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

| | | |
|---|---|---|
| **C.M., Appellant** | ) | |
| **and** | ) | **Docket No. 12-641** |
| | ) | **Issued: September 4, 2012** |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 25, 2012 appellant filed a timely appeal of an Office of Workers' Compensation Programs' (OWCP) decision dated September 7, 2011. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 sustained consequential conditions of cervical disc protrusion at C5-6 with canal stenosis and degeneration at L4-5 causally related to her accepted February 2, 2004 cervical and lumbar injuries.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

Appellant, a 33-year-old transportation security screener, alleged that she injured her spine while reaching for baggage on February 2, 2004. She filed a claim for benefits on April 5, 2004, which OWCP accepted for lumbar sprain. The claim was subsequently expanded to include the conditions of cervical strain, resolved and displacement of lumbar intervertebral discs at L3-4 and L4-5.

In a report dated April 13, 2004, Dr. Daniel D. Lee, Board-certified in orthopedic surgery, stated that appellant had complaints of neck and low back pain, primarily in the mid-back and right anterior thigh. Appellant was originally injured in February 2003 but her case was closed in March before she experienced any improvement in her symptoms. She was placed on light duty in the office, which did not help her condition. Dr. Lee advised that appellant reinjured herself in February 2004 while moving bins. He noted her complaint of ongoing back pain. Dr. Lee advised that the results of a magnetic resonance imaging (MRI) scan showed mild disc degeneration at L4-5; moderate disc degeneration at L3-4; a central focal disc bulge at L3-4 and a right paracentral disc bulge at L4-5.

Dr. Lee concluded that appellant had lumbar back pain, a lumbar strain and age-related changes of degenerative discs. He prescribed anti-inflammatory treatment and physical therapy.

In a report dated August 9, 2006, Dr. Lee advised that appellant had significant low back pain and known internal disc disruption. Appellant worked on light duty and retraining. Dr. Lee asserted that she had experienced some worsening of her neck pain, which was part of her original complaint. He noted that x-rays of appellant's neck showed no cervical fracture or misalignment with minimal spondylosis. Dr. Lee noted tenderness around the cervical spine with mechanical neck pain and worsening low back with internal disc disruption.

In a December 29, 2006 report, Dr. Lee stated that there had been no improvement in her condition. Appellant underwent a cervical MRI scan on October 2, 2006 which showed a small disc osteophyte flattening the left cord, effacing the left lateral recess. The MRI scan of the lumbar spine demonstrated a small disc herniation at L3-4 and L4-5.

In a report dated July 7, 2009, Dr. Lee stated that appellant had a history of low back pain but experienced worsening upper extremity radiculopathy and neck pain. Appellant underwent a recent MRI scan of the cervical spine which, when compared with the October 2006 study, showed a moderate to large left-sided broad-based disc protrusion of 11 millimeters by 3 millimeters at C5-6. Dr. Lee asserted that appellant sustained a left upper extremity strain at the time of her injury which had recurred. He opined that her recurrence and cervical strain was related to her industrial injury and disc herniation. Appellant had positive left C6 radicular pain and Dr. Lee recommended that she undergo pain management for left C5-6 versus C6 transforaminal selective nerve root blocks.

In a December 22, 2009 report, Dr. Firooz Mashhood, Board-certified in physical medicine and rehabilitation, stated that appellant had a history of neck pain and left upper extremity pain. He administered electromyogram (EMG) and nerve conduction velocity (NCV) tests. The tests showed evidence of mild left carpal tunnel syndrome (median nerve entrapment

at the wrist) affecting sensory components, mild left ulnar nerve entrapment at the wrist involving sensory fibers and evidence of chronic moderate left C5, C6 and C7 radiculopathy.

In a February 18, 2010 OWCP telephone memorandum, appellant requested medical treatment and a new examination. It advised her that it could not authorize her request because it had not accepted a cervical spine condition as work related. The initial medical evidence of record did not show that a cervical spine condition had been diagnosed in tandem with the acceptance of the lumbar condition. After review of the record, the claims examiner determined that one of the physicians of record found that appellant had sustained a cervical strain which had resolved at the time of his examination. Appellant was advised of the requirement to submit a medical report providing a diagnosis of her cervical spine condition and a physician's opinion regarding the relationship between the condition and her February 2, 2004 work injury.[2]

In a May 7, 2010 report, Dr. Pouya Mohajer, Board-certified in pain medicine, stated that appellant was post work-related injury with post-traumatic neck pain, post-traumatic arm pain, post-traumatic low back pain and post-traumatic leg pain. He advised that appellant underwent a bilateral L3-5 medial branch nerve block and a bilateral L5 and S1 selective nerve root block without significant, lasting benefits. Appellant currently rated her overall pain as a nine on scale of one to ten, with most of the pain localized to her low back. Dr. Mohajer related that appellant believed she was currently stable as to her cervical condition.

