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

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| **C.F., Appellant** | ) | |
| **and** | ) | **Docket No. 17-0951** |
| | ) | **Issued: June 11, 2018** |
| **U.S. POSTAL SERVICE, POST OFFICE, Newport, RI, Employer** | ) | |

*Appearances:*
*Benjamin R. Zimmermann, Esq*., for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

### ***JURISDICTION***

On March 29, 2017 appellant, through counsel, filed a timely appeal from a March 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant, through counsel, filed a timely request for oral argument, pursuant to 20 C.F.R. § 501.5(b). By order dated August 10, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0951 (issued August 10, 2017).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[4]

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish permanent aggravation of bilateral hip arthritis causally related to factors of her federal employment.

## ***FACTUAL HISTORY***

On April 24, 2014 appellant, then a 40-year-old former letter carrier, filed an occupational disease claim (Form CA-2) alleging that the acceleration of her preexisting bilateral hip osteoarthritis was causally related to the repetitive work duties she had performed during her federal employment from December 1986 until her retirement on October 19, 2012. She alleged that she first became aware of her condition and its relationship to her federal employment on January 28, 2014.

In a detailed statement, appellant described the work duties she claimed were responsible for the acceleration of her bilateral hip condition. She also noted other relevant events in her work and medical history.[5] Appellant recounted that she was off work after a fall at work on October 13, 2011, when she injured her back, shoulder, and hip.[6] She returned to light-duty work with increased restrictions after being off work for approximately one year.[7] Appellant retired on disability from the employing establishment as of October 2012.[8]

On October 14, 2011 Dr. David A. Johnson, a diagnostic radiologist, diagnosed a hip strain. October 14, 2011 post fall left hip x-rays, when compared to a September 26, 2011 study, revealed a normal left hip with a well-maintained hip joint space.

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[3] 5 U.S.C. § 8101 *et seq.*

[4] The record provided to the Board includes evidence received after OWCP issued its March 2, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

[5] In 1997, appellant started working modified duty due to a neck injury and used a pushcart instead of a satchel. In 2001, she was off work due to an accepted herniated cervical disc work injury under OWCP File No. xxxxxx961, and she has an accepted claim for cervical and thoracic sprains, cervical disc herniation C6-7 and aggravation of cervical radiculopathy after she lifted a tub of mail. Appellant eventually returned to full-time work in 2003 with lifting restrictions and use of a pushcart. In 2004, she fractured her collarbone in a motor vehicle accident. Appellant's work restrictions temporarily increased after her accident, but she eventually returned to her prior limited-duty job. In 2008, she was off work for several weeks due to Achilles tendinitis. Under OWCP File No. xxxxxx057, OWCP accepted a right Achilles strain due to a May 26, 2008 employment injury.

[6] Under OWCP File No. xxxxxx633, appellant has an accepted impingement syndrome of the left shoulder and left rotator cuff contusion as a result of her employment-related slip and fall on October 13, 2011.

[7] Appellant indicated that her hip pain began in 2007 and the pain became intolerable in 2009.

[8] Under OWCP File No. xxxxxx534, OWCP denied a claim for bilateral Hallux Rigidus, Metatarsalgia, Equinus deformity of foot and tarsal tunnel syndrome.

On May 19, 2013 Paula Hughes, a physician assistant, indicated that appellant had pain in the ankle and foot joint, cervicalgia, and pain in joint, pelvic region, and thigh.

On June 14, 2013 x-rays of the bilateral hips were reported as normal. Pelvis x-rays were noted as stable with minimal hip joint space narrowing bilaterally.

In an August 5, 2013 report, Dr. Daniel Regan, a family practitioner, provided an assessment of cervicalgia and joint pain in ankle and foot as well as in pelvic region and thigh.

On January 28, 2014 appellant was evaluated by Dr. Byron V. Hartunian, an orthopedic surgeon. In an April 2, 2014 report, Dr. Hartunian noted that she was treated for hip pain by Dr. David Johnson, an osteopathic physician. He indicated that the September 26, 2011 x-rays of appellant's hips and pelvis taken by Dr. Johnson revealed early arthritic changes of the hips. Dr. Hartunian also noted that she had a trip and fall in October 2011, after which she had increased discomfort in her left hip and shoulder, for which she underwent physical therapy. He reviewed x-rays of the pelvis and hips dated September 26, 2011 and June 14, 2013. Dr. Hartunian indicated that the June 14, 2013 x-rays revealed a superior femoral acetabular space of two millimeter (mm) cartilage interval with sclerosis of the superior acetabulum with bilateral hip arthritis. He discussed research that indicated impact loading from physical duties accelerated the progression of arthritis. Dr. Hartunian opined that appellant's job duties accelerated the progression of her hip arthritis.

By decision dated July 31, 2014, OWCP denied the claim as the medical evidence submitted failed to demonstrate that the claimed medical condition was causally related to the established work factors.

On August 4, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. The hearing was held on November 19, 2014. Additional evidence was submitted, including a September 26, 2011 right hip x-ray, which was interpreted as an unremarkable study.

