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

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| **M.M., Appellant** | ) | |
| **and** | ) | **Docket No. 10-224** |
| | ) | **Issued: October 6, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, Las Vegas, NV, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On October 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 16, 2008, which denied appellant's claim for a cervical condition. Appellant also timely appealed the Office's September 2, 2009 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

### *ISSUES*

The issues are: (1) whether appellant met his burden of proof in establishing that his cervical condition was causally related to his employment; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim.

### *FACTUAL HISTORY*

On October 17, 2004 appellant then a 54-year-old letter carrier, filed an occupational disease claim alleging that he sustained a back condition as a result of his duties. He did not stop work. However, appellant requested light duty. He indicated that he had back problems since 1974 when he fell off of an airplane while in the Air Force. Appellant also noted being rear ended in an automobile accident on July 20, 2004. The Office accepted his claim for lumbar

degenerative disc disease, temporary aggravation of lumbar stenosis and temporary aggravation of lumbar spondylosis. It also authorized lumbar spine fusion operations that were performed on January 11 and May 18, 2005 and September 20, 2006.[1] Appellant received compensation benefits. He returned to work on July 11, 2005 at full-time modified duty. Appellant stopped work on September 19, 2006.

In a November 14, 2005 report, Dr. William D. Smith, a Board-certified neurosurgeon and treating physician, advised that appellant presented with severe neck pain radiating into the shoulders and interscapular region. He found cervical spondylitic change, most severe at C4-5 and C5-6 and recommended anterior cervical discectomy and fusion. Dr. Smith opined that appellant's job for many years carrying mail predisposed him to this injury. On June 7, 2007 he advised that appellant might need further testing as he believed that appellant had early cervical myelopathy. Dr. Smith indicated that appellant was permanently disabled.

On July 13, 2007 the Office referred appellant for a second opinion examination with Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, regarding the extent of appellant's condition. In an August 1, 2007 report, Dr. Swartz, noted appellant's history and indicated that diagnostic testing dating to May 26, 2004 showed no evidence of radiculopathy. He advised that imaging studies in 2004 showed an arthritic spine with central spinal stenosis. Dr. Swartz indicated that such testing suggested that the lumbar conditions were a chronic degenerative process. He also noted that appellant was involved in a motor vehicle accident in July 2004, which caused his back pain to worsen. Dr. Swartz stated that appellant was taking numerous medications. He advised that appellant's response to a light fingertip touch signified symptom magnification. Dr. Swartz also noted that appellant had had three failed back surgeries, and failed medical treatment. He noted that appellant's physician failed to recognize that appellant had a psychiatric problem, which needed to be addressed. Dr. Swartz opined that appellant's current back condition was unrelated to his employment with the employing establishment and indicated that appellant had no other conditions related to his employment. He explained that the work-related temporary aggravation of his conditions ended when he last worked for the employing establishment. Dr. Swartz physician noted that, after that point, appellant had residuals from his years of progressive degenerative disease and his original injury that began when he was in the military. He opined that appellant could work within restrictions although the need for restrictions was not employment related.

In a September 18, 2007 report, Dr. Smith noted that appellant's automobile accident in 2004 caused a temporary worsening of his back pain. He disagreed with Dr. Swartz that appellant had reached maximum medical improvement. Dr. Smith also advised that appellant's compression of his thoracic and cervical spine was work related. On October 11, 2007 he noted that appellant had cervical stenosis and recommended an anterior cervical discectomy and interbody fusion at C4-5, C5-6 and C6-7. Dr. Smith opined that appellant's duties as a letter carrier "predisposed him to this."

[1] The record reflects that appellant has a Department of Veterans Affairs claim which was accepted for several conditions that included chronic lumbosacral strain/facet syndrome and cervical strain with degenerative joint disease.

On December 1, 2007 appellant, filed an occupational disease claim for cervical and thoracic conditions as a result of his duties. He alleged that on July 18, 2000, he realized his disease or illness was caused or aggravated by his employment.

