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

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| **M.C., Appellant** | ) | |
| **and** | ) | **Docket No. 10-2242** |
| | ) | **Issued: July 7, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Carol Stream, IL, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On September 1, 2010 appellant filed a timely appeal from a March 31, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 a cervical or lumbar condition are causally related to factors of her federal employment.

### *FACTUAL HISTORY*

This case has previously been before the Board. In an October 5, 2009 decision, the Board set aside a September 26, 2008 OWCP decision denying appellant's occupational disease

[1] 5 U.S.C. § 8101 *et seq.*

claim.[2] The Board noted that OWCP accepted that she sustained a herniated cervical disc, lumbar sprain and spondylosis due to an August 11, 1977 employment injury, cervical strain due to a July 25, 1979 employment injury and lumbar sprain due to an April 18, 1990 employment injury. On March 5, 2003 appellant underwent an anterior cervical fusion at C3-4, C4-5 and C5-6 and on October 8, 2003 she underwent surgery for tethered cord syndrome. She filed an occupational disease claim in 2005 alleging that she sustained an injury to her spine while moving heavy volumes of mail and checking on employees at various locations. Dr. Sean Salehi, a Board-certified neurosurgeon and impartial medical examiner, advised that appellant sustained a herniated disc at C6-7 due to her August 11, 1977 work injury that was treated appropriately in 1977 with a cervical fusion. He determined that her subsequent cervical discectomy, lumbar laminectomy and tethered cord release were not related to her 1977 employment injury unless the August 31, 1977 myelogram showed significant stenosis at C4-5 that was not properly resolved surgically. Dr. Salehi stated that the myelogram showed "complete cut off of the dye at C4-5" due to either in incomplete concentration of contrast or significant stenosis. He related that he could resolve the issue by reviewing the actual August 1977 cervical myelogram. The Board found that Dr. Salehi's opinion was insufficient to resolve the conflict in medical opinion. The Board remanded the case for OWCP to combine the case record of appellant's lumbar and cervical injures, obtain a copy of the August 31, 1977 cervical myelogram and request a supplemental report from Dr. Salehi regarding the cause of her current cervical and lumbar conditions and resulting surgeries. The facts and circumstances of the case as set forth in the Board's prior decision are hereby incorporated by reference.

On October 27, 2009 OWCP requested that appellant submit a copy of the August 31, 1977 cervical myelogram. On December 1, 2009 it informed Dr. Salehi that it did not have a copy of the August 31, 1977 myelogram. OWCP requested that Dr. Salehi address, if possible, the most likely cause of the dye cut-off seen on cervical myelogram. In a December 10, 2009 response, Dr. Salehi advised that he was unable to identify the cause of the dye cut-off without review of the myelogram.

On January 25, 2010 the Office referred appellant to Dr. Robert A. Beatty, a Board-certified neurosurgeon, for an impartial medical examination. In a report dated March 2, 2010, Dr. Beatty reviewed the medical evidence and discussed appellant's current complaints of intermittent numbness of the leg, a spastic walk, lumbar pain radiating down her legs into her feet and neck pain radiating into her shoulders. On physical examination, he found an absent of deep tendon reflexes in the biceps but no shoulder atrophy. Dr. Beatty opined that the "brachioradialis reflexes on each side produced clenching of the hands, a significant sign of cervical cord compression." He found no Hoffmann's sign and intact sensation of the ankles. Dr. Beatty further found no ankle reflex and hypesthesia over the feet, ankles and hands. He reviewed the diagnostic studies, including a November 13, 2003 lumbar myelogram that showed degenerative changes and a December 30, 2002 cervical magnetic resonance imaging (MRI) scan study, that revealed compression of the cervical spinal cord at C5-6 and degenerative changes. Dr. Beatty found that appellant "had a herniated disc at C6-7 in 1977 and achieved

[2] Docket No. 09-669 (issued October 5, 2009). On June 15, 2005 appellant, then a 61-year-old business mail supervisor, filed an occupational disease claim alleging that she injured her spine moving heavy mail volumes. At the time of her injury, she worked four hours a day.

solid fusion." He noted that a March 1987 myelogram did not show cord compression but did reveal some mild C5-6 ridging. A 1986 MRI scan study showed a disc protrusion at C5-6 but no cord compression. Dr. Beatty further advised that the report from appellant's 2003 surgery did not refer to a herniated disc at any of the three treated levels. He related:

> "My opinion regarding the cervical spine is that over this period of time between 1977 and 2003 when [appellant] had the anterior cervical fusion, she had the normal progression of degenerative disc disease in the neck and also in the lumbar spine.
>
> "I do not see any connection between any current medical condition and any work incident or factor in [appellant's] employment between her injury of 1977 and the present. I also do not see any medical connection between [her] current medical condition and surgery residual from any procedures authorized by [OWCP] based on what has been stated above. It is true that at the present time, [appellant] has evidence, unrelated to the original herniated disc at C6-7 or any work conditions since 1977, of cervical cord compression with hyperactive reflexes and clenching of the hands with the brachioradialis reflexes."

