

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

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D.B., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, DALLAS/FORT WORTH )  
INTERNATIONAL AIRPORT, Coppel, TX, )  
Employer )

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**Docket No. 16-0904  
Issued: May 2, 2017**

*Appearances:*  
*Jennifer Raymond, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 25, 2016 appellant, through counsel, filed a timely appeal from a January 25, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant met her burden of proof to establish cervical conditions due to her accepted May 10, 2007 employment injury.

On appeal counsel contends: (1) that OWCP did not properly evaluate all of the medical evidence; (2) that it did not resolve the dispute between appellant's treating physician and OWCP's medical adviser; and (3) that OWCP erred in relying upon the opinion of OWCP's medical adviser.

## **FACTUAL HISTORY**

On June 3, 2007 appellant, then a 54-year-old lead transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 2007 she was walking from the unload end of the conveyor to the load end when she tripped over a tub trolley. She noted that she fell to the side of the exit conveyer, landed on her side, and hit her head on the conveyer. Appellant listed the nature of her injury as multiple bruises down the side of her body, swollen jaw, and pain in her neck and back.

Appellant received treatment from a nurse at Harris Occupational Health on June 14, 2007 for the May 10, 2007 incident. At that time, she was asked to mark areas on a diagram as to where she hurt, and she shaded both sides of her lower neck, both buttocks, and her right leg and foot. The nurse's notes from the same date indicate that appellant fell on May 10, 2007 and injured her neck, lower back, right hip, right foot, and right leg.

On July 16, 2007 OWCP accepted appellant's claim for sprain of the lumbar region of the back and for thoracic or lumbosacral neuritis or radiculitis. Appellant returned to work in a limited-duty capacity until she was released to full duty on August 21, 2007. However, due to a change in her medication, the employing establishment was unable to accommodate her new restrictions and appellant stopped work on October 14, 2011. Appellant received benefits on the supplemental and periodic rolls as of June 20, 2011.

Appellant began receiving medical treatment for her back shortly after the May 10, 2007 employment injury from Dr. Daniel Kim, a Board-certified physiatrist. In a July 16, 2007 report, Dr. Kim listed his impressions as: (1) low back, right buttock and right leg pain, status post work injury on May 10, 2007; (2) probable right lumbar radiculopathy; (3) possible right lumbar facet dysfunction; (4) grade 1 L4-5 anterolisthesis; (5) lumbar spinal stenosis; and (6) lumbar sprain/strain. Appellant continued to have near-monthly appointments with either Dr. Kim or an associate. In a March 23, 2009 progress report, Dr. Kim mentioned that appellant was experiencing chronic cervical pain. He noted that appellant complained of chronic neck pain before her fall and that she felt it had been inflamed. Dr. Kim noted that cervical flexion and extension caused neck pain, and that cervical rotation to the left was more painful than to the right.

Appellant received treatment from the Village Chiropractic Center from March 25 through April 10, 2008 for sciatica, neuralgia, thoracic subluxation complex, cervical subluxation complex, and injury to multiple nerves in the pelvis.

On May 23, 2011 appellant began to receive treatment from an associate of Dr. Kim, Dr. R. Jamie Spicer, a Board-certified physiatrist. In his May 23, 2011 report, Dr. Spicer diagnosed low back pain due to a work-related injury, right greater than left lumbar radiculitis secondary to a work-related injury, and imaging evidence of grade 1 spondylolisthesis at L4-5 with moderate spinal stenosis at the L4-5 level. In a September 12, 2011 note, he asked that appellant be excused from work for a flare up of pain in the lower lumbar region. Dr. Spicer noted that she was being treated for lumbago, lumbar radiculopathy, and lumbar spondylosis. In a December 5, 2011 report, he advised that appellant had been going to physical therapy for her injuries and that it had exacerbated her neck and thoracic pain. In a March 14, 2012 letter, Dr. Spicer provided treatment results. He noted that appellant had continued complaints of neck pain that were a consequence of the original injury and that the neck pain had earlier been described to the initial spine specialist. Dr. Spicer continued to note her complaints of neck pain in subsequent reports.

