United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 11-1435**
	)	**Issued: January 23, 2012**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 31, 2011 appellant, through his representative, filed a timely appeal from an April 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation. 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 the case.

ISSUE

The issue is whether appellant's degenerative disc disease or other cervical disc conditions were causally related to her accepted employment injuries after May 31, 2006.

FACTUAL HISTORY

On March 17, 1999 appellant, then a 34-year-old city letter carrier, sustained an injury to her neck after being hit by falling postal equipment. This claim was accepted for cervical strain,

[1] 5 U.S.C. § 8101 *et seq.*

left arm contusion and facial contusion.[2] Appellant also filed a claim on March 17, 1999, which was accepted for a cervical strain resulting from casing mail.[3] She was declared medically stable on November 5, 2001. Appellant then returned to work with permanent restrictions of no work over eight hours per day and no use of a shoulder satchel. In June 2004, she was reassigned to a position as a dispute resolution team member.

Appellant filed an occupational disease claim on February 18, 2005 alleging that she had sustained cervical spine sprain and strain with underlying degenerative disc disease as well as cervical spine radiculopathy due to her federal employment. She stated that she first became aware of her condition on December 27, 2004, and she attributed the conditions to the duties of the new position as well as years of carrying mail. Appellant also alleged that on December 27, 2004 she read a 700-page grievance file, after four to five hours of reading, she began to feel pain and muscle tightness in her neck and left shoulder.

In support of her claim, appellant submitted a February 14, 2005 medical report from her attending physician, Dr. Thomas Harris, a Board-certified orthopedic surgeon, who noted appellant's history regarding the December 27, 2004 incident and diagnosed her with cervical strain with underlying degenerative disc disease and cervical spine radiculopathy. In discussing the cause of appellant's condition, Dr. Harris stated that appellant's complaints and findings on examination were consistent with her description of the work-related incident of December 27, 2004.

A February 18, 2005 magnetic resonance imaging (MRI) scan of appellant's cervical spine revealed a 4 millimeter (mm) central disc protrusion at C6-7 effacing thecal sac, a 3.5 mm disc bulge at C5-6 effacing the anterior thecal sac and causing mild-to-moderate bilateral neuroforaminal narrowing, as well as a 2 mm disc bulge at C4-5, along with kyphotic alignment of the cervical spine. The report was electronically signed by Dr. Daniel Fagerson, a Board-certified radiologist.

On June 6, 2005 OWCP accepted appellant's claim for neck sprain and strain, but noted that further development of the medical evidence was necessary to determine the causal relationship of her cervical degenerative disc disease, cervical spine radiculopathy and headaches to her federal employment.

OWCP thereafter received a May 26, 2005 report from Dr. Harris, where he noted the results of appellant's February 18, 2005 MRI scan. Dr. Harris stated that appellant's condition had improved until December 27, 2004, when her former symptoms reemerged. He went on to state that he believed that appellant's mechanism of injury, as she described, was consistent with her complaints and findings on examination, and that medical literature and studies have shown that repetitive neck movement with prolonged sitting and neck position can both exacerbate and bring about neck, upper back, shoulder and upper extremity symptoms.

[2] OWCP Claim No. xxxxxx905.

[3] OWCP Claim No. xxxxxx993.

Dr. Harris referred appellant to Dr. Sam Maywood, Board-certified in pain management, for a pain management evaluation. In an August 18, 2005 report, Dr. Maywood diagnosed appellant with cervical spine sprain/strain with multilevel spondylosis, occipital neuralgia, and persistent cervical muscle pain. He recommended trigger point injections and steroids under local anesthesia to provide relief to appellant's symptoms. Dr. Maywood performed the trigger point injections and the occipital nerve block treatments on September 9, 2005.

In his September 23, 2005 progress note, Dr. Harris diagnosed appellant with chronic myoligamental cervical spine/strain, myofascial pain syndrome and muscle contraction/tension headaches. He also noted that appellant's condition saw significant improvement after Dr. Maywood's treatment and he recommended appellant receive Botox injections for continuing relief.

In a follow-up report dated September 29, 2005, Dr. Maywood asserted that appellant was "doing extremely well" and did not need her approved second injection.

On November 28, 2005 OWCP's district medical adviser (DMA) opined that appellant's work duties were insufficient to cause progression of cervical degenerative disc disease and recommended that a second opinion should be sought by OWCP.

By decision dated November 30, 2005, OWCP denied appellant's claim on the grounds that she failed to demonstrate the causal relationship between her employment and her alleged conditions of central disc protrusion C6-7, disc bulge C4-6 and kyphotic alignment of the cervical spine.

Appellant disagreed with the decision and requested a hearing on December 19, 2005.

