

EXHIBIT 1

**U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs**

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of DAVID P. BOURKE; Employed by the Department of Veterans Affairs, Hines, Illinois; Case No. 102151589. An oral hearing was held on 06/26/2018.

The issue for determination is whether the claimant was injured in the performance of duty due to exposure to fumes on September 3rd and 11, 2014.

The claimant, born December 14, 1956, is employed as a reproduction equipment operator by the Department of Veterans Affairs in Hines, Illinois. He filed an occupational disease claim for multiple medical conditions due to exposure to fumes on September 3rd and 11, 2014.

In a statement dated July 25, 2017 the claimant indicated he was exposed twice to hazardous chemicals used by a roofing contractor. The exposure occurred through the HVAC system. The contractor was repairing and resurfacing a section of the roof. He explained he was hospitalized with significant lung damage. Prior to the exposure he did not have any pre-existing pulmonary, cardiac or skeletal conditions.

He had been a long distance runner and regularly ran 6 miles a day until the exposure at work.

It is claimed that due to the work exposure and subsequent medical treatment the claimant developed permanent and chronic back pain requiring that he walk with a walker, cane or use a scooter. It is claimed he developed degenerative disc disease, steroid induced osteoporosis with fracture, steroid induced testicular hypofunction, infectious colitis, enteritis and gastritis, blood poisoning, sleep apnea and rheumatic disorders of both mitral and tricuspid valves.

In another statement also dated July 25, 2017 the claimant explained that the print shop has its own air conditioning system to maintain specific air temperature and humidity levels. Although all employees in the print shop were exposed to the fumes the claimant's exposure was the longest as he was the acting lead clerk on duty that day and was responsible for the evacuation of the other employees.

The claim was denied by decision dated January 11, 2018 on the basis that the medical evidence did not establish that the claimant's medical conditions were causally related to his workplace exposure. It was explained that the claimant sought a second opinion with Linda Chan, M.D.. In her report dated December 8, 2015 Dr. Chan diagnosed interstitial lung disease and numerous inflammatory conditions were possible. She did not provide a firm diagnosis of a medical condition. Drs. Laghi and Moua are pulmonologists who treated the claimant. They diagnosed lung nodules and neither physician could provide a definitive diagnosis or etiology of the nodules.



In notes from February 2016 Dr. Mousa stated he could not make a definitive diagnosis that the lung nodules are sarcoidic and even if they were the claimant's brief exposure would not have caused the nodules.

Drs. Moua and Laghi noted the claimant was a heavy smoker for 30 years although he stopped smoking 10 years ago. It was also stated in the decision that he had prior jobs in which he was exposed to lung irritants, asbestos or carcinogenic chemicals. It was further stated that as the lung condition has not been accepted as causally related the other conditions stemming from the treatment of the lung condition have not been established as causally related to the employment exposure.

A telephone hearing was held on June 26, 2018. Geoffrey Shapiro, Esq. represented the claimant at the hearing.

Mr. Shapiro stated that numerous medical conditions were diagnosed. He requested that the record be left open for 30 days for the submission of a narrative medical report to establish causal relationship of the diagnosed medical conditions to the employment exposure.

The claimant testified he was sent home after the exposure and he was sick for several days. He could still smell the fumes in his nostrils, he was not sleeping and he could not breathe right.

It is the claimant's belief he was given too much prednisone, 40 mg per day, in early 2015. The prednisone was prescribed by Dr. Shaikh. He indicated a biopsy of the lungs was done on March 1 or 2, 2015 after which he contracted a hospital acquired infection in his intestines. It is also the claimant's belief he developed steroid induced osteoporosis and degenerative disc disease. He also believes a hernia he developed was due to coughing. He developed a spinal fracture and fusion surgery of his back was done.

The record was left open for 30 days for the submission of additional evidence. Additional evidence was not received.

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.¹ The test for determining whether an employee sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, a claimant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."²

¹ D.D., 57 ECAB ____ (Docket No. 06-1315, Issued September 14, 2006)

² Shaffer, 55 ECAB 386, 389 (2004)



The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.³ The opinion of the physician must be based on a complete factual and medical background of the claimant⁴ and must be one of reasonable medical certainty⁵ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁷ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim, including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.⁸

Causal relationship is a medical issue⁹ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant¹⁰, 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 established incident or factor of employment.¹¹

The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relationship.¹²

The fact that a condition manifests itself or worsens during a period of employment¹³ or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors.¹⁴

There is no rationalized medical evidence explaining how the claimant's lung condition is causally related to his accepted employment exposure. The fact that that claimant's symptoms appeared after the employment exposure is not a basis to establish causal relationship. This is a medical issue that may only be established by rationalized medical evidence. None of the claimant's physicians have provided a definitive opinion on the issue

³ *Hightower*, 54 ECAB 796 (2003)

⁴ *Martinez*, 54 ECAB 623 (2003)

⁵ *Montoya*, 54 ECAB 306 (2003)

⁶ *Rogers*, 54 ECAB 693 (2003)

⁷ 5 U.S.C. § 8102(a)

⁸ *Pendleton*, 40 ECAB 1143, 1145 (1989)

⁹ *Briggs*, 37 ECAB 578 (1986)

¹⁰ *Nimitz, Jr.*, 30 ECAB 567, 570 (1979)

¹¹ R.E. Docket Number 14-868 (issued September 24, 2014)

¹² M.B., Docket Number 15-0638 (issued August 21, 2015)

¹³ *Nimitz*, 30 ECAB 567, 570 (1979)

¹⁴ B.B., Docket No. 13-256 (issued August 13, 2013)



of causal relationship of the claimant's lung condition to the accepted federal employment exposure.