On April 30, 2008 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Mark Rosen, a Board-certified orthopedic surgeon, for an impartial medical opinion to resolve the medical conflict between Drs. Smith and Swartz about appellant's work status and whether a cervical or any other condition was work related.

In a June 2, 2008 report, Dr. Rosen noted appellant's history and examined appellant. Regarding the cervical spine, he determined that appellant could flex no more than 10 degrees nor extend at all. He also determined that appellant could not rotate to either side without pain. Dr. Rosen also noted lumbar spine findings. He stated that appellant complained of pain in his neck but not his lower back. Dr. Rosen advised that rotation around the pelvis resulted in slight back pain. He noted that appellant had pain with straight leg raise in the back which radiated to the back of his legs with elevation to no more than 15 degrees off the table and seating to 90 degrees. Dr. Rosen also determined that appellant had pain in the back when he ranged his hips. Regarding a return to gainful employment, he noted that appellant's activities at home were consistent with sedentary work noting that, at home, appellant alternated sitting, lying down and moving about his "office." Dr. Rosen opined that "there was no logical reason that appellant could n[o]t engage in such work." He noted activity restrictions and advised that appellant would need to be weaned off his pain medications so that he could stay awake. Dr. Rosen explained that appellant's limitations were due to the extensive degenerative disc disease involving appellant's cervical and lumbosacral spine, his constant complaints of chronic pain and the narcotics used for his treatment. He noted that appellant's problems began in 1974 when he fell off the wing of the airplane. Dr. Rosen explained that "[w]ithin a reasonable degree of medical probability it was this fall and possibly some degenerative genetic predisposition that resulted in the degenerative disc disease and arthritis involving the entire axial spine. There is no reason to believe that his occupation as a worker at the postal office has physically sped up the natural course of that condition." Dr. Rosen also noted that appellant had not worked at the employing establishment for the last three years and opined that while appellant's work at the employing establishment could have aggravated the symptoms due to his conditions, there was no reason to expect that they would have accelerated the anatomic degenerative conditions responsible for his suffering. He advised that since appellant had stopped working at the employing establishment, any temporary aggravation would have ceased. Dr. Rosen opined that "[s]ince stopping work has not diminished his symptoms one can not attribute his symptoms to the work."[2]

By decision dated October 16, 2008, the Office denied appellant's claim for a cervical spine condition. It determined that, based on Dr. Rosen's report, the cervical condition was not caused by appellant's work at the employing establishment as a letter carrier.

[2] The Office requested a supplemental opinion from Dr. Rosen regarding residuals due to lumbar surgery and work restrictions. In a September 5, 2008 addendum, Dr. Rosen noted that the lumbar surgeries appellant underwent resulted in residuals that accelerated disc disease in the lumbar spine. He also provided a work restriction evaluation form.

On November 9, 2008 appellant submitted a detailed statement questioning the validity of Dr. Rosen's report. He alleged that there were various inaccuracies. Appellant alleged that Dr. Rosen had a "preconceived agenda and was not interested in the facts." He noted his medical records since November 4, 1986 and argued that his cervical and thoracic conditions were "job related." Also submitted was an October 2, 2008 report from a physician's assistant.

On July 20, 2009 appellant requested reconsideration. He alleged that Dr. Rosen's opinion was not valid because he advised against a fourth lumbar surgery. Appellant noted that it was subsequently determined he was a surgical candidate. He argued that Dr. Rosen must be incorrect in determining that his cervical condition was not causally related to his injury. Appellant repeated his arguments that his cervical and thoracic conditions were job related. He also submitted a December 29, 2008 report from Dr. Smith who noted that a cervical computerized tomography (CT) scan revealed significant degeneration at C4-5, C5-6 and C6-7, with disc bulges at C4-5 and foraminal stenosis at C5-6 and C6-7. On May 14, 2009 Dr. Smith noted lumbar spine findings and on May 19, 2009, he performed a discectomy at L1-2.

