

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

S.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Carbondale, IL, Employer**

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**Docket No. 16-0960
Issued: November 8, 2016**

Appearances:
Lonnie Boylan, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2016 appellant, through her representative, filed a timely appeal of a December 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish cervical conditions causally related to factors of her federal employment.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 10, 2014 appellant, then a 50-year-old sales and service distribution clerk, filed an occupational disease claim (Form CA-2) alleging that her cervical spinal stenosis, C4-7 cervical disc prolapse, cervical radiculopathy, and cervical myelomalacia was caused or aggravated by her employment duties. She noted that she first became aware of the condition on October 25, 2011 and realized its connection to her employment on October 3, 2011. The employing establishment noted that appellant was retired and her last workday was October 24, 2011.

By letter dated November 17, 2014, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised as to the medical and factual evidence required and afforded 30 days to provide this information.

In response to OWCP's request, it received appellant's statement, the employing establishment's response, and evidence pertaining to her claim under OWCP File No. xxxxxx130.³ In a statement dated October 10, 2014, appellant noted that she had worked for 15 years for the employing establishment in positions with repetitive job duties. The positions she held with the employing establishment included sales and service distribution clerk, motor vehicle operator and tractor trailer operator, mail processing clerk, and city letter carrier. Appellant alleged that all of the positions required intermittent lifting of up to 70 pounds, while the sales and service distribution clerk position also required continuous lifting of 5 pounds.

In an October 14, 2014 response, Martin Castaldia, postmaster, disputed appellant's claim that she was required to continuously lift 5 pounds and intermittently lift 70 pounds in her position as sales and service distribution clerk. He also noted that she worked a part-time flexible schedule.

By decision dated January 9, 2015, OWCP denied appellant's claim as it found that the evidence of record was insufficient to establish the alleged factors of federal employment. On January 12, 2015 it reissued the January 9, 2015 decision as it had been mailed to appellant's old address.

In a March 2, 2015 report, Dr. Giriwarlal Gupta, a treating Board-certified internist and neurologist, diagnosed cervical radiculopathy, cervical cord compression, cervical spinal stenosis, and myelomalacia, which he opined had been aggravated by appellant's repetitive job duties. In reviewing her employment history, he noted that she started working for the employing establishment in March 1996 and stopped work on October 25, 2011. Dr. Gupta provided a description of positions appellant had reported and the physical requirements she had reported associated with those positions. He opined that the requirement of continuous lifting of 5 pounds, intermittent lifting of 70 pounds, walking, standing, kneeling, bending, stooping,

³ The evidence pertaining to appellant's prior claim includes decisions dated August 6, 2012, part of a March 3, 2013 hearing representative's decision, and April 14, 2014 concerning the denial of her occupational disease claim. Appellant filed a claim alleging that on September 29, 2011 she first became aware of her condition, but did not realize her cervical radiculopathy, cervical disc prolapse, and C4-7 cervical myelomalacia was employment related until May 1, 2012. OWCP, in these decisions, found that she had failed to establish the factual aspect of her claim.

twisting, pushing, reaching above the shoulders, pulling, and carrying mail for eight hours per day five days per week “must have aggravated her lumbar radicular and spinal cord pyramidal disease process.” Dr. Gupta opined that these duties adversely impacted appellant’s cervical spine, resulting in cervical cord compression, cervical roots compress, and myelomalacia. He further noted that her repetitive activities had direct impact on her cervical spine including aggravating her cervical cord compression, cervical radiculopathy, and myelomalacia. Dr. Gupta concluded that appellant sustained permanent aggravation of her preexisting cervical myelomalacia, cervical myelomalacia, cervical spinal cord compression with cervical spinal canal stenosis, and myelopathy due to her repetitive work duties. He opined that there was no other reasonable explanation.

In her May 5, 2015 statement, appellant reiterated information regarding the positions she held at the employing establishment from March 1999 to October 25, 2011 from her October 10, 2014 statement. On May 28, 2015 appellant’s representative requested reconsideration.

On August 26, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Robert F. Draper, a Board-certified orthopedic surgeon, to determine whether the diagnosed conditions were causally related to her factors of employment.

In a September 30, 2015 report, Dr. Draper based upon a review of the statement of accepted facts, medical evidence, and physical examination, diagnosed cervical spinal stenosis, cervical myelomalacia, C4-7 degenerative disc osteophyte pathology, and status post C5-6 anterior cervical discectomy fusion, which he found unrelated to appellant’s employment. He opined that there was no evidence of any permanent aggravation, acceleration, or precipitation of her degenerative cervical spine condition. Dr. Draper attributed appellant’s symptoms and complaints to her cervical spinal stenosis. He observed that she did not exhibit the stumbling gait during his examination that was noted in her history.

On October 5, 2015 OWCP referred appellant to Dr. Amir H. Fayyazi, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Draper and Dr. Gupta regarding whether her cervical conditions were caused or aggravated by her federal employment.