In a May 11, 2010 report, Dr. Lee stated that appellant had worsening low back and left lower extremity pain, with known degeneration and stenosis at L3-4 and L4-5. He advised that she had failed all conservative management, was completely disabled and would consider surgery. Appellant also had a large disc protrusion and herniation at C5-6 which mostly affected the left C6 nerve root.

A May 18, 2010 statement of accepted facts listed appellant's accepted lumbar strain; cervical strain, resolved; and displacement of the lumbar intervertebral discs at L3-4 and L4-5.[3]

In order to determine appellant's current disability status, OWCP referred her to Dr. Aubrey E. Swartz, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated June 21, 2010, Dr. Swartz stated that appellant had good range of motion of the cervical spine and a good range of motion of the lumbar spine, with stocking hypesthesias in both lower extremities. He opined that appellant appeared to have right upper extremity cervical radiculopathy with sensory changes related to peripheral neuropathy. Dr. Swartz advised that the cervical MRI scan results showed disc protrusion at C5-6. It was not clear, however, whether there was any nerve root compression. Dr. Swartz stated that the lumbar MRI scan results from July 2003 demonstrated a small central disc bulge with right paracentral disc bulging at two levels.

[2] This developmental letter to which OWCP refers is not contained in the instant record.

[3] The statement of accepted facts indicated that appellant had a filed previous claim for a traumatic lower back injury, case number xxxxxx689, for an injury which occurred on February 19, 2003, which OWCP accepted for lumbar sprain/strain. Appellant was released to full duty on December 12, 2003 and continued to work light duty until March 7, 2004. The claims were combined under case number xxxxxx848.

The subsequent MRI scan showed a disc protrusion to the right which did not clearly cause any nerve root compression and no clear identification at L3-4 of nerve root compression.

Dr. Swartz opined that appellant's current diagnosis was postcervical strain, occurring on February 2, 2004, with a temporary aggravation of degenerative changes in the cervical spine, that had subsided without evidence of residuals. The cervical aggravation was temporary and ceased at the time Dr. Lee found that she had reached maximum medical improvement on April 8, 2009. Dr. Swartz stated that appellant had degenerative changes in the cervical and lumbar spines which were no longer work related but disabled her from performing her preinjury job as a transportation security screener. He found that she was capable of working light duty on a full-time basis and had no further injury-related factors of disability, either subjective or objective, her ongoing physical restrictions stemmed from the preexisting degenerative disease in her cervical and lumbar spines.

In an October 1, 2010 report, Dr. Mohajer related that appellant was having a difficult time with her workman's compensation because they did not initially authorize the cervical spine condition, even though that was part of her injury. He noted that most of her pain was localized to her neck, which was of a throbbing nature. Appellant's low back pain was more an achy, sharp pain. Dr. Mahajer reiterated that she was at a postwork-related injury status with post-traumatic neck pain, post-traumatic cervical radiculitis and post-traumatic low back pain.

OWCP found there was a conflict in the medical opinion between Drs. Lee and Mashhood, and the second opinion examiner, Dr. Swartz, regarding whether appellant's servical disc at C5-6 with stenosis and degeneration at L4-5 were related to the accepted injury. It referred appellant to Dr. Mark J. Rosen, Board-certified in orthopedic surgery, for an impartial examination. In a report dated July 19, 2011, Dr. Rosen noted that the May 18, 2010 statement of accepted facts, listed the conditions of lumbar strain, cervical sprain and displacement of lumbar intervertebral discs at L3-4 and L4-5. He advised that appellant had cervical spondylosis secondary to cervical stenosis which was not related to her original work injury of February 2, 2004. Appellant had neck problems in May 2004 but did not experience any additional cervical issues until August 2006. Dr. Rosen noted that the neck was a relatively minor part of her complaints until December 2006 when she became more symptomatic. He advised that her neck pain gradually worsened to the point where she purportedly was unable to ambulate with a walker. Appellant subsequently improved and was currently ambulating without any obvious problem.