By decision dated June 20, 2006, OWCP's hearing representative remanded the case for further medical development. The hearing representative found that, although Dr. Harris' medical reports did not include sufficient rationale to establish appellant's claims, they did establish a *prima facie* claim. The hearing representative noted that the instant claim should be combined with Claim No. xxxxxx093, a statement of accepted facts should be prepared, and appellant should be referred for a second opinion evaluation, as the DMA had advised.

On March 2, 2007 OWCP referred appellant's medical records and statement of accepted facts to Dr. Thomas H. Sabourin, a Board-certified orthopedic surgeon, for a second opinion evaluation, which was conducted on March 29, 2007. In a report dated March 29, 2007, Dr. Sabourin reviewed appellant's medical history and noted her employment injuries. In reviewing appellant's medical record, he noted that Dr. Harris stated in a May 31, 2006 report that appellant believed she had "returned back to her preinjury level." Dr. Sabourin diagnosed appellant with degenerative disc disease of the cervical spine at C4-5, C5-6 and C6-7, as well as cervical sprain. He opined that appellant's bulging disc and headaches are results of a preexisting cervical condition and degenerative disc disease that might have been preexisting since 1991, which was temporarily aggravated by the December 27, 2004 injury.[4] Dr. Sabourin

[4] The medical report mistook this date for February 18, 2005.

further stated that the temporary aggravation had ceased by May 31, 2006, and that appellant no longer suffered residuals from the work injury.

By decision dated April 12, 2007, OWCP accepted appellant's case for a resolved aggravation of cervical degenerative disc disease, but denied acceptance for headache and bulging discs.

Appellant requested another oral hearing on April 28, 2007. She alleged that her degenerative disc condition was diagnosed after 1999, and as such should not be considered as "preexisting."

On July 2, 2007 Dr. Harris submitted a medical report to OWCP, in which he disputed the medical conclusions made by Dr. Sabourin. He stated that the February 5, 2001 and the February 18, 2005 MRI scan results revealed a 3.5 mm disc bulge at C5-6, a 4 mm central disc protrusion at C6-7, and a 2 mm disc bulge at C4-5; however, Dr. Sabourin did not include these findings in his report. In addition, Dr. Harris indicated that an April 28, 2000 plain film radiograph revealed minimal degenerative changes at C5-6 and C6-7, while an April 26, 2006 x-ray film showed slight degenerative changes to the cervical spine. He asserted that the increase of the degenerative changes may be attributed to repetitive strain and movement of the neck, which was part of the physical requirements of appellant's position. Dr. Harris concluded that appellant's duties as a dispute resolution team member had accelerated or worsened the mild preexisting cervical degenerative changes, and that she continued to suffer from the effects of the aggravation and requires future medical care.

Dr. Harris reaffirmed his disagreement with Dr. Sabourin in his October 8, 2007 medical report. He stated that he had not found that appellant had reached a plateau in her improvement or resolution of her symptoms, that appellant was still experiencing symptoms relating to the injury and that the resolution of her condition had not occurred. Dr. Harris further stated that Dr. Sabourin misquoted his May 31, 2006 statement with regard to resolution of appellant's symptoms, which was made in reference to a nonwork-related injury.

By decision dated April 7, 2008, OWCP's hearing representative affirmed that appellant's headaches were not causally related to her federal employment, but found a conflict in the medical evidence as to whether appellant's work factors continued to aggravate her preexisting disc disease and whether work factors caused her cervical disc bulges.

On May 6, 2008 OWCP referred appellant's case along with her medical history and a statement of accepted facts to Dr. Eric S. Korsh, a Board-certified orthopedic surgeon, for an impartial medical examination.

The referee examination was performed on June 11, 2008. Dr. Korsh opined that "at most" appellant "suffered a mild temporary aggravation of her underlying cervical spine condition on December 27, 2004." He further noted:

> "Based upon the patient's physical examination and review of the medical records and diagnostic studies, it is my medical opinion that the underlying spondylosis is preexisting and is not associated with any new injury of December 27, 2004. The cause of her current disability is the March 17, 1999 injury, and her increase in

symptoms was merely exacerbated, or temporarily aggravated by the incident of December 27, 2004. It is also noted that she was in a nonindustrial motor vehicle accident in April 2006, which may also be contributing to the increase in her current symptoms.

"There has been no change in her underlying condition since the time she was considered permanent and stationary for the effects of her 1999 injury. In my opinion, 100 percent of her current disability has been caused by her underlying pathology and 0 percent has been caused by the prolonged neck flexion while reading a report on December 27, 2004….

"There is no objective or subjective factor of disability with regard to the temporary aggravation of December 27, 2004. There is no increased disability associated with the temporary aggravation of December 27, 2004. It is my opinion that she returned to her preaggravation status at least as of May 31, 2006."