As the medical evidence does not establish that the claimant's lung condition was causally related to his exposure to toxic fumes the other medical conditions that it is claimed arose as a result of treatment for the lung condition are not compensable. There is no basis for the payment of compensation for medical conditions consequential to a condition that has not been accepted. It is also noted that there is no medical evidence directly relating any of the claimant's other medical conditions to the employment exposure.

The claimant has not discharged his burden of proof to establish that the employment exposure to fumes caused a personal injury.

The decision dated January 11, 2018 is affirmed.

Issued:
Washington, D.C.

Electronically Signed
Hearing Representative
for
Director, Office of Workers'
Compensation Programs



**U.S. Department of Labor
Employees' Compensation Appeals Board**

D.B., Appellant)	
)	
And)	Docket No.: 2019-0514
)	
Department of Veterans Affairs)	Claim: 102151589
VMAC Edward Hines Jr. Hospital)	
Hines, IL, Employer)	

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

A. Statement of the Facts

It must be recalled at the outset that this federal employee along with others at the Hines VA facility were exposed to noxious fumes on at least two occasions in September of 2014. The fume exposure and the subsequent medical treatment form the basis of this claim. Unfortunately the fume exposure caused the need for medical treatment. This medical treatment resulted in complications and further and more serious harm. The nexus of the multiple injuries in the claim stem from the medical treatment Mr. Bourke had after his work exposures.

Mr. David Bourke was at work as a reproduction equipment operator for the Department of Veteran Affairs in Hines, Illinois when he was exposed on September 3, 2014 and September 11, 2014 to hazardous chemicals

through the HVAC system. The chemicals were being used by a roofing contractor that was repairing and resurfacing a section of the roof. The print shop where Mr. Bourke was exposed has its own ventilation and air-conditioning system to maintain specific air and humidity levels. Additionally, there are no windows. On September 3, 2014, when Mr. Bourke and his co-workers were initially exposed, some industrial fans were brought in and doors were opened to try to eliminate the fumes from the print shop. When the second exposure occurred, Mr. Bourke had significantly more exposure to the toxic chemicals due to the fact that he was the acting supervisor that day and was responsible for evacuating the other employees and shutting down the printers before he could get out of the print shop.

Following the second exposure to the toxic fumes from the roofers on September 11, 2014, Mr. Bourke and his co-workers reported to employee health due to feeling nauseous and noticing irregular heartbeat and irregular breathing. Roughly 10 ten days later, Mr. Bourke reported to nurse practitioner Mike Egan with the VA because he was still suffering from the exposure. Specifically, Mr. Bourke was having trouble breathing and sleeping, and was unable to do his usual six mile daily runs. A CAT scan was performed on October 21, 2014, which showed, "1. Multiple pulmonary nodules as above 3-6 months followup is recommended. 2. Patchy reticulondular opacities mainly in the upper lobes which may represent smoking related interstitial lung disease. 3. Calcified mediastinal and hilar lymph nodes as well as calcified granulomas consistent with prior granulomatous disease. 4. Noncalcified mediastinal lymph nodes up to 8mm. 5. 3.4 X 3.3 cm liver cyst. 6. Other findings as above."

Due to the CAT scan findings noted above, Mr. Bourke was referred to Dr. Shaikh with the VA. A second CAT scan was ordered and subsequently performed on January 22, 2015, which showed:

“Multiple reticulonodular somewhat groundglass speculated opacities with upper lobe predominance. Multiple groundglass nodules throughout both lung fields limited evaluation for single dominant lesion. Stable speculated left upper lobe nodule. Overall stable appearance of the lungs. Infectious or inflammatory etiologies are considerations such as RBILD, hypersensitivity pneumonitis or possibly atypical infection or fungal cause. Followup in 6 months is recommended unless clinical symptoms change.”

A biopsy of the left lung was performed on March 1, 2015. Dr. Shaikh prescribed prednisone because she suspected a diagnosis of Sarcoidosis.

The first complication to occur in this case is that Mr. Bourke developed a hospital acquired infection in his intestines following the March 1, 2015 biopsy. He was admitted to the ER, and subsequently spent 8 days in the hospital being treated for infectious colitis. This required antibiotics, and he was also still being prescribed the 40 milligrams per day of prednisone to treat the suspected Sarcoidosis. Mr. Bourke took this amount of prednisone for a total of 5.5 months, but in the mean time his left lung collapsed. This required 2 weeks of hospitalization. He was released and sent home with the prednisone prescription, but was soon back in the hospital for another left lung collapse, this time for a week. He followed up with Mike Egan, his Nurse Practitioner with the VA, who admitted Mr. Bourke for 2 days in the hospital because his oxygen levels were below a safe level.