Dr. Beatty attributed appellant's tethered clonus to a congenital defect unrelated to a work injury. He found that the cervical spine surgery on March 5, 2003 was not due to her employment. Dr. Beatty stated, "I would repeat my opinion stated earlier that [appellant] did have genuine ridging of the cervical spinal canal and narrowing of the canal, especially at C5-6 with cord compression, but I am not able to connect this degenerative finding to any injury or factor of her employment." He concluded that her current symptoms were due to a "natural progression of cervical and lumbar degenerative disease and, in the absence of any significant work injuries, that [her] work activities did not worsen, aggravated or accelerate the cervical or lumbar spine degenerative disease." In a February 24, 2010 work restriction evaluation, Dr. Beatty found that appellant was totally disabled.

By decision dated March 31, 2010, OWCP denied appellant's occupational disease claim.[3]

On appeal, appellant asserted that delays by OWCP in approving treatment worsened her condition and resulted in additional surgery.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[4] 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, FECA 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

[3] OWCP indicated that it was denying modification of its prior decision; however, the Board set aside the prior OWCP decision on appeal.

[4] 5 U.S.C. §§ 8101-8193.

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 on a traumatic injury or an occupational disease.[6]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing the employment 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 employment factors identified by the claimant.[9]

Section 8123(a) 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.[10] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11]

When 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.[12]

## ***ANALYSIS***

Appellant contended that she sustained a spinal injury as a result of moving heavy mail volumes and checking on employees in various locations during the course of her federal employment. In a prior appeal, the Board determined that the report from the impartial medical examiner, Dr. Salehi, was insufficient to resolve a conflict in medical opinion regarding whether she sustained an occupational injury to her spine and whether her surgeries in 2003 were related

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[8] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[9] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

[12] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

to her employment. The Board noted that OWCP had previously accepted that appellant sustained a herniated cervical disc, lumbar sprain and spondylosis as a result of an August 11, 1977 work injury, employment-related cervical strain on July 25, 1979 and a lumbar sprain on April 18, 1990. Dr. Salehi advised that appellant's need for a cervical disectomoy and fusion in 2003 and the release of the tethered cord resulted from a progressive, degenerative condition rather than a work injury. He further noted, however, that a 1977 cervical myeologram showed that dye was cut off at C4-5 and requested review of the myelogram to determine whether she had a herniation at that level. The Board remanded the case for OWCP to obtain a supplemental report from Dr. Salehi after his review of the 1977 myelogram and the evidence from all of appellant's work injuries.

OWCP could not obtain a copy of the 1977 myelogram. Dr. Salehi advised that he was unable to provide further clarification without the myelogram. Therefore, OWCP properly referred appellant for a second impartial medical examination.[13]

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[14] The Board finds that the opinion of Dr. Beatty, a Board-certified neurosurgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Beatty reviewed appellant's medical and work history, including the operative reports and diagnostic studies. He diagnosed cervical and lumbar degenerative disc disease with cord compression of the cervical spine. Dr. Beatty found that appellant's current medical condition was unrelated to her work duties or 1977 injury. He asserted that between 1977 and the time of her cervical fusion in 2003 she experienced "the normal progression of degenerative disc disease in the neck and also in the lumbar spine." Dr. Beatty provided rationale for his opinion by explaining that the diagnostic studies and 2003 operative report did not show a herniated disc and that the ridging and narrowing of the cervical spine with cervical cord compression at C5-6 was due to degeneration. He further related that the surgery for the tethered clonus was a congenital defect unrelated to appellant's employment. As Dr. Beatty's report is detailed, reasoned and based on a proper factual background, his opinion is entitled to the special weight accorded the impartial medical examiner.[15] OWCP, consequently, properly denied appellant's occupational disease claim.

On appeal, appellant maintains that her condition worsened due to OWCP's failure to promptly approve treatment. The issue, however, is whether she has established that she sustained an occupational disease of the cervical or lumbar spine due to factors of her federal employment. The issue of causal relationship is a medical one and must be resolved by

[13] In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist. *See Guiseppe Aversa*, 55 ECAB 164 (2003).

[14] *See David W. Pickett*, *supra* note 12.

[15] *Id*.

probative medical evidence.[16] 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 established that she sustained a cervical or lumbar condition causally related to factors of her federal employment.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 31, 2010 is affirmed.

Issued: July 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] *Luis M. Villanueva*, 54 ECAB 666 (2003).