* * *

"With regard to her MRI [scan] findings, I do concur that there are discogenic changes with mild disc bulges at C5-6 and C6-7. The C4-5 level is normal. There is no new onset of any disc pathology or bulges at the C4-5 level. [Appellant] has no residual effects from any claimed industrial injury of December 27, 2004. Her symptoms are such that[,] while she describes pain, she clearly states that the pain is tolerable. [Appellant] states [that] she can live with it. She has no desire for any sort of aggressive intervention. [Appellant] does describe numerous occasions when she has had stiffness and spondylosis at work but this predates the industrial injury of December 27, 2004."

In an August 5, 2008 decision, OWCP denied appellant's request to expand her claim to include disc bulges because she had not established that this condition was causally related to her December 27, 2004 injury.

On January 23, 2009 appellant requested reconsideration. In support of her request, she submitted a medical report from Dr. Harris dated January 21, 2009. Dr. Harris disputed Dr. Korsh's finding that appellant's C4-5 disc space was normal. He based his argument upon appellant's assertion that Dr. Korsh never reviewed the MRI scan films, and that both Dr. Fagerson and Dr. Sabourin, in addition to himself, had found that there was a positive pathology present at C4-5 level. Dr. Harris also disagreed with Dr. Korsh's diagnosis of appellant's condition as temporary aggravation of underlying cervical spondylosis. He claimed that appellant sustained a new injury, not merely an aggravation, due to the December 2004 exposure. To this point, Dr. Harris explained as follows:

"I have come to this conclusion, since the MRI scan of February 18, 2005 does in fact reveal new pathology at the C4-5 level, with additional or greater findings at the C5-7 levels as well. This reveals that not only has the patient experienced a progression of her disc pathology at C5-7, but also has new findings at C4-5.

> "To further prove my point, the patient was seen in my office for initial evaluation, due to the December 2004 DOI [date of injury] on February 7, 2005 and was not found to be at a permanent and stationary level until July 12, 2005. This after a course of conservative management and cervical injections performed by Dr. Sam Maywood, with the final visit with Dr. Maywood being on November 17, 2005, at which time the patient reported a 75 percent improvement in her neck symptoms and significant improvement in her headaches. Given the time that elapsed between the injury, treatment, and final report, I would not find that she sustained a mere temporary aggravation.... Per the patient's medical records and history, her neck symptoms, including her headaches, became worse following the December 2004 injury, she was appropriately treated, and reached a level of maximum medical improvement. However, this clearly reveals that the December 2004 incident was not a mere aggravation but an increase in her symptoms, a new injury, and a progression of a chronic condition.
>
> "Furthermore, a temporary aggravation would not require the extensive medical care, to include cervical injections, which [appellant] underwent."

By decision dated February 5, 2009, OWCP concluded that the report from Dr. Korsh, a referee physician, represented the weight of the medical evidence and affirmed the August 5, 2008 decision.

Appellant disagreed with the decision and requested reconsideration on November 20, 2009. She submitted another rebuttal medical report dated November 18, 2009 from Dr. Harris who continued to note his disagreement concerning Dr. Korsh's interpretation of the MRI scan findings and opinion regarding appellant's residuals. Dr. Harris also noted that appellant continued to suffer residuals of the December 27, 2004 occupational injury and utilized the fifth edition of the A.M.A., *Guides* in support of his opinion. He opined that appellant did in fact have an impairment, disability or handicap involving her cervical spine which she expressed subjectively with pain and recurrent headaches and objectively by physical examination and findings on MRI scans. Dr. Harris stated that Dr. Korsh overlooked or disregarded these findings. He opined that appellant continued to experience symptoms which supported that the injury was not a temporary aggravation, but rather a permanent aggravation. Dr. Harris concluded that she sustained a cumulative trauma-type injury from repetitive traumatic activities over time. He noted that the evidence clearly supported that appellant's symptoms arose out of and occurred in the course of her employment and is supported by the ergonomic evaluation and self-modifications, which supported that her statement that prolonged activity with her neck flexed had caused increased symptoms.

OWCP denied modification of the prior decision, on January 27, 2010, finding that Dr. Harris' report was insufficient to overcome the special weight given to the referee physician.

Appellant once again filed for reconsideration on August 26, 2010. She also submitted an August 26, 2010 medical report from Dr. Harris. In the report, Dr. Harris reiterated his belief that appellant continued to suffer from the cumulative trauma-type injury to her neck, which occurred over time due to repetitive and continuous tasks in her work duties. He also stressed that Dr. Korsh did not in fact review MRI scan films, but had only provided his own

interpretations of the MRI scan reports given by the radiologist. Dr. Harris concluded that appellant had in fact sustained a permanent aggravation of her cervical spine condition. Appellant also submitted October 29, 2008 and April 22, 2009 progress reports from Dr. Harris, which included diagnosis of her condition and prescriptions for her treatment.