The next complication occurred when Mr. Bourke suffered a fractured back in August of 2015. The specific diagnosis was a steroid induced osteoporosis and degenerative disc disease with fracture. This required two surgeries – the first was in October of 2015 and was an attempt to stabilize the fractured vertebra, and the second was to fuse L4 and L5 in the lower back, with insertion of rods and screws on November 28, 2016.

Mr. Bourke's recovery was further complicated by the diagnosis of a double hernia at the site of the infection, with resulting surgical repair on August 22, 2016 at Hines VA Hospital.

Mr. Bourke decided at this point to seek second and third medical opinions regarding the lung conditions and the questionable necessity of the high doses of prednisone that he had been prescribed. He sought treatment with the Mayo Clinic in Rochester, Minnesota and was informed that he did not actually have Sarcoidosis and thus the prednisone usage was, and had been all along, unnecessary. Additionally, in June of 2018 Mr. Bourke had a spinal stimulator implant placed by a neurosurgeon at Loyola Medical Center in Maywood, Illinois.

Mr. Bourke filed an occupational disease claim for the multiple conditions listed above due to the exposure he suffered at work on September 3 and September 11, 2014. Specifically, the conditions for which he seeks compensation are: *degenerative disc disease, steroid induced osteoporosis with fracture, steroid induced testicular hypofunction, infectious colitis, enteritis and gastritis, blood poisoning, sleep apnea, two*

collapsed lungs, and rheumatic disorders of both mitral and tricuspid valves. His claim was denied per Decision dated January 11, 2018 on the basis that the medical evidence did not establish that Mr. Bourke's medical conditions were causally related to his workplace exposure. Mr. Bourke disagreed with the January 11, 2018 Decision and a telephone hearing was held on June 26, 2018.

Per Decision dated August 30, 2018 Mr. Bourke's claim was denied for the reason that, "There is no rationalized medical evidence explaining how the claimant's lung condition is causally related to his accepted employment exposure," and "As the medical evidence does not establish that the claimant's lung condition was causally related to his exposure to toxic fumes the other conditions that it is claimed arose as a result of the treatment for the lung condition are not compensable."

B. Statement of the Case

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing 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 the Act; 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. *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003). 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. See *Elizabeth H. Kramm* (*Leonard O. Kramm*), 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

To determine whether an employee sustained a traumatic injury or occupational disease in the performance of duty, the Office must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999). Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997). An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident. *Id.*

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done. *Phillip L. Barnes*, 55 ECAB 426 (2004). 20 C.F.R. § 10.118(a) states: “The employer is responsible for submitting to [the Office] all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.”

Mr. Bourke has certainly established that he is an “employee of the United States” within the meaning of the Act and that the injury occurred at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. The undisputed facts in this case show that there were noxious fumes at the Hines VA causing evacuation and hospitalization. It is also undisputed that the multiple hospitalizations and complications resulted from the fume exposure. The question in this case is whether Mr. Bourke submitted sufficient medical evidence to establish a causal relationship between the exposure to toxic fumes and the conditions for which compensation is claimed. The evidence in the claim show that he did.

It is clear that Mr. Bourke presented to employee health, along with his co-workers who were also exposed to the roofing fumes in the print shop, on the date of the second exposure – September 11, 2014. Mr. Bourke testified at the June 26, 2018 phone hearing that he and all of his co-workers were feeling nauseous, but that they kept him the longest because he had an irregular heartbeat and irregular breathing rhythm. Because he continued to have symptoms, he reported to his NP Mike Egan at the VA. He reported to Dr. Egan that he could still smell the toxic fumes for several days after the exposure, that he couldn’t sleep, couldn’t breathe right and could no longer run his daily 6 miles. Prior to the injury, Mr. Bourke had been a long distance runner and had run 6 miles every day. Mr. Bourke had no prior pulmonary, cardiac or skeletal conditions.

From this point, things went from bad to worse for Mr. Bourke. His lung condition was misdiagnosed as Sarcoidosis, for which he was prescribed large daily doses of prednisone. Following a lung biopsy, he developed a hospital related infection which required antibiotics and a lengthy hospital stay. The massive, and as it turns out unnecessary, doses of prednisone led to skeletal degeneration in Mr. Bourke's back which required several surgeries. Additionally, he suffered two collapsed lungs and hernia at the location of the hospital infection.

Mr. Bourke's health has been deteriorating ever since his exposure to toxic fumes at work on September 3 and September 11, 2014, and it all stems from that original exposure. If he wouldn't have been exposed to the toxic fumes, he never would have been misdiagnosed with sarcoidosis and developed prednisone-related complications. Without the exposure, he would never have had the biopsy which led to the hospital infection and hernia. This all began with his work-related exposure to toxic fumes, which is documented in the medical records from employee health on September 11, 2014. Mr. Bourke had no prior problems with his lungs – he ran 6 miles every day. He had no problems with his back. It all stems from the exposure.

