

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

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**A.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bellmawr, NJ, Employer**

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**Docket No. 13-1995  
Issued: March 11, 2014**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On August 28, 2013 appellant, through her attorney, filed a timely appeal of a June 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish a back condition as a result of her accepted employment exposures.

On appeal counsel argued that the impartial medical examiner was not properly selected as there were no screen shots and that his report was vague and required supplemental evidence.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 19, 2010 appellant, then a 45-year-old mail handler filed an occupational disease claim alleging that she developed a low back and neck condition with radiculopathy as a result of her employment duties of pushing, pulling, lifting and moving heavy sacks and containers of mail. She first related her condition to her employment in September 2010.

The employing establishment submitted a statement dated December 10, 2012 alleging that appellant had not performed her job as a mail handler since June 11, 2010. It stated that her primary function for the last two years was driving a forklift on the platform and working as a tow motor driver. Appellant did not report difficulty or pain to her supervisors.

In a letter dated December 14, 2010, OWCP requested additional factual and medical evidence in support of appellant's claim. Dr. Bruce H. Grossinger, an osteopath and a Board-certified neurologist, completed a report on August 31, 2010 diagnosing lumbar radiculopathy as a result of her federal employment. He examined appellant on November 11, 2010 and found evidence of multiple symptomatic disc bulges, lumbar radiculopathy and lumbar facet syndrome resulting from a June 16, 2010 employment injury.

In a decision dated January 14, 2011, OWCP denied appellant's claim finding that the factual element of her claim had not been established due to the discrepancy between her statement and that of the employing establishment.

Appellant requested an oral hearing before an OWCP hearing representative on January 21, 2011. Dr. Grossinger submitted a report dated May 5, 2011. He noted that appellant was employed as a mail handler for 21 years, a position which required physical work including lifting, carrying, bending, pushing and pulling. Dr. Grossinger stated that as a consequence of her duties appellant developed radiating neck and low back complaints. He found that she had abnormal findings on her July 30, 2010 magnetic resonance imaging (MRI) scan which demonstrated disc protrusions at L4-5 and L5-S1. Dr. Grossinger noted that an electromyogram (EMG) reflected moderate right S1 radiculopathy. He reported that appellant's examination was consistent with leg weakness, positive straight leg raising, sitting root signs and an inability to maintain a posture for a length of time. Dr. Grossinger also noted that her cervical spine demonstrated chronic cervical strain with muscle spasm and that a cervical MRI scan demonstrated straightening of normal cervical lordosis compatible with muscle spasm. He opined that appellant's cumulative work as a mail handler gave rise to her neck and low back conditions including chronic somatic dysfunction of the cervical spine, tearing and protrusion of the annuli at L4-5 and L5-S1 with nerve injury. Dr. Grossinger recommended a two-level laminectomy discectomy and fusion and opined that she was currently totally disabled.

Appellant testified at the oral hearing on May 19, 2011. She stated that she was hired as a mail handler on November 19, 1988. Appellant testified that she daily moved hundreds of sacks weighing between 20 and 80 pounds. She also noted that while operating the forklift she was also required to occasionally lift opened pallets of catalogs or other mail. Appellant stated that for the last two years of her employment she drove a tow motor on the high speed forklift in addition to unloading trucks including heavy sacks. She stopped work on June 16, 2010. Appellant stated that she developed pain in her neck and numbness in her hands. She stated that

she was initially diagnosed with carpal tunnel syndrome. OWCP denied this claim from appellant, who noted that she worked at Wal-Mart in customer service from December 2009 through February 2010.

In a decision dated July 29, 2011, OWCP's hearing representative remanded appellant's claim for further development of the medical evidence such as referral to a second opinion physician.

Dr. Grossinger submitted a July 30, 2010 MRI scan of appellant's lumbar spine which demonstrated disc bulges at L4-5 and L5-S1 with straightening of the normal lordotic curvature compatible with muscle spasm. He also submitted a July 30, 2011 cervical MRI scan which demonstrated straightening of the normal cervical lordosis compatible with muscular spasm. In a note dated August 3, 2010, Dr. Grossinger reviewed the MRI scan and opined that her injuries were "directly referable" to her cumulative work at the employing establishment. He opined that appellant was totally disabled and recommended lumbar epidural steroidal injections. Dr. Grossinger stated that appellant's cervical neck injury arose from cumulative inflammation and traction to her neck rather than mechanical compression in her cervical spine.

OWCP referred appellant for a second opinion examination with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. In a report dated September 20, 2011, Dr. Smith reviewed the statement of accepted facts and the MRI scans. He diagnosed mild age-related degenerative disc disease. Dr. Smith noted that given the benign findings on MRI scan it was likely that Dr. Grossinger's electrodiagnostic findings were false positive artifact. Appellant's physical examination did not reveal spasm, atrophy, trigger points or deformity. Dr. Smith found normal range of motion of the neck and back with normal neurologic examination. He stated, "I see no evidence of any aggravation, precipitation or acceleration of [appellant's] mild preexisting degenerative disease related to her federal employment and would consider the findings in her lumbar spine of some disc bulges as being preexisting and nonindustrial." Dr. Smith opined that appellant could return to her date-of-injury position with no restrictions.

In a decision dated November 25, 2011, OWCP denied appellant's claim based on Dr. Smith's report. Counsel requested an oral hearing on November 30, 2011.

Dr. Jason Brajer, a Board-certified anesthesiologist, completed a report on June 29, 2011 and diagnosed lumbar radiculopathy secondary to lumbar facet and S1 joint dysfunction.

