



conflict of medical opinion as it was speculative, contradictory and not in accordance with the statement of accepted facts.

### **FACTUAL HISTORY**

This is the second appeal before the Board in this case. By decision and order issued December 23, 2009,<sup>2</sup> the Board set aside OWCP's November 4, 2008 decision and remanded the case to OWCP to obtain a supplemental report from Dr. Dennis, a Board-certified orthopedic surgeon and impartial medical examiner, regarding whether appellant was disabled for work on and after November 9, 2006. The Board noted that he opined that a right foot drop had resolved by December 11, 2006, although Dr. Elias J. Lehaf, an attending Board-certified internist, observed a right foot drop five weeks later on January 17, 2007. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

In a January 31, 2011 letter, OWCP requested that Dr. Dennis provide a supplemental report as his October 20, 2008 opinion did not specifically address appellant's disability for work on or after November 9, 2006 and whether the accepted aggravation of her underlying degenerative spinal disease and scoliosis had ceased. OWCP asked Dr. Dennis to provide medical rationale addressing "the duration of the aggravation and [appellant's] level of disability on or after November 9, 2006." It also asked him to explain why he found that appellant did not have a right foot drop on December 11, 2006 examination, as Dr. Lehaf stated that he observed it on January 17, 2007.

In a February 18, 2011 report, Dr. Dennis opined that the accepted October 30, 2006 workplace incident, in which appellant's postal vehicle lost power steering and she had to turn the wheel manually for 45 minutes, was unlikely to have altered underlying degenerative spinal disease. He explained that it was "almost impossible to visualize voluntary efforts" turning the wheel "capable of producing substantial injury to [the] lumbar spine, with or without preexisting conditions." Appellant's longstanding experience in driving a mail delivery vehicle "made it extraordinarily improbable that she could have imposed any real injury to her lumbar spine that was not already preexisting and already symptomatic." Also, appellant did not exhibit sciatica or a foot drop that would indicate the type of spinal injury alleged. He therefore opined that appellant's preexisting scoliosis and spondylosis were unaltered by a lack of power steering for 45 minutes on October 30, 2006. Dr. Dennis stated that any aggravation of the underlying conditions was only temporary in nature and ceased as of November 15, 2006.

Dr. Dennis disputed Dr. Lehaf's<sup>3</sup> diagnosis of a right foot drop, noting that Dr. Lehaf did not record the precise strength of the muscles supposedly affected, did not use a dynamometer or other instrument to quantify the weakness observed, or use measuring tools to record how high appellant was able to rise on her heels and toes. He explained the diagnostic criteria for a foot

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<sup>2</sup> Docket No. 09-883 (issued December 23, 2009).

<sup>3</sup> On its face, the report refers to Dr. Richard M. Lehman, an attending Board-certified neurosurgeon. The Board notes that the reference to Dr. Lehman and Dr. Lehaf appears to be a nondispositive typographical error confusing two similar names. Dr. Dennis' remarks in the remainder of the report clearly demonstrate that he was referring to Dr. Lehaf's opinion and not that of Dr. Lehman.

drop, which he characterized as a “conglomerate of findings” that would have been observed by the attending physician. Dr. Dennis stated that a patient with a bona fide foot drop would have required a cane to ambulate, walked with a scrubbing motion of the affected foot, had an abnormal wear pattern on the toe area of the shoe worn on the affected foot, exhibited a distinctive pattern of abnormal calluses on the sole of the affected foot, and would have reported tripping while walking. No physician of record reported any of these findings. Also, on examination, Dr. Dennis observed no neurologic abnormality in the L5 dermatome competent to produce a foot drop, and that appellant was able to “raise her toe up to put her shoes on,” demonstrating that she did not have a foot drop. He also noted that the EMG results demonstrating a generalized radiculopathy were insufficient to support a peroneal nerve impairment to produce a foot drop. Appellant did not have localizable dermatomal findings necessary to diagnose a peroneal nerve impairment. Dr. Dennis concluded that appellant “never had a foot drop,” and that what Dr. Leahaf observed was appellant’s submaximal effort to raise her toes.

By decision dated April 28, 2011, OWCP denied modification of its November 4, 2008 decision on the grounds that Dr. Dennis’ supplemental report established that appellant never had a foot drop and that she was not disabled for work on and after November 9, 2006.

In a May 2, 2011 letter, appellant, through counsel, requested an oral hearing. By decision dated June 6, 2011, OWCP denied her request for an oral hearing on the grounds that she was not entitled to a hearing as a matter of right because she had previously requested reconsideration. It exercised its discretion and further denied appellant’s request for hearing on the grounds that the issues could be addressed equally well pursuant to a valid request for reconsideration.