The law and facts in this case support a finding of causal relationship between the exposure to toxic fumes at work and the claimed physical conditions. The initial employee health and emergency room admissions began a totally non humorous comedy of errors. The continuous chain of events in this claim show causation in its most basic form. Since proceedings under the Act are not adversarial in nature, nor is the Office a

disinterested arbiter then the factual basis must be completely developed. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done. *Phillip L. Barnes*, 55 ECAB 426 (2004).

20 C.F.R. § 10.118(a) states: “The employer is responsible for submitting to [the Office] all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.” The Employer in this case had an obligation to submit any and all evidence pertaining to the roofing company it had hired, the particular substances and fumes it had used in the roofing process, and information from employee health with respect to treatment of Mr. Bourke and the other print shop employees that were exposed. This is all information that is in the custody of the employer so would not be accessible to Mr. Bourke. It is also information that would help shed light on Mr. Bourke’s claim of exposure to toxic fumes and subsequent diagnoses. In addition the medical aspects of the subsequent treatment following the occupational exposure must be considered in context. There were multiple obvious complications resulting in multiple harms.

Mr. Bourke’s claim should be recognized as he has established by appropriate fact and law that his conditions are causally related to his exposure to toxic fumes at work. But at a minimum, Mr. Bourke’s claim should be remanded in order for the Office to seek more information from the Employer regarding the exposure at issue in this claim.

ECAB Docket: 2019-0514

Claim No.: 102151589

For all of the foregoing the Decision below must be vacated. ECAB is respectfully requested to issue a de novo Decision finding that this injured worker sustained a compensable occupational injury and may therefore participate in the benefits of the Federal Employees Compensation Act.

Respectfully submitted,

Alan J. Shapiro
Attorney for David Bourke

EXHIBIT 3

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

D.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
EDWARD HINES, JR. VETERANS
ADMINISTRATION MEDICAL CENTER,
Hines, IL, Employer**

Docket No. 19-0514

Issued: January 27, 2020

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from an August 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On July 25, 2017 appellant, then a 60-year-old reproduction equipment operator, filed an occupational disease claim (Form CA-2) alleging multiple medical conditions as a result of being exposed to chemical fumes due to factors of his federal employment. He indicated that he first became aware of his conditions, and their relationship to factors of his federal employment, on October 21, 2014.

In a narrative statement dated July 25, 2017, appellant indicated that on September 3 and 11, 2014 he was exposed to hazardous roofing material chemicals, which came through the air conditioning system and into his employment duty station. He noted that he left work on September 11, 2014 for medical examination. Appellant subsequently felt ill in the days after exposure and sought medical treatment from his primary physician on September 30, 2014. He related that a scan of his lungs revealed a number of noncalcified growths sprouting in both lungs. Appellant indicated that he began experiencing severe pain in his lower intestines on March 5, 2015 and was diagnosed with infectious colitis. He noted that he was hospitalized and then placed on a steroid medication for his lung disease, which had been diagnosed as sarcoidosis. Appellant noted that the steroid medication caused side effects including a collapsed left lung and dangerously low levels of oxygen. He also noted that, subsequent to filing the Form CA-2, he also suffered from blood poisoning, bronchitis, a fractured back from repetitive coughing, a left-sided hernia, and had major corrective spinal surgery all of which he attributed to the chemical exposure in March 2014.

In a development letter dated August 9, 2017, OWCP advised appellant of the deficiencies of his claim. It provided a questionnaire for his completion and informed him of the medical evidence needed to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In response to OWCP's development letter, on August 14, 2017 OWCP received approximately 100 separate diagnostic examination reports ranging from December 17, 2008 to July 1, 2016 regarding appellant's lung conditions.

In addition, OWCP received approximately 40 separate medical reports with dates ranging from March 30, 2014 to October 28, 2016 from various physicians at the Veterans Administration (VA) Hospital in Hines, IL including: a report dated March 30, 2014 from Dr. Hameeda Shaikh, a Board-certified pulmonologist; a report dated February 24, 2015 from Dr. Michael Eng, a Board-certified cardiothoracic surgeon; reports dated April 7, 2015 from Dr. John Santaniello, a Board-certified general surgeon, and Dr. Michael Sprang, a Board-certified gastroenterologist; a report dated April 21, 2015 from Dr. Jennifer Plitcha, a Board-certified general surgeon; a report dated May 19, 2015 from Dr. Usman Khan, a Board-certified pulmonologist; a report dated August 26, 2015 from Dr. Ambrose Panico, an osteopath; a report dated September 15, 2015 from Dr. William W. Ashley, a Board-certified neurosurgeon; a report dated December 8, 2015 from