By decision dated March 9, 2015, an OWCP hearing representative accepted the claim for aggravation of bilateral arthritis of the hips. He noted that the medical evidence submitted was insufficiently reasoned to show that appellant sustained a permanent aggravation or acceleration of the underlying osteoarthritis condition, but indicated that OWCP should develop the medical evidence and adjudicate the issue of the nature and extent of the work-related aggravation and whether it was temporary or permanent. The hearing representative further noted that the current claim should be administratively combined with the October 13, 2011 injury assigned File No. xxxxxx633, which OWCP accepted for left shoulder impingement syndrome and left rotator cuff contusion, as appellant had reported and the physicians of record had confirmed, that at the time of the October 13, 2011 injury she had experienced worsened left hip pain.

On April 10, 2015 OWCP formally accepted the claim for aggravation of bilateral hip arthritis.

On October 25, 2016 OWCP referred the case record along with a statement of accepted facts (SOAF) to its medical adviser for an opinion as to whether the accepted condition of aggravation of bilateral hip arthritis was permanent or temporary in nature. In an October 27, 2016 report, OWCP's medical adviser, Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon,

reviewed the medical evidence of record and related that, when appellant was treated for hip pain, the diagnosis made by the treating physicians at that time was S1 joint and hip strain, and not osteoarthritis of either hip. He opined that there was insufficient evidence that she had osteoarthritis of her hips or that there had been any aggravation, temporary, or permanent, of arthritis in either of her hips. Dr. Orenstein recommended that an independent radiologist interpret the x-rays of the hips taken in 2011 and 2013 to determine whether or not osteoarthritis of appellant's hips was actually present.

On October 26, 2016 the instant claim was administratively combined with the October 13, 2011 injury assigned File No. xxxxxx633, which OWCP had accepted for left shoulder impingement syndrome and left rotator cuff contusion.

In November 2016, OWCP referred appellant, along with a SOAF, the case record, and a list of questions, to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether the accepted condition of aggravation of bilateral hip arthritis was permanent or temporary in nature. In a November 14, 2016 report, Dr. Geary opined that, based on his review of the record, it did "not appear that appellant had ever actually suffered from hip arthritis." Rather, appellant may be suffering from bilateral sacroiliac (SI) joint arthritis which may have been aggravated by her fall in 2011. Dr. Geary indicated that if the bilateral SI joint arthritis was an accepted condition, then the aggravation of her bilateral SI joint arthritis was likely permanent. He concluded that appellant never suffered from bilateral hip arthritis.

On December 7, 2016 OWCP informed appellant that, since Dr. Geary's opinion differed from Dr. Hartunian's as to whether the accepted aggravation of her bilateral hip arthritis was temporary or permanent, she would be scheduled for an impartial medical evaluation. On December 9, 2016 it referred her, along with a SOAF, a list of questions, and the case record, to Dr. Murray Goodman, a Board-certified orthopedic surgeon, for an impartial medical examination.[9]

In a December 18, 2016 report, Dr. Justin W. Kung, a diagnostic radiologist, reviewed appellant's June 14, 2013 bilateral hip x-rays. He indicated that the right femoroacetabular compartment measured 2.5 mm and the left femoroacetabular compartment measured 2.5 mm and that there was moderate narrowing bilaterally. Dr. Kung opined that there was moderate degenerative change in the right and left femoroacetabular compartments.

In a January 30, 2017 report, Dr. Goodman noted his review of the case file and the SOAF and presented examination findings. He explained that appellant had a predilection for arthritis as she had radiographic evidence of osteoarthritis at the first metatarsophalangeal joint and the knee, and further explained that the natural history of osteoarthritis is for it to progress over a period of time. Dr. Goodman opined that the physical examination did not support a diagnosis of clinically significant osteoarthritis based upon an excellent preservation of range of motion, no guarding,

[9] On January 24, 2017 counsel objected to the selection of Dr. Goodman as the impartial medical specialist. He noted that a number of physicians must have been bypassed to select Dr. Goodman as his office was 96 miles from appellant's residence. The bypass history report reflects that five physicians were bypassed because they did not perform impartial medical evaluations, were retired, or did not treat or evaluate hip conditions. Counsel has not continued to contest the selection process.

and a normal gait. He indicated that x-ray studies from 2013 when compared to 2011 showed no significant progression of symmetric joint space narrowing. Dr. Goodman indicated that, while minor narrowing on the 2013 radiographs was noted by Dr. Kung, the primary radiologist interpretation had shown no change from 2011 to 2013, which indicated no aggravation. He, therefore, opined that appellant had minor radiographic osteoarthritis and none of the major clinical findings of osteoarthritis of the hip, and neither appellant's job duties nor the 2011 work injury was responsible for any permanent progression or aggravation or acceleration of the preexisting bilateral hip arthritis. Dr. Goodman again related that this opinion was based on minimal objective findings of hip osteoarthritis on physical examination and an absence of radiographic progression noted two years following the injury. He further indicated that he concurred with Dr. Geary's opinion that appellant's symptoms were more reflective of lumbar radiculitis or SI joint pain than they were of osteoarthritis of the hip. Dr. Goodman concluded that he took exception to Dr. Hartunian's contention that she had significant osteoarthritis, which was adversely affected by the injury at work.