In a March 12, 2015 report, Dr. Kim noted cervical extension more painful than cervical flexion. In a June 17, 2015 report, he noted that appellant was in the performance of her regularly assigned duties as a lead transportation security screener on May 10, 2007, when she injured her neck and low back when she twisted her spine after tripping over a tub trolley and hitting her head on the exit conveyer ramp. Dr. Kim noted that this injury was clearly noted in her claim, on the initial report at Harris Occupational Health on June 14, 2007 and in her treatment notes from her chiropractor. He concluded that it was well documented that as a result of appellant's work injury on May 10, 2007 she experienced a swollen jaw, multiple bruises down the left side of her body, and painful injuries to her back and neck, causing radicular symptoms on her left side. Dr. Kim noted that her recent physical examination findings which confirmed her persistent cervical injury included cervical extension more painful than cervical flexion, severe left cervical paraspinal tenderness and left upper trapezius spasms, reduced trace left biceps reflex compared to 1+ right biceps reflex, mildly decreased sensation to light touch in the left hand, and Spurling's test mildly positive for radicular symptoms in her left upper extremity on the left side. He opined that appellant's fall of May 10, 2007 caused cervicalgia, left cervical facet dysfunction, and left cervical radiculopathy.

In a June 17, 2015 letter to OWCP captioned "Request to Upgrade Conditions," appellant, through counsel, requested an upgrade to include an injury to her cervical spine.

On July 15, 2015 OWCP asked its medical adviser to determine whether these additional conditions were caused by the work injury of May 10, 2007. On July 28, 2015 Dr. H. Mobley, an internist and OWCP medical adviser, reviewed the medical record and determined that it failed to support the contention that appellant had significantly injured her cervical spine at the time of the initial fall. He noted that her neck complaints started several years afterwards and were complicated by the presence of fibromyalgia. Dr. Mobley also noted that the suggested diagnoses of facet dysfunction and cervical radiculopathy were lacking in diagnostic confirmation.

On August 3, 2015 another OWCP medical adviser, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, indicated that while Dr. Kim was correct that the mechanism of injury on May 10, 2007 included appellant's head striking the conveyer belt, and that there was a complaint of neck pain at the time of the initial visit to Harris Occupational Health in 2007, the

subsequent records, including multiple visits with Dr. Kim, make no reference to any cervical or upper extremity radicular complaints. He noted it was not until December 5, 2011, more than four years following the work-related injury of May 10, 2007, that Dr. Spicer noted cervical complaints. Dr. Kim opined that while appellant may have struck her head at the time of the initial injury and sustained a cervical strain, based on the records within the database including many visits addressing her ongoing lumbar complaints, but none addressed ongoing cervical/neck complaints, any potential cervical injury sustained in 2007 was self-limited. He concluded that the subsequent complaints beginning in 2011 and the diagnoses proposed by Dr. Kim were not supported, even in part, *via* a causal link to the work-related injury of 2007.

In a decision dated September 3, 2015, OWCP denied appellant's request to expand the accepted conditions, as the medical evidence failed to establish that cervicalgia, left cervical facet dysfunction, and left cervical radiculopathy were due to the accepted work injury of May 10, 2007.

On December 14, 2015 appellant, through counsel, requested reconsideration. Counsel asked that OWCP either accept appellant's claim for cervicalgia, left cervical facet dysfunction, and left cervical radiculopathy or further develop the evidence.

In support of her reconsideration request, appellant submitted a statement dated September 24, 2015. She detailed her injury history from the date of the employment injury, May 10, 2007, to the present. Appellant noted that during the weeks after her employment injury, her back and neck hurt, but that the pain that began to occur in her calf and radiated in her knee and foot became excruciating. She explained that this pain in her leg was so intense that she was not thinking about her cervical condition much at that time. Appellant indicated that she could not receive treatment from a physician for her cervical condition because it was not an accepted condition, but that her chiropractor was treating her cervical issues. She noted that both Drs. Kim and Spicer would tell her that her cervical condition was not covered. Appellant indicated that she stopped seeing her chiropractor because it became financially difficult.

In further support of the reconsideration request, counsel submitted a December 8, 2015 medical report wherein Dr. Kim reiterated appellant's medical history and restated his earlier conclusions regarding appellant's cervical conditions. Dr. Kim responded to the medical reports by OWCP's medical advisers. He noted that the reason that there was no reference to appellant's cervical spine or upper extremity radicular complaints during her early visits was because her cervical spine injury was not included or covered in her workers' compensation injury claim when she was referred to his office. Dr. Kim noted that financial difficulty caused her to stop paying for the chiropractor who was treating her cervical condition, and that is why she mentioned the worsening cervical spine condition to Dr. Spicer, who started documenting her neck complaints in his office note dated December 5, 2011. He concluded that, based on the objective findings, it was his medical conclusion, with reasonable medical certainty, that the way appellant fell on her head and the resulting impact to her neck from the work-related injury on May 10, 2007 caused cervicalgia, left cervical facet dysfunction, and probable left cervical radiculopathy.