Dr. Linda Chan, a Board-certified pulmonologist; a report from Dr. Raj Uppal, an anesthesiology specialist; multiple reports dated February 1 through 16, 2016 from Dr. Teng Moua, a Board-certified pulmonologist; reports dated February 2 and 17, 2016 from Dr. Robert A. Werners, a Board-certified endocrinologist; reports dated February 4, 2015 and June 9, 2016 from Dr. Brian E. Grogg, Board-certified in physical medicine and rehabilitation; a report dated February 4, 2016 from Dr. Amy E. Rabatin, Board-certified in physical medicine and rehabilitation; multiple reports dated February 19 through April 15, 2016 from Dr. Michael Frett, a pain management specialist; a report dated May 15, 2016 from Dr. W. Richard Marsh, a Board-certified neurosurgeon; a report dated May 18, 2016 from Dr. Jeremy L. Fogelson, a Board-certified neurosurgeon; a report dated June 17, 2016 from Dr. Stephen J. Johans, a Board-certified neurosurgeon; a report dated June 29, 2016 from Dr. Jerry Bauer, a Board-certified neurosurgeon; and a report dated October 28, 2016 from Dr. Frank Laghi, a Board-certified pulmonologist. These physicians collectively diagnosed the following conditions: lung nodules, chronic back pain, degenerative disc disease, steroid-induced osteoporosis with fracture, steroid-induced testicular hypofunction, infectious colitis, enteritis, gastritis, blood poisoning, sleep apnea, and rheumatic disorders of both mitral and tricuspid valves. Each physician reviewed appellant's history of injury and diagnostic reports, performed a physical examination, and diagnosed a variety of conditions.

In a report dated February 16, 2016, Dr. Moua indicated that he could not provide a definitive diagnosis as to whether the lung nodules were sarcoidic in nature, and noted that, even if the nodules were sarcoidic, the brief exposures on September 9 and 11, 2014 could not have caused them.

OWCP reviewed the medical records submitted and undertook further development of the claim. In a new development letter dated September 21, 2017, it advised appellant of the deficiencies of his claim, notified him of the type of additional evidence needed to establish his claim, and provided a questionnaire for his completion. Appellant was informed of the medical evidence necessary to establish his claim. OWCP afforded him 30 days to respond.

On October 17, 2017 OWCP received 83 separate medical reports, dated August 26, 2015 to October 12, 2017, from a number of physicians at the VA Hospital in Hines, IL, including: a report dated August 26, 2015 from Dr. Keith Burgard, an internal medicine specialist; multiple reports dated September 14, 2015 through September 26, 2017 from Dr. Farah A. Meah, a Board-certified endocrinologist; a report dated February 19, 2016 from Dr. Kaya Shah, a pain management specialist; multiple reports dated March 7, 2016 through June 2, 2017 from Dr. Laghi; a report dated March 25, 2016 from Dr. Arslan Zaidi, a pain management specialist; a report dated April 15, 2016 from Dr. Sara Strowd, a pain management specialist; a report dated June 21, 2016 from Dr. Yvonne Lucero, a physical medicine and rehabilitation specialist; multiple reports dated August 25, 2016 through March 16, 2017 from Dr. Michael Wernhoff, a Board-certified neurosurgeon; a report dated August 28, 2016 from Dr. Edward C. Villa, an emergency medicine specialist; a report dated September 23, 2016 from Dr. Bruce E. Lewis, a Board-certified neurosurgeon; a report dated November 26, 2016 from Dr. Stephen Roberts, a Board-certified neurosurgeon; a report dated December 3, 2016 from Dr. Swathi Chidambaram, a Board-certified neurosurgeon; a report dated December 13, 2016 from Dr. John S. Wheeler, a Board-certified neurosurgeon; two reports dated September 20, 2017 from Dr. Kevin Swong, a Board-certified neurosurgeon, and Dr. Matthew Kominsky, a pain management specialist; two reports dated October 11 and 12, 2017 from Dr. Werners; a report dated October 12, 2017 from Dr. Grogg; and

two reports dated October 12 and 30, 2017 from Dr. Moua. These physicians provided examination findings including the previously listed diagnoses.

In his October 12 and 30, 2017 reports, Dr. Moua indicated that he was provided with the material safety data sheet for the chemical exposure and that it was not likely that one exposure could be the cause of appellant's pulmonary condition. In addition, he diagnosed nodules with unknown etiology and could not definitively choose between the possible causes of granulomatous infection or inflammation, sarcoidosis, or inhalation injury.

By decision dated January 11, 2018, OWCP denied appellant's occupational disease claim finding that the evidence of record failed to establish that his diagnosed conditions were causally related to the accepted factors of his federal employment.

On January 22, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. He submitted two diagnostic reports dated October 21, 2014 and December 18, 2015 along with his request.

On June 26, 2018 a hearing was held before an OWCP hearing representative.

By decision dated August 30, 2018, OWCP's hearing representative affirmed OWCP's January 11, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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,⁴ 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.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

In an occupational disease claim, to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the

³ *Supra* note 2.

⁴ *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *A.M.*, *supra* note 4; *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

disease or condition;⁷ (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;⁸ and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁹

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.¹¹ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

In support of his occupational disease claim, appellant submitted a total of 288 medical reports dated February 13, 2014 to October 12, 2017. These reports indicated appellant's diagnosed conditions, which included: lung nodules, chronic back pain, degenerative disc disease, steroid induced osteoporosis with fracture, steroid-induced testicular hypofunction, infectious colitis, enteritis, gastritis, blood poisoning, sleep apnea, and rheumatic disorders of both mitral and tricuspid valves. However, none of these reports included a narrative medical opinion regarding the cause of appellant's diagnosed conditions. The Board has held that medical evidence which does not offer an opinion on causal relationship is of no probative value to the issue of causal relationship.¹³ Therefore, these reports are insufficient to establish appellant's claim.