By decision dated March 2, 2017, OWCP accepted appellant's claim for temporary aggravation of minor osteoarthritis, both hips. In a second decision also dated March 2, 2017, it denied her occupational disease claim for permanent aggravation or acceleration of her bilateral hip arthritis causally related to the accepted employment exposure. OWCP noted that prior authorization for medical treatment was terminated. Determinative weight was accorded to the opinion of Dr. Goodman, the impartial medical examiner.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[10] 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 or specific condition for which compensation is claimed is causally related to the employment injury. 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.[11]

It is well established that where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable. However, the normal progression of untreated disease cannot be stated to constitute aggravation of a condition merely because the performance of normal work duties reveal the underlying condition. For the conditions of employment to bring about an aggravation of preexisting disease, the employment must be such as to cause acceleration of the disease or to precipitate disability.[12]

[10] *Supra* note 3.

[11] *J.E.*, 59 ECAB 119 (2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[12] *A.C.*, Docket No. 08-1453 (issued November 18, 2008).

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.[13] 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.[14]

## ***ANALYSIS***

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

By decision dated March 9, 2015, an OWCP hearing representative accepted appellant's claim for aggravation of bilateral hip arthritis. However, he found that the medical evidence should be further developed to determine whether the aggravation was temporary or permanent. OWCP thereafter further developed the claim and referred appellant to Dr. Goodman to resolve the conflict in medical opinion evidence between Dr. Hartunian and Dr. Geary, the second opinion physician, on the issue of whether she had sustained a permanent aggravation or acceleration of the accepted bilateral hip osteoarthritis. Following receipt of Dr. Goodman's report, by decision dated March 2, 2017, OWCP accepted her claim for temporary bilateral hip aggravation of minor osteoarthritis. In a separate decision dated March 2, 2017, it denied appellant's claim for permanent aggravation or acceleration of her bilateral hip arthritis and terminated authorization for medical treatment.

Dr. Geary, the second opinion examiner, found that appellant never suffered from bilateral hip arthritis. He related that it did not appear that she actually had hip arthritis, but that she may have bilateral S1 joint arthritis which may have been aggravated by the employment incident.[15] The Board finds that Dr. Geary's opinion is of diminished probative value as he disregarded the fact that OWCP had found and accepted that appellant had bilateral hip arthritis. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his or her opinion on the accepted facts.[16] The Board has found that the report of a second opinion physician who disregarded a critical element of the SOAF was of diminished probative value.[17]

Therefore, at the time of the referral to Dr. Goodman, there was no conflict in the medical opinion evidence regarding whether the accepted bilateral hip arthritis was temporarily or

[13] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

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

[15] In his October 27, 2016 report, Dr. Orenstein, the district medical adviser, also noted that appellant's treating physicians initially noted an S1 joint strain.

[16] *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

[17] *J.C.*, Docket No. 07-1246 (issued December 13, 2007).

permanently aggravated.[18] Dr. Goodman's report is, thus, not entitled to the special weight afforded to an opinion of an impartial medical specialist. However, his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.[19]

Dr. Goodman acknowledged that the SOAF included a diagnosis of bilateral hip arthritis, however, he did not accept that appellant's employment caused an aggravation, either temporary or permanent, of this condition. Rather, he found that she had preexisting minimal bilateral hip osteoarthritis which was not accelerated by the employment injury. Dr. Goodman related that, while appellant had minor radiographic evidence of osteoarthritis, she had none of the major clinical findings of osteoarthritis. He related that he concurred with Dr. Geary's opinion that her symptoms were more reflective of lumbar radiculitis or S1 joint pain. The reports from OWCP's physicians generally support a diagnosis of S1 pathology, but OWCP did not request clarification of a specific diagnosis, and whether an S1 diagnosis was causally related to the accepted employment injury. Dr. Goodman's opinion is, therefore, also of diminished probative value as he disregarded the SOAF and that OWCP had accepted aggravation of appellant's bilateral hip arthritis as causally related to the accepted employment injury.[20]

Under the circumstances, a supplemental opinion from Dr. Goodman is necessary.[21] Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[22] Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. OWCP shares responsibility to see that justice is done.[23]

On remand OWCP shall prepare an updated SOAF and request that Dr. Goodman clarify his report. After such further development of the medical evidence as deemed necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

[18] *Supra* note 13.

[19] *See D.B.*, Docket No. 16-0648 (issued July 21, 2016).

[20] *Supra* note 18.

[21] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP-Directed Medical Examinations*, Chapter 3.500.3f(2) (July 2011).

[22] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

[23] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 2, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 11, 2018
Washington, DC

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

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

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