



neck, shoulder, arm, and back when the vehicle in which he was riding was rear ended. OWCP accepted the claim for cervical, thoracic, and lumbar strain and a recurrent abdominal herniation.

On November 3, 2003 appellant underwent incisional herniorrhaphies times two and a small bowel resection. He returned to part-time employment on January 4, 2004 and to his usual employment on February 25, 2004.<sup>2</sup>

Appellant received treatment after his injury from Dr. Arthur W. Duran, an osteopath who is Board-certified in family medicine.<sup>3</sup> On April 25, 2013 Dr. Duran evaluated appellant for right arm pain. He stated:

“This is revolving back from a work[ers’] comp[ensation] injury back in 2003. [Appellant] was diagnosed with cervical disc disease with significant nerve root compression at the C6-7 dermatome. He was sent for epidurals, he had complete resolution of his pain, this was approximately two years ago. [Appellant] now has recurrent symptoms, exactly the same as they were in 2011. He has neck pain with pain radiating into the right arm along the C6-7 dermatome with some decreased grip strength and weakness into the right hand.”

Dr. Duran diagnosed cervical disc disease with C6-7 cervical radiculopathy. He stated, “I do believe [that] this is a direct result of [appellant’s] motor vehicle accident back from 2003 and should be included under work[ers’] compensation.”

On July 18, 2013 Dr. Duran noted that appellant had undergone a series of epidurals, but continued to experience pain, numbness, and weakness of the C6-7 dermatome in the right arm. He diagnosed “[c]ervical disc disease with nerve root compression, C6-7 with severe intractable pain.”

An MRI scan study of the cervical spine performed on July 31, 2013 showed moderate diffuse degenerative disc and joint disease with mild spinal stenosis at C6-7 and nerve root compression at C5-6.

On October 28, 2013 Dr. Keith L. Jackson, an orthopedic surgeon, evaluated appellant for right hand and neck pain, and tingling and numbness in three fingers of the right hand for

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<sup>2</sup> In impairment evaluations dated December 18, 2006 and April 3, 2007, Dr. Robert P. Durning, a Board-certified orthopedic surgeon, diagnosed neck pain, mild left C7 nerve root dysfunction, and decreased left shoulder movement. By decision dated September 18, 2007, OWCP granted appellant a schedule award for a three percent permanent impairment of the left upper extremity.

<sup>3</sup> In a report dated October 3, 2003, Dr. Duran diagnosed a recurrent abdominal wall herniation and cervical radiculopathy from a “whiplash-type injury of the cervical spine” due to the August 23, 2003 motor vehicle accident. On January 19, 2007 he noted that subsequent to his accident appellant experienced “chronic neck, pain, intermittent headaches as well as restricted range of motion.” Dr. Duran related that a cervical magnetic resonance imaging (MRI) scan study showed a C3-4 disc protrusion and a mild disc bulge at C5-6 “with bilateral spur formation producing mild ventral flattening of the thecal sac.” He recommended chiropractic treatment. On July 20, 2011 Dr. Duran diagnosed improved cervical radiculopathy after epidural injections and lumbar radiculopathy.

10 years following a motor vehicle accident. He noted that appellant obtained pain management with steroid injections, but that the effectiveness of this treatment was diminishing.

In a report dated October 28, 2013, Dr. James D. Kang, a Board-certified orthopedic surgeon, discussed appellant's history of a motor vehicle accident 10 years ago. He recommended a laminectomy and fusion at C3-7.

On November 8, 2013 OWCP received a request to authorize a cervical laminectomy and fusion.

In a report dated November 21, 2013, Dr. Duran reviewed Dr. Kang's recommendation for surgery. He diagnosed radiculopathy of the right arm due to C5-6 and C6-7 disc degeneration. Dr. Duran stated, "I do believe that all nonoperative measurements have been exhausted and [appellant's] only step left is that of surgical intervention." He further opined, "I do believe that [appellant's] cervical disc disease is a direct result of his motor vehicle accident in 2003 and that truly this is [his] only option at this point in time. I do feel the surgery is medically necessary...."

On November 27, 2013 OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On December 8, 2013 Dr. Duran advised that appellant was disabled from November 24 to December 24, 2013 due to his August 23, 2003 work injury.

In a report dated December 19, 2013, Dr. Ghanma noted that appellant was a passenger in the back seat of a Ford Focus that was rear-ended by a Chevy Suburban going about 50 to 60 miles an hour. Appellant had to be cut out of the totaled vehicle. Dr. Ghanma diagnosed resolved cervical, thoracic, and lumbar strains and resolved recurrent abdominal herniations due to appellant's August 23, 2003 motor vehicle accident. He noted:

"It is difficult to relate [appellant's] current cervical spinal stenosis to the work injury of his claim, since he likely developed this independent of the work injury. A cervical sprain alone would not likely have resulted in cervical spinal stenosis 10 years after a neck injury.

"There are some older studies that indicate that individuals with similar injury may have a slightly higher likelihood of developing spinal stenosis than those without such injury. However, these studies were completed 30 and 40 years ago, and would not stand up to the current scrutiny for peer-reviewed medical materials."

Dr. Ghanma found that the cervical fusion from C3 to C6 was warranted, but not as a result of the employment injury. He opined that appellant could perform his usual employment.

