

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

MARGARET MOORE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 04-1329
Issued: July 8, 2005**

Appearances:
Margaret Moore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 22, 2004 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated July 22, 2003 wherein the Office determined that appellant had not established that she suffered from a medical condition affecting her left shoulder and cervical spine which was causally related to her federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant developed left shoulder and cervical spine conditions causally related to her federal employment duties.

FACTUAL HISTORY

On June 21, 1994 appellant, then a 56-year-old letter sorting machine operator/distribution clerk, filed an occupational disease claim alleging that she sustained rotary syndrome

of the left side and cervical strain as a result of her federal employment.¹ The Office requested additional factual and medical evidence by letter dated June 28, 1994.

On August 30, 1994 the Office referred appellant for a second opinion to Dr. Joseph R. Mariotti, a Board-certified orthopedic surgeon, and requested that he determine the extent and degree of any disability or residual effects of appellant's alleged work-related condition. In a report dated September 28, 1994, Dr. Mariotti diagnosed pain, left shoulder and left upper extremity, etiology unclear, and mild right carpal tunnel syndrome. Dr. Mariotti indicated that appellant's symptoms appeared to be work related but stated that he could not provide a clear diagnosis other than pain.

By decision dated November 1, 1994, the Office denied appellant's claim find that she had not established fact of injury. The Office found that Dr. Mariotti's report diagnosing subjective complaints of pain was not sufficient to establish that appellant sustained a condition due to factors of her federal employment.

Appellant requested an oral hearing on November 18, 1994. By decision dated June 7, 1995, the hearing representative remanded appellant's claim for the Office to further development the medical evidence through an additional second opinion evaluation.

On June 28, 1995 the Office referred appellant to Dr. Robert R. Herrick, a Board-certified neurologist, for a second opinion evaluation. In his July 19, 1995 report, Dr. Herrick diagnosed bilateral carpal tunnel syndrome, chronic low back pain and left shoulder joint derangement with limited range of motion. He stated that his examination focused on the issue of carpal tunnel syndrome and stated that this condition was industrially caused.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome on July 26, 1995. Appellant stopped working on August 7, 1995. On October 26, 1995 Dr. Kendrick E. Lee, a Board-certified orthopedic surgeon, performed a right carpal tunnel release on appellant. In a report dated June 21, 1996, Dr. Lee indicated that he had treated appellant for "bilateral carpal tunnel syndrome and resulting continued symptoms of pain diffusely, from the hand to the shoulders." He indicated that he had released appellant to return to work modified duty. Dr. Lee saw appellant on November 13, 1996, and indicated that appellant had a disappointing response to her carpal tunnel release and had reached maximum medical improvement as of November 13, 1996.

In a decision dated May 23, 1996, the Office terminated appellant's compensation benefits based on her refusal of suitable work. By decision dated September 5, 1996, the hearing representative reversed the Office's termination decision.

The Office again terminated appellant's compensation benefits by decision dated December 1, 1997 and denied appellant's claim for a schedule award on January 20, 1998. By decision dated September 14, 1998, the hearing representative reversed the Office's December 1, 1997 termination decision, reinstated appellant's compensation benefits and remanded the case

¹ In a letter dated December 23, 1986, the Office accepted that appellant sustained a traumatic shoulder and neck injury on November 29, 1993 as a no lost time claim.

for the Office to obtain an additional second opinion evaluation regarding appellant's claimed left shoulder and cervical conditions as well as her claim for a schedule award due to her accepted carpal tunnel syndrome.

By letter dated October 20, 1998, the Office referred appellant to Dr. John Lavorgna, a Board-certified orthopedic surgeon, for a second opinion. The Office asked Dr. Lavorgna to address whether appellant had a left shoulder and/or cervical spine condition due to her work activities, what the extent was of appellant's permanent impairment due to any work-related upper extremity condition and to determine appellant's work capacity. In a medical opinion dated November 23, 1998, Dr. Lavorgna listed his impression as status post right carpal tunnel release and subjective left upper extremity symptoms of a nonspecific nature with no objective evidence of any orthopedic abnormality. He indicated that at the present time he did not believe that appellant had a work-related cervical spine or left shoulder condition.

By decision dated January 26, 1999, the Office denied appellant's claim for left shoulder injury because the evidence did not establish that this condition was causally related to appellant's employment factors. By decision dated February 10, 1999, appellant received a schedule award for a 10 percent permanent impairment of each upper extremity as a result of her carpal tunnel syndrome, which was paid for the period January 31, 1999 to April 11, 2000. Appellant received total disability compensation for her carpal tunnel syndrome since 1995 with the exception of the time covered by the schedule award.