Dr. Rosen stated that appellant's MRI scans and other studies showed that she had a significant problem at C5-6 with a protruding disc and spinal stenosis. He opined that, to a reasonable degree of medical probability, this was due to a chronic degenerative process which was not related to the February 2004 employment injury. Dr. Rosen advised that the most striking thing about appellant was the waxing and waning of her cervical complaints. He opined that the desultory pattern of her complaints was consistent with cervical spinal stenosis, which was degenerative in nature and not work related; otherwise, there were no work-related disabilities. Regarding appellant's lumbar spine, he stated that appellant was quite functional and surgery or other treatment was not recommended. Dr. Rosen added that, while appellant might require surgery in the future, it would be related to her chronic degenerative disease, which was not causally related to her industrial injury. He concluded: "If one accepts based upon the statement of accepted facts that the displacement of lumbar intervertebral disc is the result of her industrial

injury rather than a chronic degenerative process, then her continued pain in the low back and consequent restrictions are subsequent to the February 2, 2004 injury."

By decision dated September 7, 2011, OWCP found that appellant failed to establish that her cervical disc protrusion at C5-6 with canal stenosis and degeneration at L3-4 and L4-5 did not develop as a consequence of her accepted February 2, 2004 employment injury.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[4] has the burden of establishing that 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, 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.[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]

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause.[7] The subsequent injury is compensable if it is the direct and natural result of the compensable primary injury. With respect to consequential injuries, the Board has noted that where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even if nonemployment related, is deemed because of the chain of causation to arise out of and in the course of employment and is compensable.[8]

Section 8123(a) provides that, if there is a 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.[9] 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 a proper factual and medical background, must be given special weight.[10]

---

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *See Debra L. Dillworth*, 57 ECAB 516 (2006).

[8] *L.S.*, Docket No. 08-1270 (issued July 2009).

[9] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

[10] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

## ***ANALYSIS***

In this case, OWCP accepted that appellant had sustained the conditions of cervical strain, resolved, lumbar strain and displacement of lumbar intervertebral disc at L3-4 and L4-5. It found that there was a conflict in the medical evidence between appellant's treating physicians, Dr. Lee and Dr. Mashhood, and the second opinion physician, Dr. Swartz, regarding whether appellant developed additional conditions of cervical disc protrusion at C5-6 with canal stenosis and degeneration at L4-5 as a consequence of the February 2, 2004 employment injury. OWCP referred appellant to Dr. Rosen for an impartial examination to resolve the conflict.

In his July 19, 2011 report, Dr. Rosen stated that appellant's diagnostic tests, including MRI scans and other studies, demonstrated that she had a significant problem at C5-6 with a protruding disc and spinal stenosis. He stated, however, that these findings were related to a chronic degenerative process and not to her February 2, 2004 employment injury. Dr. Rosen noted that appellant had neck problems in May 2004 which resolved but that she did not experience any additional cervical issues until August 2006, she had no significant problems with her neck until December 2006. He opined that the most striking thing about her condition was the waxing and waning of her complaints, noting that at one time she was so disabled she required a walker but somehow improved to the point where that was no longer needed. Dr. Rosen opined that this pattern was indicative of cervical spinal stenosis, which was degenerative in nature and not work related.

Regarding appellant's lower back condition, Dr. Rosen concluded that appellant had current complaints related to the accepted work-related condition of displacement of the lumbar intervertebral disc, and due to a chronic degenerative process, but that appellant was quite functional relative to these conditions. Dr. Rosen opined that appellant's lumbar degenerative process was not work related. He explained that appellant's continued low back pain and restrictions were work related in so far as they were due to the accepted condition of lumbar disc displacement, rather than a chronic degenerative process.

The Board finds that OWCP properly found that Dr. Rosen's referee opinion negated a causal relationship between appellant's claimed consequential conditions of cervical disc protrusion at C5-6 with canal stenosis and degeneration at L4-5, and the February 2, 2004 work injury. Dr. Rosen's opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, OWCP properly accorded his opinion the special weight of an impartial medical examiner.[11]

Therefore, given the fact that the weight of the medical evidence of record, as represented by Dr. Rosen's referee opinion, indicates that appellant's claimed conditions did not arise as a consequence of her February 2, 2004 work injury, appellant has not met her burden of proof to establish her claim that these conditions were sustained in the performance of duty. The Board will affirm OWCP's September 7, 2011 decision.

[11] *Gary R. Seiber*, 46 ECAB 215 (1994).

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 failed to establish that she sustained consequential conditions of cervical disc protrusion at C5-6 with canal stenosis and degeneration at L4-5 causally related to her accepted February 2, 2004 employment injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 7, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 4, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board