 2018 appellant, through counsel, requested reconsideration.<sup>8</sup>

By decision dated March 29, 2018, OWCP modified in part and affirmed in part its August 21, 2017 decision. It accepted appellant’s claim for a contusion of the right thigh. OWCP found, however, that the medical evidence was insufficient to show that he sustained right hip osteoarthritis, cervical myelopathy with radiculopathy, or lumbar radiculopathy causally related to the December 10, 2015 employment injury.

On April 9, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

By decision dated April 26, 2018, OWCP denied appellant’s request for a telephone hearing under 5 U.S.C. § 8124(b). After exercising its discretion, it noted that the underlying issue in the case could equally well be addressed through the reconsideration process.

On June 4, 2018 appellant appealed the March 29 and April 26, 2018 decisions to the Board.

On June 11, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period December 12, 2016 to September 14, 2017.

In a report dated August 13, 2018, Dr. Bowman discussed appellant’s history of a December 10, 2015 injury when appellant fell on a two-way radio bruising his right hip and thigh. He noted that appellant had preexisting arthritis and that after appellant’s injury appellant had pain and reduced motion in his right leg and an antalgic gait. Dr. Bowman opined that appellant’s myositis ossificans resulting from appellant’s thigh contusion had “likely significantly contribut[ed] to his persistent alteration in gait.” He indicated that appellant might require a total hip replacement at a future date.

By decision dated November 7, 2018, OWCP denied appellant’s disability claim for the period December 12, 2016 through September 14, 2017 causally related to his accepted employment injury.

On November 7, 2018 OWCP expanded acceptance of appellant’s claim to include myositis ossificans traumatic of the right thigh and an aggravation of unilateral primary osteoarthritis of the right hip.

By decision dated January 18, 2019, the Board affirmed OWCP’s March 29, 2018 decision denying appellant’s request to expand acceptance of his claim to include right hip osteoarthritis,

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<sup>8</sup> On February 1, 2018 Dr. Bowman advised that he had treated appellant for a right leg and hip injury after he tripped and fell on December 10, 2015, landing on a two-way radio in appellant’s right front pocket. He diagnosed a tear of the right hip musculature and an exacerbation of preexisting osteoarthritis of the right hip due to appellant’s employment injury.

cervical myelopathy with radiculopathy, and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury.<sup>9</sup>

In a report dated April 12, 2019, Dr. Alcantara advised that the mechanism of injury of appellant falling to the ground was sufficient to cause a spinal cord injury. He related, “While my review of the records does not appear to support a significant delay in [appellant’s] symptoms, more likely representing an underreporting of symptoms, a delay of onset is plausible given the pathophysiology of spinal cord injury, which can include a subacute component of vascular injury.” Dr. Alcantara advised that the record supported that appellant had complained of symptoms that correlated to a spinal cord injury around the time of his injury. He opined that his “cervical myelopathic injury is directly (proximately) related to the incident of December 10, 2015 with reasonable medical certainty.”

Dr. Bowman continued to submit progress reports regarding his treatment of appellant.

By decision dated April 29, 2019, OWCP’s hearing representative set aside the November 7, 2018 decision denying appellant’s claim for disability from December 12, 2016 to September 14, 2017. He found that Dr. Bowman’s reports were sufficient to warrant further development regarding whether appellant had sustained additional employment-related conditions and whether he had experienced employment-related disability.

On May 7, 2019 appellant, through counsel, requested reconsideration of OWCP’s denial of appellant’s request to expand acceptance of his claim.

On May 16, 2019 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated June 5, 2019, Dr. Hanley provided his review of appellant’s history of injury and the medical evidence of record. He diagnosed a quadriceps contusion of the right thigh with the development of myositis ossificans, advanced cervical spinal stenosis with a fixed cervical cord injury and residual central cord syndrome, bilateral hip arthritis, lumbar spinal stenosis, and carpal tunnel syndrome. Dr. Hanley related that appellant had not sustained a hip, back, or neck injury at the time of appellant’s fall “as none of those areas were complained of at the time.” He indicated that appellant had an ataxic gait disorder due to neurologic compromise. Dr. Hanley opined that appellant had sustained only a quadriceps contusion and myositis ossificans due to the December 10, 2015 employment injury. He related, “I do not believe that the work injury aggravated an underlying existing condition, to include [appellant’s] hip arthritis or his lumbar degenerative disease.” Dr. Hanley opined that appellant’s disability from December 12, 2016 to September 14, 2017 was unrelated to appellant’s accepted employment injury and that the “symptomatology from the work-related condition has resolved.”