Appellant also submitted copies of previously submitted reports and diagnostic test results. They included Dr. Smith's November 14, 2005 report and a January 10, 2005 report from Dr. Richard Kudrewicz, a Board-certified family practitioner, who provided an impairment rating for the lumbosacral spine, right shoulder, cervical spine and right knee. Additionally, the Office received cervical magnetic resonance imaging (MRI) scans dated March 29, 2005 and January 2, 2007, thoracic MRI scans dated March 13, 2006 and October 2, 2007 and cervical x-rays dated January 21, 2004 and February 24, 2005.

A November 25, 2008 CT scan of the cervical spine read by Dr. William Orrison, a Board-certified diagnostic radiologist, revealed marked degenerative changes at C4-5, C5-6 and C6-7. Dr. Orrison also provided a November 25, 2008 lumbar spine CT scan. Additionally, he provided a myelogram of the cervical, thoracic and lumbar spine on that same date. Dr. Orrison found noted multi-level degenerative changes in the cervical spine and bulging discs at C3-4, C4-5, C5-6, C6-7 and C7-T1. In the thoracic spine, he noted a mild intervertebral disc bulge at T5-6 with degenerative changes. A February 18, 2009 electromyography (EMG) and nerve conduction study from Dr. Leo Germin, a Board-certified neurologist, noted findings for L2-S2 innervated muscles.

On August 5, 2009 the Office received a copy of an October 12, 2005 report, from Dr. Anthony Ruggeroli, a Board-certified anesthesiologist, who noted that appellant's cervical MRI scan revealed broad-based protrusions at C4-5 with other associated degenerative changes. In his October 28, 2005 report, Dr. Ruggeroli noted "the precise source of appellant's pain is still unclear." He noted that appellant had degenerative changes at C4-5 and C5-6 and opined that "it would be unusual if those findings were responsible for any pain he is experiencing." Dr. Ruggeroli noted that appellant had myofascial pain. Also submitted was a February 18, 2009 report noting his treatment of appellant's lumbar spine. In a September 2, 2009 decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

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

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of proof to establish the essential elements of his claim by the weight of the evidence, including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[7] To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.[8] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[9] 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 diagnosed condition and the specific employment factors identified by the claimant.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

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[3] 5 U.S.C. §§ 8101-8193.

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id*.

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[8] *I.R.*, 61 ECAB ___ (Docket No. 09-1229, issued February 24, 2010).

[9] *Y.J.*, 60 ECAB ___ (Docket No. 08-1167, issued October 7, 2008).

[10] *Phillip L. Barnes*, 55 ECAB 426 (2004); *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] *A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008).

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

The Office accepted the claim for several low back conditions and authorized lumbar spine surgery. Appellant's treating physician, Dr. Smith opined that appellant's cervical and thoracic conditions were work related. The second opinion physician, Dr. Swartz, opined that appellant did not have any other work-related conditions. On April 30, 2008 the Office referred appellant to Dr. Mark Rosen, a Board-certified orthopedic surgeon and impartial medical examiner, to resolve the conflict.

Section 8123(a) of the Act provides, in pertinent part: "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."[12] Where 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.[13]

In a June 2, 2008 report, Dr. Rosen conducted an extensive review of appellant's history and noted findings on examination of appellant's spine, including his cervical spine. He opined that appellant's current spine condition began when appellant fell from an airplane in 1974 while in the Air Force. Dr. Rosen opined that this fall and possibly some degenerative genetic predisposition resulted in the degenerative disc disease and arthritis involving the entire axial spine. He explained that there was no reason to believe that his occupation at the employing establishment physically sped up the natural course of that condition. Dr. Rosen further noted that appellant had not worked at the employing establishment for the last three years and thus while there may have been an aggravation of the symptoms due to his conditions, "there was no reason to expect that they would have accelerated the anatomic degenerative conditions responsible for his suffering." He explained since appellant had stopped working at the employing establishment, any temporary aggravation would have ceased and, because appellant's symptoms had not diminished since stopping work, he could not attribute symptoms to his former work. In a September 5, 2008 addendum, Dr. Rosen clarified that appellant had lumbar residuals due to accepted surgeries. However, he noted no basis on which to attribute appellant's neck or other spine condition to his employment.