Appellant requested an oral hearing and submitted additional medical evidence. In a medical report dated March 9, 1999, made at appellant's request, Dr. Herrick indicated that appellant had chronic cervical and lumbar pain/strain without hard findings for cervical or lumbar nerve root impingement; status post right carpal tunnel surgery with good relief of dysesthetic symptoms but persistent aching pain and probably chronic tendonitis, left carpal tunnel syndrome and left shoulder rotator cuff injury with significant pain on elevation of the left arm, especially under load, and a partially frozen left shoulder joint. He noted that appellant had an industrial injury to her left shoulder in the 1980's and opined that there was a clear connection with the accepted industrial injury to make the left shoulder joint disability industrial.

By decision dated November 15, 1999 and finalized November 16, 1999, the hearing representative remanded this case to provide Dr. Lavorgna an opportunity for a follow up with regard to whether appellant sustained an injury as a result of the work factors as outlined in her 1994 claim.²

In response to the Office's query as to, *inter alia*, whether appellant had a left shoulder cervical condition medically connected to factors of her employment, in a medical report dated January 28, 2000, Dr. Lavorgna diagnosed degenerative disc disease, cervical and lumbar spine; subjective complaints of left shoulder pain consistent with rotator cuff tendonitis; and bilateral carpal tunnel syndrome, status post release on the right. He stated that he did not believe that the subjective complaints about the cervical spine and shoulder were work related. Dr. Lavorgna opined that appellant could be gainfully employed. He noted that appellant still had residuals of

² The Office hearing representative affirmed the Office's schedule award for a 10 percent impairment of the upper extremities.

her carpal tunnel syndrome although the symptoms were not specific at the present time and surgery was not warranted.

By letter dated March 22, 2000, appellant was referred to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a referee examination. Dr. Swartz submitted a report dated April 14, 2000.

Appellant objected to the selection of Dr. Swartz as an impartial medical examiner on the grounds that he frequently performed second opinion examinations for the Office and questioned whether he was selected under the appropriate guidelines.

By letter dated April 19, 2001, the Office referred appellant to Dr. Darrel W. Hayes, a Board-certified orthopedic surgeon, for a referee examination to resolve a conflict in medical opinion as Dr. Lavorgna reported that appellant was capable of working eight hours per day with restrictions but Dr. Herrick reported that she was only capable of working four hours due to partial disability. However, Dr. Hayes did not respond.

By letter dated May 8, 2002, the Office referred appellant to Dr. Thomas Schmitz, a Board-certified orthopedic surgeon, for a second opinion as to whether appellant's left shoulder conditions are causally related to the June 8, 1994 injury and whether residuals continued.

By decision dated September 23, 2002, the Office determined that appellant's cervical condition and left shoulder injury were not causally related to her occupational disease and that therefore the claim for a cervical and left shoulder condition was denied. On the same date, the Office denied appellant's claim for an additional schedule award for the carpal tunnel syndrome.

Appellant requested a review of the written record. By decision dated April 2, 2003, the hearing representative noted that, as Dr. Swartz was not qualified to resolve the conflict as he had previously seen appellant and as the Office referred appellant to Dr. Schmitz for a second opinion, there remained an unresolved conflict between Drs. Lavorgna and Herrick as to whether appellant had a disabling medical condition affecting her left shoulder and cervical spine which is causally related to the physical activities she performed in her employment prior to August 11, 1995 and the nature and extent of such condition. The hearing representative set aside the September 23, 2002 decisions and remanded the case for conflict resolution.

By letter dated May 15, 2003, the Office referred appellant to Dr. Clarence A. Boyd, a Board-certified orthopedic surgeon, for an impartial medical examination. Once again, the Office noted that a conflict existed between the opinions of Drs. Herrick and Lavorgna as to whether appellant had a disabling medical condition affecting her left shoulder and cervical spine which was causally related to her federal employment activities. In a medical report dated June 27, 2003, Dr. Boyd noted appellant's history of an employment injury in 1983 and reviewed her medical history. He performed a physical examination and noted that appellant displayed full range of motion of her cervical spine and that her left shoulder revealed no joint effusion or edema. He stated that she had some loss of range of motion of her left shoulder in

flexion and abduction, but that she offered inconsistent and nonanatomic complaints during active range of motion testing. Dr. Boyd found intact sensory and motor functions in the upper extremities with no evidence of muscle atrophy or other abnormality. He stated:

“Regarding the diagnosis at the left shoulder, the most consistent diagnosis is that of left shoulder muscle strain. This injury appears [to have occurred] in 1983. There’s no evidence to support any cumulative trauma having been directed to the left shoulder based upon my review of [appellant’s] prior job duties. This includes the fact also that a good deal of [appellant’s] time prior to her leaving work in 1995 was spent at modified duty where there was no heavy lifting required and specifically no repetitive motion required of her left shoulder. Review of her prior job duties, including the review of the job description also revealed no evidence of repetitive motion having been directed to [appellant’s] cervical spine. There is no evidence, therefore, that [appellant] ever sustained either acute injury or cumulative trauma to her cervical spine. The medical record is most consistent with the diagnosis of age-related degenerative disc disease of her cervical spine.