On July 11, 2019 Dr. Bowman reviewed a May 22, 2018 MRI scan of appellant’s right hip and pelvis. He attributed appellant’s limp to a permanent aggravation of osteoarthritis of the right hip due to his December 10, 2015 employment injury. In a Form CA-20 of even date, Dr. Kemer diagnosed cervical myopathy and checked a box marked “Yes” to indicate that the condition

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<sup>9</sup> *Supra* note 4.

resulted from the described employment activity of a fall causing neck pain and progressive numbness and tingling in the arms.

In a supplemental report dated July 24, 2019, Dr. Hanley advised that Dr. Kerner had determined that appellant's limp was not antalgic or resulting from pain, but instead a limp arising from a neurological condition due to damage to the spinal cord in the cervical area. He opined that appellant's progressive, degenerative cervical condition was not due to a traumatic injury, noting that appellant did not complain of an injury to his neck or head at the time of his fall. Dr. Hanley reiterated that he "did not aggravate anything ongoing in [appellant's] hip" and that if there was a brief period of aggravation it was "temporary, if at all."

By decision dated August 2, 2019, OWCP denied modification of its denial of appellant's request to expand acceptance of his claim.<sup>10</sup> It advised that the report from Dr. Alcantara was insufficient to support that appellant's fall caused cervical myelopathy.

By decision dated August 15, 2019, OWCP denied appellant's claim for disability from December 12, 2016 to September 14, 2017.

On August 20, 2019 appellant, through counsel, requested a telephonic hearing on the August 15, 2019 decision before a representative of OWCP's Branch of Hearings and Review.

On August 27, 2019 appellant, through counsel, appealed the August 2, 2019 decision to the Board.

Appellant submitted progress reports from Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, describing his treatment of appellant for a contusion of the right thigh and osteoarthritis of the right hip.

By decision dated February 10, 2020, OWCP's hearing representative set aside the August 15, 2019 decision. He found that Dr. Hanley failed to use the statement of accepted facts (SOAF) as the basis for his opinion, noting that he had determined that appellant's hip condition was unrelated to the accepted employment injury. The hearing representative instructed OWCP to refer appellant to a new second opinion examiner to determine whether appellant was disabled from December 12, 2016 to September 14, 2017 due to his thigh contusion, myositis ossificans, and aggravation of hip osteoarthritis.

On February 27, 2020 OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination on the issue of disability from employment.

In a report dated March 20, 2020, Dr. Schwartz diagnosed cervical spondylosis spinal cord myelomalacia that was "unaccepted as related to December 10, 2015 date of injury [and] not clearly related by history," an accepted right thigh contusion with myositis ossificans, and an accepted aggravation of unilateral primary osteoarthritis of the right hip. He advised that appellant

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<sup>10</sup> OWCP indicated that it was denying modification of the January 18, 2019 Board decision; however, Board decisions and orders are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d).

missed work from December 12, 2016 to September 14, 2017 due to cervical spinal surgery. Dr. Schwartz opined that the employment-related conditions had resolved.

By decision dated April 17, 2020, OWCP denied appellant's disability claim for the period December 12, 2016 to September 14, 2017.

On April 24, 2020 appellant, through counsel, requested a telephonic hearing on the August 2, 2019 decision before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 1, 2020, OWCP terminated appellant's medical benefits effective September 2, 2020.

By order dated September 9, 2020, the Board set aside the August 2, 2019 decision and remanded the case for proper consideration of the evidence of record, to be followed by a *de novo* decision on appellant's expansion claim.<sup>11</sup> The Board found that OWCP had failed to reference or review Dr. Hanley's report in issuing its August 2, 2019 decision.

In a report dated September 14, 2020, Dr. Wardell opined that appellant had sustained an injury to his spinal cord on December 10, 2015 "from which [appellant] was predisposed due to preexisting cervical spinal stenosis. He related, "Dr. Schwartz is correct in saying that this cervical cord injury has not been accepted as related to his December 10, 2015 injury, but the causality is not in doubt. Had it not been for [appellant's] fall, his spinal cord would not have been crushed, resulting in his chronic cervical myelopathy, and this is a large component of his continuing disability." Dr. Wardell also disagreed that appellant had recovered from his hip injury.