The Board finds that Dr. Rosen provided a detailed and well-rationalized report based on a proper factual background and thus his opinion is entitled to the special weight accorded an impartial medical examiner. His report, therefore, constitutes the weight of the medical opinion evidence and establishes that appellant does not have a cervical condition as a result of his duties at the employing establishment.

[12] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

[13] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[15] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[16] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[17]

## ***ANALYSIS -- ISSUE 2***

Appellant disagreed with the denial of his claim for a cervical condition and requested reconsideration. The underlying issue, of whether appellant established that he sustained a cervical condition causally related to his employment, is medical in nature. However, appellant did not provide any relevant or pertinent new medical evidence to the issue of whether his cervical condition was causally related to his accepted employment injuries.

In a November 9, 2008 statement and a July 20, 2009 request for reconsideration appellant argued that his cervical and thoracic conditions were "job related." Causal relationship, however, is a medical issue and must be supported by medical evidence.[18] These unsupported allegations do not show that the Office erroneously applied or interpreted a specific point of law and do not advance a relevant legal argument not previously considered by the Office. Likewise, appellant also questioned the validity of Dr. Rosen's report and alleged various inaccuracies. For example, he alleged that Dr. Rosen had a "preconceived agenda and was not interested in the facts." He also argued that Dr. Rosen's opinion was not valid because he did not support further lumbar surgery although appellant was later found to be a surgical candidate. The Board finds that these general assertions are not medical in nature nor relevant to the underlying issue of causal relationship.[19]

Appellant submitted new reports from Dr. Smith, including a December 29, 2008 report which noted degeneration in the cervical spine; a May 14, 2009 report regarding the lumbar

[14] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b)(2).

[16] *Id*. at § 10.607(a).

[17] *Id*. at § 10.608(b).

[18] *See supra* note 9. *See also Gloria J. McPherson*, 51 ECAB 441 (2000) (lay individuals are not competent to render a medical opinion).

[19] *See J.P.*, 58 ECAB 289 (2007) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

spine and a May 19, 2009 report noting Dr. Smith had performed a lumbar discectomy. While these reports were new reports, they are not relevant because Dr. Smith did not address causal relationship between appellant's cervical condition and his federal employment. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[20] Likewise, reports of diagnostic testing such as those from Dr. Orrison and Dr. Germin were submitted. These reports are not relevant because they did not offer an opinion supporting that appellant's work duties caused or aggravated a diagnosed cervical condition.

Appellant submitted copies of previously submitted reports. These included Dr. Ruggeroli's October 12 and 28, 2005 reports. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[21] Additionally, the record also contains an October 2, 2008 report from a physician's assistant. This evidence is not relevant as a physician's assistant is not a physician and cannot render a medical opinion. As noted, the underlying issue is medical in nature.[22]

Consequently, the evidence and argument submitted by appellant on reconsideration do not establish a basis for reopening the claim for a merit review under the Office's regulatory criteria.

On appeal, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal.[23] He also repeated the arguments made on reconsideration, which included his questions regarding the validity of the impartial medical examiner. These arguments are not supported by the record. Dr. Rosen's opinion, as noted, has been found to be the weight of medical evidence. At the time of his examination, Dr. Rosen found no basis to support that appellant's neck condition was caused or aggravated by his federal employment. As noted, appellant has the burden of proof to establish his claim.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that his cervical condition was causally related to his accepted employment injuries. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[20] *Supra* note 19.

[21] *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

[22] *See* 5 U.S.C. § 8101(2) (provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[23] 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 2, 2009 and October 16, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 6, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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