In a December 7, 2015 report, Dr. Fayyazi based upon a review of the medical evidence, medical and employment history, statement of accepted facts, and physical examination, diagnosed preexisting multilevel progressive degenerative disc disease and facet arthrosis, which he opined was unrelated to her employment. He also reviewed correspondence from the employing establishment, accident report, and statement of employment. Dr. Fayyazi reported that appellant worked for the employing establishment as a sales clerk for approximately 15 years, but had last worked in October 2011. A physical examination revealed decreased lumbar and cervical range of motion, normal bilateral shoulder range of motion, no evidence of upper extremity deformity, decreased right C5 sensation, decreased sensation along the bilateral L5 distribution, and absent Waddell’s signs. Dr. Fayyazi summarized the diagnostic tests and medical reports from Drs. Gupta and Draper and noted a diagnosis of myelopathy due to spinal cord compression in 2011 based on radiographic evidence. He opined that myelomalacia and myelopathy were not due to either traumatic injury or repetitive injuries, but were preexisting conditions. In support of this conclusion, Dr. Fayyazi observed that myelomalacia is a natural

and progressive process occurring in individuals who suffer from small canal diameter and osteophyte formation. According to him there was no indication of any employment involvement in appellant's cervical condition. Dr. Fayyazi noted that he had reviewed Dr. Gupta's report, which he opined was inconsistent with published literature and "what is considered to be factual." In addition, he advised that myelomalacia and myelopathy are degenerative conditions with no correlation to any specific injury.

By decision dated December 17, 2015, OWCP found the evidence of record sufficient to establish the factual basis of appellant's claim, but insufficient to establish that the diagnosed cervical stenosis was caused or aggravated by the identified employment factors. It found that the weight of the medical opinion evidence rested with the opinion of the impartial medical examiner, Dr. Fayyazi.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish 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 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 a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁸ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is causal relationship between the employee's diagnosed condition and the compensable employment factors.⁹ The opinion of the physician must be based on a complete

⁴ *Supra* note 2.

⁵ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Roy L. Humphrey*, 57 ECAB 238 (2005); *Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

⁹ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

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

Section 8123(a) of FECA 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.¹¹ 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.¹²

ANALYSIS

Appellant filed an occupational disease claim alleging that her repetitive job duties from her various positions aggravated cervical spinal stenosis, C4-7 cervical disc prolapse, cervical radiculopathy, and cervical myelomalacia. OWCP found the factual evidence sufficient to establish the alleged employment factors, but denied the claim as the medical evidence was insufficient to establish causal relationship.

OWCP denied appellant's occupational disease claim as it found that the weight of the medical opinion evidence rested with the opinion of Dr. Fayyazi, the impartial medical examiner. However, the Board finds that Dr. Fayyazi's December 7, 2015 report is not sufficiently well rationalized to be accorded the special weight of medical opinion. Dr. Fayyazi concluded that appellant did not sustain a work-related occupational disease. He diagnosed preexisting multilevel progressive degenerative disc disease and facet arthrosis and myelopathy due to spinal cord compression based on radiographic evidence. Dr. Fayyazi concluded that her myelomalacia and myelopathy were preexisting conditions and unrelated to either a traumatic or repetitive work injury. He observed that myelomalacia is a natural and progressive process occurring in individuals who suffer from small canal diameter and osteophyte formation and was not employment related.

The Board finds that Dr. Fayyazi's conclusion on causal relationship is vague and lacks sufficient medical rationale.¹³ Dr. Fayyazi concluded that the cervical myelomalacia and myelopathy were not aggravated by work factors, but he did not provide any detailed explanation for his stated conclusion.

Dr. Fayyazi also noted reviewing and disagreeing with Dr. Gupta's report as it was not based on the facts or published medical literature. The Board has previously noted that causal relation is a medical question that generally can only be established by competent medical

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

¹¹ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹² *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹³ *Supra* note 10.

opinion evidence.¹⁴ Scientific studies, like medical literature, have probative value only to the extent they are interpreted by a physician rendering an opinion on causal relation.¹⁵ Dr. Fayyazi opined appellant's condition was preexisting and there was no basis in the literature to attribute aggravation to employment factors, but he did not provide an explanation of his conclusion, based upon interpretation of specific medical literature.¹⁶

For the above-described reasons, the opinion of Dr. Fayyazi is in need of clarification. Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded for a supplemental report to provide rationale regarding whether appellant sustained a work-related occupational disease.¹⁷ After such further development as OWCP deems necessary, an appropriate decision should be issued regarding her occupational disease claim.

CONCLUSION

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

¹⁴ *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁵ *Elizabeth H. Kramm, claiming as widow of Leonard O. Kramm*, 57 ECAB 117 (2005).

¹⁶ *Supra* note 10.

¹⁷ *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *V.G.*, 59 ECAB 635 (2008); *Nancy Keenan*, 56 ECAB 687 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 17, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 8, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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