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

An employee seeking compensation under FECA<sup>4</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.<sup>5</sup>

To establish a causal relationship between a claimed period of disability and the accepted employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.<sup>6</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>7</sup> Rationalized medical evidence is evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. 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

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>6</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>7</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

Section 8123 of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.<sup>9</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup> However, in a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>11</sup> If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on October 30, 2006 appellant sustained a temporary aggravation of degenerative spinal disease which ceased by November 9, 2006. It based its acceptance on an OWCP medical adviser's review of reports from attending physicians Dr. Lehaf, a Board-certified internist, and Dr. Lehman, a Board-certified neurosurgeon. OWCP selected Dr. Dennis, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion between an OWCP medical adviser and appellant's attending physicians as to whether she was disabled for work on and after November 9, 2006 due to the accepted injury. In his October 20, 2008 report, Dr. Dennis found that, based on the medical record, the aggravation ceased as of November 9, 2006 and that appellant did not have a right foot drop. However, as Dr. Lehaf had diagnosed a foot drop on January 17, 2007, the Board remanded the case to OWCP pursuant to the first appeal to obtain a supplemental report from Dr. Dennis clarifying this discrepancy.

On remand, OWCP requested a supplemental report from Dr. Dennis on January 31, 2011 addressing the apparent inconsistency in his prior opinion. Dr. Dennis submitted a February 18, 2011 report opining that the accepted temporary aggravation of preexisting spinal conditions ceased no later than November 15, 2006. He provided extensive, detailed medical rationale explaining why he disputed Dr. Lehaf's finding of a foot drop. Dr. Dennis explained the clinical indicators needed to diagnose a foot drop. He noted that Dr. Lehaf did not measure or record appellant's right lower extremity strength, indicate how high appellant was able to rise

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<sup>8</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>9</sup> 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>10</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>11</sup> *Nancy Keenan*, 56 ECAB 687 (2005).

<sup>12</sup> *Guiseppe Aversa*, 55 ECAB 164 (2003).

on her heels and toes, and did not observe an abnormal gait, abnormal callus pattern or indicative shoe wear pattern. Each of these objective signs would demonstrate the presence of a peroneal nerve impairment that would cause a foot drop. Dr. Leahaf did not observe any of these indicators. Dr. Dennis therefore opined that Dr. Leahaf observed only appellant's submaximal effort to raise her toes and not a foot drop. The Board finds that Dr. Dennis' opinion is sufficiently well rationalized to represent the weight of the medical evidence and establish that appellant did not have a right foot drop.<sup>13</sup>

In its April 28, 2011 decision, OWCP found that the accepted temporary aggravation of preexisting spinal conditions ceased on November 9, 2011. In his February 18, 2011 report, Dr. Dennis opined that based on the medical record, the temporary aggravation ceased on November 15, 2006. Therefore, OWCP's April 28, 2011 decision will be modified to find that the temporary aggravation of preexisting spinal conditions ceased as of November 15, 2006.

On appeal, counsel asserts that Dr. Dennis' supplemental report is insufficient to resolve the medical conflict as it was speculative, contradictory and not in accordance with the statement of accepted facts. As stated above, Dr. Dennis' report was extremely clear and well rationalized. His opinion is sufficient to resolve the conflict of opinion, to establish that appellant never had a right foot drop and that the accepted temporary aggravation ceased no later than November 15, 2006.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that a claimant for compensation who is not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision and before review under section 8128(a), to a hearing on his claim before a representative of the Secretary.<sup>14</sup> Federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>15</sup> Although the claimant is no longer entitled to an oral hearing or review of the written record as a matter of right if the request is filed past the 30-day period or she previously requested reconsideration pursuant to section 8128(a), OWCP may within its discretionary powers grant or deny a claimant's request and must exercise that discretion.<sup>16</sup>

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<sup>13</sup> *Jacqueline Brasch*, *supra* note 10.

<sup>14</sup> 5 U.S.C. § 8124(b)(1); *Peggy R. Lee*, 46 ECAB 527 (1995).

<sup>15</sup> 20 C.F.R. § 10.615.

<sup>16</sup> *See Eddie Franklin*, 51 ECAB 223 (1999); *Peggy R. Lee*, *supra* note 14.

## **ANALYSIS -- ISSUE 2**

On May 2, 2011 appellant requested a hearing pursuant to OWCP's April 28, 2011 decision denying modification of its November 4, 2008 decision finding that Dr. Dennis' opinion was sufficient to establish that the October 30, 2006 work incident caused only a temporary aggravation of preexisting spinal conditions. However, as she had previously requested reconsideration on August 7 and October 11, 2007 and April 29, 2008, under section 8124(b)(1) of FECA, she was not entitled to a hearing as a matter of right.

OWCP then exercised its discretion and determined that her reconsideration request could equally well be addressed by requesting reconsideration and submitting additional evidence establishing that the accepted temporary aggravation did not cease as of November 9, 2006.<sup>17</sup> The Board finds that there is no evidence of record that OWCP abused its discretion in denying appellant's hearing request. Thus, the Board finds that OWCP's June 6, 2011 decision denying appellant's request for an oral hearing was proper under the law and facts of this case.

## **CONCLUSION**

The Board finds that appellant has not established that she was disabled for work on and after November 15, 2006 due to the accepted October 30, 2006 injury. The Board further finds that OWCP properly denied appellant's request for a hearing.

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<sup>17</sup> By the present decision and order, the Board has modified OWCP's finding that the accepted temporary aggravation ceased on November 9, 2006 to find that it ceased on November 15, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 6, 2011 is affirmed. The decision dated April 28, 2011 is affirmed as modified.

Issued: September 17, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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