By decision dated April 13, 2011, OWCP again found that the evidence submitted by appellant was insufficient to warrant modification of the January 27, 2010 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[6] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[7] As part of her burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[8] 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.[9]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[10]

Under FECA, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[11] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.[12] If the employment

[5] 5 U.S.C. §§ 8101-8193.

[6] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[7] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *G.T.*, *supra* note 7; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

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

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[11] *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

[12] *Id.*

exposure causes a permanent condition, such as a heightened sensitivity to a wider field of allergens, the employee may be entitled to continuing compensation.[13]

Section 8123(a) provides in pertinent part: "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."[14]

In situations where there are 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 on a proper factual background, must be given special weight.[15]

ANALYSIS

Appellant's treating physician, Dr. Harris, opined that appellant's work duties as a dispute management team leader, which required repetitive strain and movement of her neck, as well as the December 27, 2004 incident caused a permanent aggravation of appellant's underlying degenerative disc disease, and found her condition to be continuing and chronic. The second opinion physician, Dr. Sabourin, noted appellant's employment as a dispute management team leader and asserted that the December 27, 2004 incident had only caused temporary aggravation of appellant's condition, and the aggravation had resolved by May 31, 2006. OWCP found a conflict in medical opinion and referred appellant to Dr. Korsh to resolve the conflict.

Dr. Korsh performed a thorough examination of appellant and reviewed all medical records. He reported accurate medical and employment histories, carefully relating appellant's multiple injuries and claims pertaining to her 20-year history of federal employment. Dr. Korsh stated that her underlying degenerative disc disease had been preexisting and was not associated with any new injury, and that the December 27, 2004 event caused a temporary aggravation of appellant's condition and the aggravation had ceased by May 31, 2006. He further noted that, upon reviewing the MRI scan reports, he found no change in appellant's underlying condition from the time she was considered permanent and stationary for the effects of her 1999 injury. Dr. Korsh noted that the February 18, 2005 MRI scan study had been over-read, and that the two mm disc bulge seen at C4-5 was within normal limits. The Board finds that, under the circumstances of this case, the opinion of Dr. Korsh is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that the aggravation of appellant's preexisting degenerative disc disease was temporary in nature and had stabilized by May 31, 2006 with no change in her underlying condition. OWCP properly accorded special weight to the impartial medical specialist's findings.[16]

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[13] *James C. Ross*, 45 ECAB 424, 429 (1994); *Gerald D. Alpaugh*, 31 ECAB 589, 596 (1980).

[14] 5 U.S.C. § 8123(a).

[15] *I.J.*, *supra* note 10; *Roger Dingess*, 47 ECAB 123 (1995); *Nathan L. Harrell*, 41 ECAB 402, 407 (1990).

[16] *See Bryan O. Crane*, 56 ECAB 713 (2005).

Appellant submitted additional medical reports from Dr. Harris to controvert Dr. Korsh's findings. In particular, in his August 26, 2010 report, Dr. Harris reiterated his assertion that appellant still had ongoing symptoms related to her cervical spine condition, which never returned to her preaggravation level, and that appellant's condition suffered a permanent aggravation due to the December 27, 2004 incident. Dr. Korsh had already addressed this issue by pointing out that appellant's symptoms should be attributed to her preexisting cervical spine spondylosis, rather the incident of December 27, 2004. Dr. Harris also argued that Dr. Korsh's finding that there was no onset of any disc pathology or bulge at the C4-5 level was incorrect, as it was contradicted by the findings of other doctors. He argued that the existence of the disc bulge at C4-5 indicated a new injury from the December 27, 2004 incident. Dr. Korsh's report did find that there was no pathology at the C4-5 level. As noted above, in resolving a medical conflict, the referee's opinion must be given special weight. Furthermore, Dr. Harris, as appellant's treating physician, was on one side of the conflict. The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[17] Dr. Harris also argued that Dr. Korsh's findings cannot be relied upon because Dr. Korsh did not actually review the MRI scan films, but he did review the MRI scan report and concluded that appellant's MRI scan was essentially normal regarding the C4-5 level. For these reasons, the Board finds that Dr. Harris' January 21 and November 18, 2009 and August 26, 2010 medical reports are of diminished probative value.

The October 29, 2008 and an April 22, 2009 reports issued by Dr. Harris are also of diminished probative value, as they are progress reports of appellant's condition and do not address the issue at hand. The Board finds that the weight of the medical evidence establishes that the December 27, 2004 incident resulted in a temporary aggravation of appellant's degenerative disc condition and the aggravation had resolved by May 31, 2006.

CONCLUSION

The Board finds that appellant failed to establish that the employment incident had caused a permanent, rather than temporary aggravation of her existing condition.

[17] *See I.J., supra* note 10; *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 13, 2011 is affirmed.

Issued: January 23, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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