By decision dated January 25, 2016, OWCP determined that the evidence submitted on reconsideration was insufficient to modify the decision of September 3, 2015, because the

medical evidence of record did not support that appellant's cervicgia, left cervical facet dysfunction, and cervical radiculopathy were related to the employed-related injury of May 10, 2007.

### **LEGAL PRECEDENT**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>3</sup>

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, 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 claimant.<sup>4</sup>

### **ANALYSIS**

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

OWCP accepted that appellant had a lumbar sprain and thoracic/lumbosacral radiculopathy causally related to the accepted May 10, 2007 employment injury. Appellant asked that this claim be expanded to include acceptance of her cervical conditions, *i.e.*, cervicgia, left cervical facet dysfunction, and probable left cervical radiculopathy. OWCP denied expansion of the claim to accept these conditions.

When appellant filed her claim on June 3, 2007, she mentioned her neck pain. Appellant also described neck pain at the time of her initial treatment with Harris Occupational Health on June 14, 2007 and shaded a diagram to indicate neck pain. She also received chiropractic treatment for her neck in 2008. The first mention by a physician of neck pain was by Dr. Kim in his March 23, 2009 progress report. Dr. Spicer noted on March 14, 2012 that, in reviewing appellant's record, appellant complained of neck pain with the initial injury and that she had continued to complain of neck pain subsequent to this injury. Dr. Kim noted in his June 17, 2015 report that the way appellant fell on her head on May 10, 2007 caused cervicgia, left cervical facet dysfunction, and left cervical radiculopathy.

OWCP referred appellant's case to OWCP medical advisers, but neither Dr. Mobley nor Dr. Katz believed that her cervical conditions were causally related to the May 10, 2007 employment injury. Dr. Mobley indicated that her neck complaints started several years after the employment injury and were complicated by the presence of fibromyalgia. Dr. Katz noted that,

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<sup>3</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004); *see also M.R.*, Docket No. 15-1181 (issued January 29, 2016).

<sup>4</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

although appellant did initially note neck pain in 2007, subsequent records, including reports by Dr. Kim, make no reference to any cervical or upper extremity radicular complaint and that the first reference of a cervical injury was not until December 5, 2011, more than four years following the employment-related injury of May 10, 2007. However, Dr. Kim clearly noted in a March 23, 2009 progress report that appellant was experiencing chronic cervical pain. Therefore, the opinions of OWCP's medical advisers contradicting the reports of Drs. Kim and Spicer are not based on an accurate medical history, do not represent the weight of the medical evidence, are insufficient to deny appellant's claim for compensation for her cervical conditions.

Dr. Kim reviewed the reports of OWCP's medical adviser and, in a December 8, 2015 report, described appellant's employment incident noting that she clearly had indicated on her claim form and in her first medical appointment after the May 10, 2007 incident that she had neck pain. He explained that neck pain was not discussed in his earlier reports because her cervical spine injury was not covered by her workers' compensation injury claim. Dr. Kim also noted that appellant had received treatment for this condition from her chiropractor, but that when she stopped seeing him due to financial difficulties, Dr. Spicer started documenting cervical complaints. Dr. Kim concluded that, based on his objective findings, it was his medical conclusion that she fell on her head on May 10, 2007 and the resulting impact to her neck from the employment-related injury on May 10, 2007 caused cervicgia, left cervical facet dysfunction, and probable left cervical radiculopathy.

Dr. Kim and Dr. Spicer submitted medical opinions linking appellant's cervicgia, left cervical facet dysfunction, and probable left cervical radiculopathy, to appellant hitting her head on the exit conveyer ramp on May 10, 2007. They noted her history of injury, that she complained of neck pain shortly after the injury, and that she was treated for neck pain by her chiropractor.

The Board finds that the opinions of Dr. Spicer and Dr. Kim are sufficient to require further development of the record. Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>5</sup>

On remand OWCP should submit a statement of accepted facts to a second opinion physician in order to obtain a rationalized opinion as to whether appellant's current cervical condition is causally related to her accepted employment injury of May 10, 2007. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The case is not in posture for decision as further development of the medical evidence is necessary.

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<sup>5</sup> *L.T.*, Docket No. 16-0172 (issued July 13, 2016); *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 25, 2016 is set aside and this case is remanded for further action consistent with this decision.

Issued: May 2, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board