By decision dated October 26, 2020, OWCP's hearing representative vacated the April 17, 2020 decision and remanded the case for Dr. Schwartz to review Dr. Wardell's September 14, 2020 report.

By decision dated February 8, 2021, OWCP denied modification of its August 2, 2019 decision. It found that the opinion of Dr. Hanley constituted the weight of the evidence and established that appellant's cervical and lumbar conditions were unrelated to appellant's accepted employment injury.

### **LEGAL PRECEDENT**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>12</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>13</sup> A physician's opinion on whether there is a causal relationship

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<sup>11</sup> *Order Remanding Case, F.H.*, Docket No. 19-1801 (issued September 9, 2020).

<sup>12</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>13</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>14</sup> Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition, and appellant's employment injury.<sup>15</sup>

### ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 29, 2018 decision because the Board considered that evidence in its January 18, 2019 decision and found that it was insufficient to establish that OWCP should expand acceptance of his claim. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.<sup>16</sup> The Board, therefore, need not review the evidence addressed in the prior appeal.

Subsequent to appellant's appeal to the Board, OWCP expanded acceptance of the claim to include an aggravation of unilateral osteoarthritis of the right hip.

OWCP referred appellant to Dr. Hanley for a second opinion examination to determine whether acceptance of appellant's claim should be expanded to include additional employment-related conditions and whether he had established disability from employment. Based on his reports, it denied appellant's request to expand acceptance of his claim.

In a June 5, 2019 report, Dr. Hanley diagnosed a quadriceps contusion of the right thigh with the development of myositis ossificans, advanced cervical spinal stenosis with a fixed cervical cord injury and residual central cord syndrome, bilateral hip arthritis, lumbar spinal stenosis, and carpal tunnel syndrome. He attributed the quadriceps contusion and myositis ossificans to the December 10, 2015 employment injury. Dr. Hanley opined that appellant had not sustained any other condition due to the work injury, including an aggravation of arthritis of the hip or lumbar degenerative joint disease. In a supplemental report dated June 24, 2019, he found appellant's degenerative cervical condition unrelated to his December 10, 2015 employment injury and again advised that he had not aggravated any ongoing hip condition, or at most had sustained a temporary aggravation for a brief period. OWCP, however, accepted that appellant sustained an aggravation of right hip osteoarthritis as a result of the December 10, 2015 employment injury.

OWCP's procedures provide that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim, as set forth in the

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<sup>14</sup> *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>15</sup> *Id.*

<sup>16</sup> *D.A.*, Docket No. 19-1965 (issued February 10, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020).



SOAF.<sup>17</sup> OWCP's procedures and Board precedent dictate that when OWCP's referral physician or impartial medical specialist renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>18</sup> As Dr. Hanley determined that appellant had not sustained an aggravation of hip osteoarthritis, or at most had sustained only a temporary aggravation, he failed to rely on the SOAF and thus his report is not based upon an accurate history.<sup>19</sup> Consequently, his report is of diminished probative value and insufficient to constitute the weight of the evidence.<sup>20</sup>

Proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>21</sup> It has an obligation to see that justice is done.<sup>22</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>23</sup>

The Board, therefore, finds that the case must be remanded to OWCP for further development. On remand, OWCP shall refer appellant and a SOAF to a physician in the appropriate field of medicine to resolve the issue of whether acceptance of his claim should be expanded to include additional employment-related conditions. After this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.810.11a (September 2019).

<sup>18</sup> *Id.* at Chapter 3.600.3(10) (October 1990); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *M.D.*, Docket No. 18-0468 (issued September 4, 2018); *Paul King*, 54 ECAB 356 (2003).

<sup>19</sup> *Id.* at Chapter 3.600.3 (October 1990); *V.K.*, Docket No. 19-0422 (issued June 10, 2020).

<sup>20</sup> *Id.* See also *L.F.*, Docket No. 20-0459 (issued January 27, 2021).

<sup>21</sup> See *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>22</sup> See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2021 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: December 9, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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