“It is my assessment that the muscular strain of the left shoulder 1983 has long since resolved. It has been this examiner’s clinical experience with the treatment of the entire range of such injuries, from trivial to severe, that even severe strains are typically resolved after a period of six to eight weeks. Of course as of the date of this evaluation, 20 years have elapsed since that muscular strain. It should also be noted that the symptoms that [appellant] offers regarding her left shoulder are not consistent with any ongoing effects of a left shoulder muscular strain. The physical examination is also inconsistent with any ongoing effects.

“Indeed regarding her left shoulder, [appellant] was quite vague when describing her symptoms and they were found to be inconsistent with any specific diagnosis or impairment. Specifically, she could only state that her left shoulder pain was aggravated by ‘usage, anything, everything.’”

He concluded that, since the left shoulder muscle strain has long since resolved without subjective or objective residual, there was no indication for any medical treatment to appellant’s left shoulder for that now resolved muscular strain or for cervical strain.

By decision dated July 22, 2003, the Office determined that, based on Dr. Boyd’s report, appellant did not suffer from a disabling medical condition affecting her left shoulder and cervical spine which is causally related to her federal employment. The Office noted, however, that appellant’s entitlement to compensation for carpal tunnel syndrome was not affected by this decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ 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 an injury was sustained 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.⁴

In an occupational disease claim, the claimant must submit: (1) medical evidence establishing the existence of the disease or condition on which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the disease; and (3) medical evidence establishing that the employment factors were the proximate cause of the disease, or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵

Section 8123(a) of the Act⁶ provides that, "[i]f there is a disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁷

ANALYSIS

The Board finds that there was a conflict of medical opinion evidence between Dr. Lavorgna, a Board-certified orthopedic surgeon and second opinion physician, and appellant's physician, Dr. Herrick, a Board-certified neurologist.⁸ Dr. Lavorgna opined that appellant had no work-related cervical or left shoulder condition while Dr. Herrick opined that appellant's partially frozen left shoulder was employment related. Due to this conflict of

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Melinda C. Epperly*, 45 ECAB 196 (1993).

⁵ *Id.*

⁶ 5 U.S.C. § 8123(a).

⁷ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

⁸ The Board notes that Dr. Herrick was initially an Office referral physician, however, as appellant subsequently returned to Dr. Herrick on her own, requesting an evaluation and report in support of her claim, the doctor must be deemed appellant's physician. *See Mohamed Yunis*, 42 ECAB 325, 335 (1991); *Donald J. Summers*, 37 ECAB 634, 640 (1986).

medical opinion evidence, the Board further finds that the Office properly referred appellant to Dr. Boyd, a Board-certified orthopedic surgeon, for an impartial medical evaluation.⁹

In his June 27, 2003 report, Dr. Boyd described appellant's employment injury in 1983 and reviewed her medical history. He listed his findings on physical examination and noted that appellant displayed full range of motion of her cervical spine and that her left shoulder revealed no joint effusion or edema. Dr. Boyd stated that appellant had some loss of range of motion of her left shoulder in flexion and abduction, but that she offered inconsistent and nonanatomic complaints during active range of motion testing. He found intact sensory and motor functions in the upper extremities with no evidence of muscle atrophy or other abnormality. Dr. Boyd diagnosed a left shoulder muscle strain occurring in 1983 and age-related degenerative disc disease of the cervical spine. He opined that appellant's left shoulder strain had long since resolved in the 20 years since the injury occurred and that appellant's current symptoms were not consistent with left shoulder muscle strain and no abnormal objective findings correlating with her symptoms. Dr. Boyd opined that appellant's left shoulder strain resolved in 1983 without subjective or objective residuals. He also concluded that appellant's cervical condition had no relationship to her employment.

As Dr. Boyd, the impartial medical specialist, provided a detailed report based on a proper factual background and explained the lack of objective physical findings supporting either an ongoing left shoulder condition after 1983 or a cervical spine condition causally related to appellant's employment, his report is entitled to the special weight of the medical evidence.

CONCLUSION

The Board finds that the special weight of the medical evidence as represented by Dr. Boyd's well-reasoned report fails to establish that appellant sustained a left shoulder or cervical condition due to factors of her federal employment and that the Office properly denied her claim.

⁹ The hearing representative properly noted that Dr. Swartz could not act as an impartial medical examiner as he had previously examined appellant. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.00.4.b.(3) (May 2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2003 is affirmed.

Issued: July 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member