Dr. Grossinger reported on January 4, 2012<sup>2</sup> his disagreement with Dr. Smith's September 20, 2011 findings and conclusions. He noted that appellant had two disc bulges at L4-5 and L5-S1 without any other associated degenerative joint disease and that therefore there was no support on the MRI scan that the disc bulges were degenerative in etiology. Dr. Grossinger also noted that appellant's EMG and nerve conduction study demonstrated moderate right S1 radiculopathy.

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<sup>2</sup> The report is misdated as 2011, but as Dr. Smith did not examine appellant until August 2011 the Board is confident that Dr. Grossinger's report is actually dated January 4, 2012.

The Branch of Hearings and Review found that appellant's claim was not in posture for a hearing on February 13, 2012 and remanded the claim for referral to an impartial medical specialist along with a statement of accepted facts and a list of specific questions.

OWCP referred appellant to Dr. Andrew Gelman, a Board-certified orthopedic surgeon. The record contains an ME-M listing the physicians previously involved in the case dated May 9, 2012, and the ME023 selecting Dr. Gelman dated May 17, 2012 and the appointment information listing Dr. Gelman's name, address and the date and time of the scheduled examination.

In a letter dated May 25, 2012, counsel requested that OWCP provide proof that Dr. Gelman was properly selected to serve as an impartial medical examiner. He requested iFECS screen shots and an imaging of the ME023 as well as the proper reasons for the bypasses of physicians who were selected on a strict rotational basis. OWCP responded on June 22, 2012 and stated that Dr. Gelman was the first physician on the rotation, that he accepted the appointment and that there were no physicians bypassed. It provided a copy of the ME023. OWCP stated, "Although the screen shots were not saved, Medical Scheduler Alice Hannah has verified the above information."

Counsel again requested that the screen shot images of Dr. Gelman's selection from the Physician's Directory Service (PDS) be provided by letter dated July 3, 2012. He stated that he had an extreme concern about Dr. Gelman's ability to provide an unbiased opinion given his experience with his prior reports. Counsel stated that confirmation of his proper selection from PDS was very important to appellant.

Dr. Gelman completed a report on June 27, 2012 and provided his findings on physical examination noting that in the cervical area, motor strength was normal and light touch sensation was normal. He found that appellant's lumbar spine was tender to the touch in the paravertebral muscles with tenderness over the right distal iliotibial band. Dr. Gelman found negative straight leg raising along with a slow and labored gait. He attributed appellant's condition to aging disease and morbid obesity. Dr. Gelman diagnosed neck and back pain as a result of mild degenerative disease. He concluded that appellant's conditions were not related to her employment. Dr. Gelman stated, "As far as [appellant's] employment as a mail handler, the repetition and/or cumulative nature of her requirement are noted, though I would not be able to directly attribute the work requirements and [appellant's] symptomatology. It is my opinion that difficulties are more so attributable to the natural aging process in this poorly conditioned, morbidly obese individual." He opined that appellant could return to her date-of-injury position based on her independent tolerance to function within the job description.

OWCP denied appellant's claim by decision dated November 1, 2012 relying on Dr. Gelman's report.

Counsel requested an oral hearing on November 8, 2012. Dr. Grossinger completed a report dated December 6, 2012 and disagreed with Dr. Gelman's findings and conclusions. He stated that appellant's objective clinical and supportive neurological testing was indicative of cervical radiculopathy, cervical facet syndrome, lumbar radiculopathy and lumbar facet

syndrome related to her federal employment. Dr. Grossinger further opined that appellant was totally disabled.

Counsel appeared at the oral hearing on March 26, 2013 and argued that, without the screen shots of Dr. Gelman's selection, there was no adequate proof that he was properly selected.

By decision dated June 12, 2013, OWCP's hearing representative found that the medical evidence did not establish a cervical or lumbar condition causally related to appellant's employment.

### **LEGAL PRECEDENT**

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.<sup>3</sup> 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>4</sup>

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.<sup>5</sup>

The Medical Management Application (MMA), which replaced the PDS, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examination. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician. If an appointment cannot be scheduled in a timely manner, or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

<sup>4</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>5</sup> *J.N.*, Docket No. 13-289 (November 15, 2013); *C.P.*, Docket No. 10-1247 (issued September 28, 2011); *Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- *Medical*, Chapter 3.500.5 (December 2012); *see also R.C.*, Docket No. 12-468 (issued October 15, 2012) (where the Board first discussed the application of the MMA and found that appellant's reasons for objecting to the list of impartial medical specialists provided by OWCP were not valid).

## ANALYSIS

The Board finds that this case is not in posture for decision. OWCP did not establish that Dr. Gelman was selected as an impartial medical examiner in a fair and unbiased manner.

It is well established that OWCP has an obligation to verify that it selected Dr. Gelman in a fair and unbiased manner. It maintains records for this very purpose.<sup>7</sup> The current record includes a May 17, 2012 Form ME023 report and an appointment information sheet that lists Dr. Gelman as the selected physician. The record also contains a Form ME-M which listed previous physicians involved in the case. There are no other documents, screen captures or any other evidence to establish how the MMA system was used to select the referee physician. Board case law provides that a Form ME023 is not sufficient documentation that OWCP properly followed its selection procedures.<sup>8</sup>

The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.<sup>9</sup> OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.<sup>10</sup>

The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue a *de novo* decision.

## CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant has met her burden of proof in establishing a back condition as a result of her federal job duties.

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<sup>7</sup> *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

<sup>8</sup> *J.N.*, *supra* note 5; *L.M.*, Docket No. 12-1396 (issued January 25, 2013); *D.A.*, Docket No. 12-311 (issued July 25, 2012); *C.P.*, *supra* note 5, *petition for recon. denied*, Docket No. 10-1247 (issued May 15, 2012).

<sup>9</sup> *See D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

<sup>10</sup> *M.A.*, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development of the medical evidence in accordance with this decision.

Issued: March 11, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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