The only physician of record who addressed causal relationship was Dr. Moua. In his reports dated October 12 and 30, 2017, Dr. Moua opined that he could not definitely identify the

⁷ C.C., Docket No. 18-1229 (issued March 8, 2019); *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

⁸ K.C., Docket No. 19-1185 (issued November 12, 2019); *R.A.*, Docket No. 16-1218 (issued November 10, 2016); *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁹ *Id.*

¹⁰ A.M., Docket No. 18-0685 (issued October 26, 2018).

¹¹ E.V., Docket No. 18-0106 (issued April 5, 2018).

¹² A.M., *supra* note 10; *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹³ See *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

etiology or cause of appellant's conditions. As Dr. Moua's opinion is equivocal and speculative in nature, it is insufficient to establish appellant's claim.¹⁴

On appeal counsel asserts that appellant has met his burden of proof to establish that his diagnosed lung conditions are causally related to the accepted factors of his federal employment. He does not, however, cite to a rationalized medical report on the issue of causation. As explained above, the Board finds that the record lacks rationalized medical evidence establishing causal relationship between appellant's federal employment duties and his diagnosed conditions. For this reason, the Board finds that appellant 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.

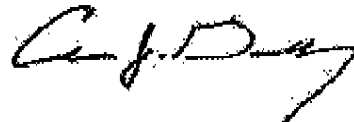
CONCLUSION

The Board finds that appellant has not met his burden of proof to establish lung conditions causally related to the accepted factors of his federal employment.

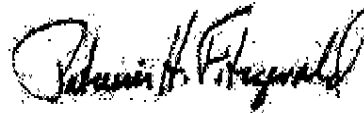
ORDER

IT IS HEREBY ORDERED THAT the August 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

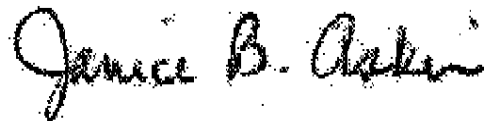
Issued: January 27, 2020
Washington, DC



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



Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board



Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁴ M.M., Docket No. 19-0061 (November 21, 2019); D.R., Docket No. 17-0971 (issued October 5, 2017).

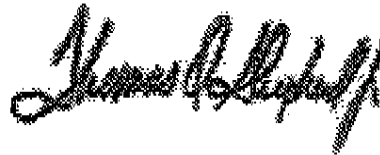
CERTIFICATE OF SERVICE

ECAB-2019-0514 DAVID P BOURKE v. Department of Veterans Affairs

I certify that the parties below were served this day.

01/27/2020

(DATE)



Thomas O. Shepherd, Jr., Esq.
Clerk of the Appellate Boards

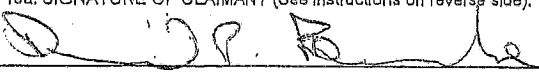
Alan J. Shapiro
8 Shaker Glen
Shaker Heights, OH 44122
--Electronic

DAVID P BOURKE
1021 BARNSDALE RD UNIT 4
Unit 4
LA GRANGE PARK, IL 60526
--Certified

Counsel for Claims and Compensation
USDOL SOL FEEWC
200 Constitution Ave NW
Washington, DC 20210
--Electronic

Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Attn: Director OWCP-DFEC
Washington, DC 20210
--Electronic

EXHIBIT 4

CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency: VETERANS AFFAIRS EDWARD HINES TR. VA HOSPITAL			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. DAVID P. BOURKE 1021 BARNES DALE RD, #4 LA GRANGE PARK, ILL 60526		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN	4. DATE OF BIRTH DEC 14, 1956	5. MARITAL STATUS SINGLE	6. DATE AND DAY OF ACCIDENT SEPT. 11, 2014	7. TIME (A.M. OR P.M.) PM	
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary). SEE ATTACHED 2 PAGE RIDER					
9. PROPERTY DAMAGE NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code). NONE					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side). NONE					
10. PERSONAL INJURY/WRONGFUL DEATH STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT. SEE ATTACHED 2 PAGE RIDER					
11. WITNESSES					
NAME		ADDRESS (Number, Street, City, State, and Zip Code)			
CALVIN COX		PO Box 334, HINES ILL 60141			
JAMES SCALES		HINES VA HOSPITAL, 5000 S. 5TH AVE Reproduction Dept, Bldg #1, Sect C-105 HINES, ILL, 60141			
12. (See instructions on reverse). AMOUNT OF CLAIM (In dollars)					
12a. PROPERTY DAMAGE NONE	12b. PERSONAL INJURY 10 Million Dollars	12c. WRONGFUL DEATH NONE	12d. TOTAL (Failure to specify may cause forfeiture of your rights). 10 Million Dollars		
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM (630) 392-1377		14. DATE OF SIGNATURE Sept 2, 2016
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS Fine, Imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