On December 31, 2013 appellant filed a claim for compensation from December 14 to 27, 2013.

By letter dated January 3, 2014, OWCP provided Dr. Duran with a copy of Dr. Ghanma's report and requested that he address whether he concurred with his opinion.

On February 4, 2014 appellant underwent a cervical laminectomy at C3-4, C4-5, C5-6, C6-7 and a posterior cervical fusion at C3-7.

In a decision dated February 5, 2014, OWCP denied appellant's claim for compensation from December 14 to 27, 2003. It further found that the medical evidence was insufficient to show that he required surgery causally related to his accepted work injury.

On February 7, 2014 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a report dated February 19, 2014, Dr. Duran reviewed Dr. Ghanma's report and his conclusion that appellant's current condition was not due to his 2003 motor vehicle accident. He noted that appellant did not have cervical pain or radiculopathy before his motor vehicle accident. Dr. Duran stated:

“Over approximately a 10-year period of time, unfortunately [appellant's] symptoms progressed and he had further degeneration in the cervical spine resulting in stenosis, as well as, nerve root compression. It is of my medical opinion that the traumatic neck injury from 2003 ultimately led to these changes in his cervical spine. I am basing this off of the fact that, prior to the motor vehicle accident, [appellant] had no neck issues whatsoever. It was a severe injury at that time resulting in severe neck pain and restricted range of motion, which ultimately resolved over a significant period of time with extensive physical therapy. It is well known that trauma at this level can ultimately lead to changes over time in the cervical spine, which can ultimately lead to stenosis leading to radicular symptomatology into the upper extremities. At this point in time, due to [appellant's] severe right arm pain and weakness and the fact that [he] is requiring chronic narcotic medications to control his pain, I do not believe that he is capable of performing his work duties. Therefore, it is my opinion that his recent diagnosis of cervical disc disease, as well as, cervical spinal stenosis should be allowed on his claim and that the above work restrictions are appropriate as he is unable to perform his duties at work at this time....”

At the telephone hearing, held on August 6, 2014, appellant's counsel argued that Dr. Ghanma's reports are consistently unfavorable to claimants. He also maintained that there was a conflict in medical opinion.

By decision dated November 3, 2014, an OWCP hearing representative affirmed the February 5, 2014 decision.

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

A “recurrence of disability” means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous

injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>4</sup>

Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence a causal relationship between his recurrence of disability and his employment injury.<sup>5</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>6</sup>

Section 8103 of FECA<sup>7</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of monthly compensation.<sup>8</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being that of reasonableness.<sup>9</sup>

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.<sup>10</sup> The implementing regulations state 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 an 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.<sup>11</sup>

### **ANALYSIS -- ISSUES 1 & 2**

OWCP accepted that on August 23, 2003 appellant sustained cervical, thoracic, and lumbar strains, and a recurrent abdominal herniation in a motor vehicle accident. Appellant underwent incisional herniorrhaphies on November 3, 2003. He resumed part-time employment on January 4, 2004 and full-time employment without restrictions on February 25, 2004.

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<sup>4</sup> 20 C.F.R. § 10.5(x).

<sup>5</sup> *Carmen Gould*, 50 ECAB 504 (1999).

<sup>6</sup> *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>7</sup> *Supra* note 1.

<sup>8</sup> 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>9</sup> *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> 20 C.F.R. § 10.321.

On August 25, 2013 Dr. Duran, appellant's attending physician, diagnosed cervical disc disease with nerve root compression at C6-7, which he attributed to the 2003 employment-related motor vehicle accident. On November 8, 2013 OWCP received a request to authorize a cervical fusion. In a report dated November 21, 2013, Dr. Duran reviewed the opinion of Dr. Kang recommending a C3-7 laminectomy and fusion. He again related that appellant sustained cervical disc disease due to the 2003 motor vehicle accident and asserted that the surgery was medically necessary.

In a report dated December 19, 2013, Dr. Ghanma, an OWCP referral physician, discussed appellant's work injury and diagnosed a resolved recurrent abdominal herniation and resolved cervical, thoracic, and lumbar strains. He opined that he was unable to relate the stenosis of the cervical spine to the work injury and found that a cervical sprain would not cause stenosis. Dr. Ghanma advised that the requested C3 to C6 fusion was necessary, but unrelated to the employment injury.

On February 19, 2014 Dr. Duran reviewed Dr. Ghanma's report and disagreed with his conclusions. He indicated that appellant did not have neck problems prior to the injury and found that the injury was sufficiently severe to lead to spinal changes over time, including stenosis and radiculopathy. Dr. Duran opined that appellant was disabled from employment.

The Board finds that a conflict exists between Dr. Duran and Dr. Ghanma regarding whether appellant required a cervical laminectomy and fusion as a result of his August 23, 2003 employment injury and whether he was disabled due to his work injury beginning December 14, 2013. Section 8123(a) of FECA 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.<sup>12</sup> On remand, OWCP should refer appellant to an appropriate specialist for an impartial medical evaluation to determine whether he required a cervical fusion as a result of his August 23, 2003 employment injury and to address whether he was disabled on or after December 14, 2013 as a result of his accepted injury. After such further development as deemed necessary, it should issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>12</sup> 5 U.S.C. § 8123(a); *S.E.*, Docket No. 14-963 (issued August 13, 2014).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 3, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 22, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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