RECEIVED
2016 SEP -8 PM 2:41
CHICAGO REGIONAL
COUNSEL
HINES ILL 60141

STANDARD FORM 95 REV. (2/2007) BACK

<p>IN ORDER THAT SUBROGATION CLAIMS MAY BE ADJUDICATED, IT IS ESSENTIAL THAT THE CLAIMANT PROVIDE THE FOLLOWING INFORMATION REGARDING THE INSURANCE COVERAGE OF THE VEHICLE OR PROPERTY.</p> <p>15. Do you carry accident insurance? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number.</p> <p>Blue Cross/Blue Shield, #25926631, FEDERAL Employee program, PO Box 305107, Chicago, IL 60680-3625</p>		<p>16. Have you filed a claim with your insurance carrier in this instance, and if so, is full coverage or deductible? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If deductible, state amount.</p> <p>NONE</p>		<p>17. If deductible, state amount.</p> <p>NONE</p>		<p>18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).</p> <p>currently processing claims as submitted</p>		<p>19. Do you carry public liability and property damage insurance? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code).</p>	
<p>CLAIMS PRESENTED UNDER THE FEDERAL TORT CLAIMS ACT SHOULD BE SUBMITTED DIRECTLY TO THE "APPROPRIATE FEDERAL AGENCY" WHOSE EMPLOYEE(S) WAS INVOLVED IN THE INCIDENT. IF THE INCIDENT INVOLVES MORE THAN ONE CLAIMANT, EACH CLAIMANT SHOULD SUBMIT A SEPARATE CLAIM FORM.</p> <p>Complete all items - Insert the word NONE where applicable.</p> <p>DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.</p> <p>The amount claimed should be substantiated by competent evidence as follows:</p> <p>(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.</p> <p>(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested persons, or, if payment has been made, the itemized signed receipts evidencing payment.</p> <p>(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competent bidders, and should be certified as being just and correct.</p> <p>(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.</p>									
<p>INSTRUCTIONS</p> <p>CLAIMS PRESENTED UNDER THE FEDERAL TORT CLAIMS ACT SHOULD BE SUBMITTED DIRECTLY TO THE "APPROPRIATE FEDERAL AGENCY" WHOSE EMPLOYEE(S) WAS INVOLVED IN THE INCIDENT. IF THE INCIDENT INVOLVES MORE THAN ONE CLAIMANT, EACH CLAIMANT SHOULD SUBMIT A SEPARATE CLAIM FORM.</p> <p>Complete all items - Insert the word NONE where applicable.</p> <p>DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.</p> <p>The amount claimed should be substantiated by competent evidence as follows:</p> <p>(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.</p> <p>(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested persons, or, if payment has been made, the itemized signed receipts evidencing payment.</p> <p>(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competent bidders, and should be certified as being just and correct.</p> <p>(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.</p>									
<p>PRIVACY ACT NOTICE</p> <p>The claim may be filled by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.</p> <p>Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.</p> <p>If instruction is needed in completing this form, the agency listed in Item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14.</p> <p>The claimant is deemed presented when it is resolved by the appropriate agency, not when it is mailed.</p> <p>Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is resolved by the appropriate agency, not when it is mailed.</p>					<p>PAPERWORK REDUCTION ACT NOTICE</p> <p>Part 14, following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2871 et seq., 28 C.F.R. A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2871 et seq., 28 C.F.R. B. Principal Purpose: The information requested is to be used in evaluating claims. C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information. D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."</p>				
<p>is notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Tort Branch, Attention: Paperwork Reduction Project, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget, Do not mail completed form(s) to these addresses.</p>									

Claim for Damage, Injury or Death
Standard Form 95
(Rider)

David P. Bourke
1021 Barnsdale Rd. #4
LaGrange Park, Ill. 60526

September 2, 2016

8. Basis for Claim:

Exposure to hazardous chemical and toxic fumes through HVAC system from VA hired roofing contractor while in print shop. The contractor was repairing and resurfacing the roof on building 1, section c, including roof areas over reproduction and credit union departments. Claimant and Several VA employees went to VA medical center immediately after exposure. Claimant was ill for several days and then hospitalized with significant lung damage. This is a federal workman's compensation claim.

10. Nature of injury

On March 2, 2015 Claimant was hospitalized and had a biopsy of his left lung, severe intestinal pain and a hospital acquired clostridium difficile colitis infection. His lungs have air pockets, loss of elasticity, increased size and number of calcified granules/spots, a collapsed left lung, low oxygen levels. His left lung collapsed twice, had additional hospitalization, antibiotics, decrease immune system and fluctuating weight loss. Claim suffers from acute asthma, uses nebulizer and abulteral daily.

Lung treatment caused steroid induced osteoporosis and fracture of thoracic vertebrae. Compression back fractures due to calcium loss from medication, degenerative spine, vertebrae fractures and bulging disks at L-4/5, T-4/5, L-5/S1, T-8 no bone connective tissue. Needs surgical repair of vertebrae bone graft and fusion with rods and screws for L-5, L-4. During surgery to repair the fractured back bottom spine shifted and was misaligned due nonsupport and degenerative disk disease type 2. Claimant also has advanced stenosis of nerves and spinal cord.

Surgery is required correct spine alignment through bone grafts, spinal fusion and insertion of metal rods and screws. Spinal misalignment caused left inguinal hernia which was surgically repaired on August 22, 2016.

Due to nature and extent of surgery required to correct lower spin misalignment, a specialist in neuro-orthopedic surgery at Loyola University Hospital will perform this surgery on November 28, 2016.

Claim for Damage, Injury or Death
Standard Form 95
(Rider)

David P. Bourke
Page Two

September 2, 2016

Hospitals:

- Mayo Clinic, Rochester, Minn. - spine, neurosurgery and pulmonary departments
- Hines VA, Hies, Ill.- general medicine, endocrinology, gastro-intestinal, spine, neurosurgery departments
- Good Samaritan Hospital, Downers Grove, Ill. - pulmonary department
- Loyola Medical Center, Maywood, Ill. - pain, neurosurgery departments
- Park Ridge Medical Center (Lutheran General Hospital), Park Ridge, Ill.

EXHIBIT 5



U.S. Department of Veterans Affairs
Office of General Counsel

Office of Chief Counsel
Midwest District - West
1 Veterans Drive, Building 73
Minneapolis, MN 55471
Telephone: 612.467.5900
Facsimile: 612.467.5928

Via Certified-Mail

In Reply Refer To: 283353

January 30, 2017

Mr. David Bourke
1021 Barnsdale Road #4
LaGrange Park, IL 60526

Re: Administrative Tort Claim

Dear Mr. Bourke:

This office has completed our investigation of the above-referenced matter under the Federal Tort Claims Act (FTCA). The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680, under which you filed your claim, provides for monetary compensation when a Government employee, acting within the scope of employment, injures another by a negligent or wrongful act or omission.

Our investigation revealed that the claimed injuries occurred during the course of your employment with the Department of Veterans Affairs (VA). The Federal Employment Compensation Act (FECA) is a comprehensive worker's compensation program for federal civilian employees who are injured on the job. Like comparable state workers' compensation acts, FECA is an exclusive remedy and precludes, for example, suit under the FTCA. The exclusive-liability provision of FECA precludes an FTCA action by a federal employee for damages resulting from medical malpractice by a government doctor treating an on-the-job injury.

During our telephone conversation, you stated that your claim was also for malpractice on behalf of the VA providers for treatment to the injuries sustained as a result of the FECA injury. The FECA bar extends to subsequent malpractice during treatment of your FECA injury. Accordingly, your claim is denied.

Alternatively, if you are dissatisfied with this decision, you may file a request for reconsideration of your claim with the VA General Counsel by any of the following means:

- (1) Mail to the Department of Veterans Affairs, General Counsel (021B), 810 Vermont Avenue, N.W., Washington, DC 20420; or
- (2) By data facsimile (fax) to (202) 273-6385; or
- (3) E-mail your request to OGC.torts@mail.va.gov.

To be timely, VA must receive this request within six months of the mailing of this final denial. The VA has six months to act on the reconsideration request. After that time, you have the option of filing suit in an appropriate U.S. District Court under 28 U.S.C. § 2675(a). 28 C.F.R. § 14.9.

Please note that FTCA claims are governed by a combination of federal and state laws. Some state laws may limit or bar a claim or law suit. VA legal staff handling FTCA claims work for the federal government, and cannot provide advice regarding the impact of state laws or state filing requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael T. Newman".

Michael T. Newman
FOR: D. Brent Pope, Chief Counsel

EXHIBIT 6

VA



**U.S. Department
of Veterans Affairs**

Office of the General Counsel
Washington DC 20420

In Reply Refer To: 021B: GCL: 283353

Certified Mail #7013 2630 0001 4725 7499

January 31, 2020

Mr. David Bourke
1021 Barnsdale Road #4
LaGrange Park, IL 60526

Re: Administrative Tort Claim- Request for Reconsideration

Dear Mr. Bourke:

This office has completed reconsideration of the above-referenced matter under the Federal Tort Claims Act (FTCA), and it is again denied.

Your claim was related to an injury you sustained in September 2014 while working at the Hines Department of Veterans Affairs (VA) Medical Center. As you were advised by the Office of Chief Counsel, workplace injuries are compensated through the Federal Employees Compensation Act (FECA). FECA, rather than the FTCA, governs the outcome of this claim, including your contention that your injury was not treated correctly by VA, causing additional injuries.

If you are dissatisfied with the denial of your claim, you may file suit directly under the FTCA, 28 U.S.C. §§ 1346(b) and 2671-2680. The FTCA provides that when an agency denies an administrative tort claim, the claimant may seek judicial relief in a Federal district court. The claimant must initiate the suit within six months of the mailing of this notice as shown by the date of this denial (28 U.S.C. § 2401(b)). In any lawsuit, the proper party defendant is the United States, not the Department of Veterans Affairs.

Please note that FTCA claims are governed by a combination of Federal and state laws. Some state laws may limit or bar a claim or law suit. VA attorneys handling FTCA claims work for the Federal government, and cannot provide advice regarding the impact of state laws or state filing requirements.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Robert P. Kirchhoefer".

Robert P. Kirchhoefer
Deputy Chief Counsel, Torts Law Group