

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

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<b>G.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0105</b>
	)	<b>Issued: May 15, 2019</b>
<b>U.S. POSTAL SERVICE, MOUNT</b>	)	
<b>GREENWOOD POST OFFICE, Chicago, IL,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 11, 2018 appellant filed a timely appeal from an April 17, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's April 17, 2018 decision was October 14, 2018. Since using October 18, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 11, 2018, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

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

## ISSUE

The issue is whether appellant has met her burden of proof to establish a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 4, 2013 appellant, then a 55-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she began experiencing pain in her lower back while loading a truck during the performance of her federal duties intermittently for the period December 26, 2012, when she returned to work, until February 29, 2013.<sup>4</sup> She explained that the pain increased while walking and carrying a satchel weighing up to 35 pounds on her shoulder. Appellant alleged that, by the end of the workday, her right leg and knee were weak and her feet ached. She listed the nature of her disease as "pinched nerve in the back/degenerative disc disease." The employing establishment controverted appellant's claim.<sup>5</sup>

In a statement dated March 5, 2013, appellant indicated that she had returned to work after being off work in excess of 11 years due to a prior accepted claim, and she noted that this circumstance presented challenges. She alleged that she had a medical history of lumbar radiculopathy (pinched nerve in her back) which was produced in the work environment and also had degenerative disc disease which was aggravated in the work environment. Appellant noted that, during her absence from work, she worked as a substitute teacher and that, while performing that work she never experienced any of the severe symptoms that were now revisiting her as a result of returning to work in a physically demanding environment. She described her work activities as lifting parcels, standing on a concrete floor, loading trucks, bending, stooping, twisting, climbing stairs to deliver mail, and carrying a satchel weighing up to 35 pounds on her shoulder while walking as many as six to seven miles per day. Appellant also noted that she had to perform heavy lifting and bending to load trucks.

In support of her claim, appellant submitted reports from Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon. In a February 21, 2013 office note, Dr. Chmell

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<sup>3</sup> Docket No. 15-0275 (issued September 17, 2015).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx009.

<sup>5</sup> Under a separate case file, OWCP File No. xxxxxx487, OWCP accepted in 2000 that appellant sustained an occupational injury in the form of a lumbar radiculopathy radiating to her right leg. Under OWCP File Nos. xxxxxx070 and xxxxxx108, OWCP accepted in 2000 that she sustained the occupational injuries of tendinitis and strains of the bilateral feet/ankles, right sided tarsal tunnel syndrome, and a Morton's neuroma of the right foot. Under OWCP File No. xxxxxx496, OWCP accepted in 2003 that appellant sustained the occupational injury of herniated disc at L5-S1. It administratively combined OWCP File Nos. xxxxxx009, xxxxxx487, xxxxxx070, xxxxxx108, and xxxxxx496, and it designated OWCP File No. xxxxxx487 as the master file.

diagnosed lumbar disc derangement with radiculopathy/pinched nerve, bilateral ankle and foot derangement, tendinitis of the upper extremities/carpal tunnel syndrome, cervical derangement, right knee derangement, and left shoulder derangement. In a March 25, 2013 report, he opined that appellant's underlying lumbar condition was aggravated by her work duties.

By decision dated July 12, 2013, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the claimed medical conditions were causally related to the established employment factors.

On August 9, 2013 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated January 24, 2014, OWCP's hearing representative affirmed the July 12, 2013 decision.

On July 10, 2014 appellant requested reconsideration. She submitted a June 26, 2014 report in which Dr. Chmell indicated that she had nerve compression at L5-S1 and bulging and herniated lumbar discs which were caused by her work duties.

By decision dated October 1, 2014, OWCP denied modification of its January 24, 2014 decision, finding that the medical evidence submitted was insufficient to establish that appellant's employment duties resulted in a new employment injury or caused a permanent aggravation of her preexisting back condition.

Appellant appealed the October 1, 2014 decision to the Board and, by decision dated September 17, 2015,<sup>6</sup> the Board set aside OWCP's October 1, 2014 decision, finding that Dr. Chmell's reports were sufficient to require further development of the medical evidence regarding whether she sustained a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment. The Board remanded the case to OWCP for further development, to include a second opinion examination and opinion on this matter.

On remand, OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he provide an opinion regarding whether she sustained an employment-related pinched nerve in her back and/or degenerative disc disease.<sup>7</sup>

In a March 29, 2016 report, Dr. Brecher discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that, upon examination, she was nontender throughout her back and there was no spasm in her lumbar spine. Dr. Brecher indicated that appellant had 5/5 strength and intact sensibility in her lower extremities. He concluded that there was no objective evidence that she suffered an employment-related aggravation of her preexisting lumbar degenerative disc disease. Dr. Brecher opined that

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> Dr. Chmell continued to treat appellant for her multiple medical conditions. In an October 15, 2015 report, he opined that she continued to have employment-related lumbar disc derangement with radiculopathy/pinched nerve.

appellant's subjective back complaints were related to the normal progression of her preexisting condition.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Chmell and Dr. Brecher regarding the issue of whether appellant sustained an employment-related pinched nerve in her back and/or degenerative disc disease. It referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a July 1, 2016 report, Dr. Wehner discussed appellant's factual and medical history, including a history of her numerous diagnostic tests. She reported the findings of the physical examination she performed on July 1, 2016, noting that appellant did not exhibit any objective clinical findings of a pinched nerve such as positive straight leg raise test or diminished motor strength. Appellant exhibited no atrophy or abnormal reflexes in her lower extremities. Dr. Wehner indicated that appellant's subjective complaints upon examination needed to be verified by clinical or radiographic correlation. She indicated that the radiographic findings showed some mild-to-moderate degenerative changes at L5-S1 that were entirely age-appropriate, but not clinically significant. Dr. Wehner advised that disc bulges were not supported in the medical literature as being a specific finding that causes pain or disability in the back. Appellant's magnetic resonance imaging (MRI) scan findings revealed a normal aging process and had no traumatic etiology. Dr. Wehner opined that there was no medical basis to support the fact that a bulging disc caused appellant's ongoing pain or disability.

Dr. Wehner indicated that Dr. Chmell's discussion of how appellant's work activities caused additional shock to her spine was not supported by the medical literature. She noted that, during the present examination, appellant did not complain of any pain radiating down her right leg. Moreover, appellant exhibited normal reflexes, had a normal straight leg raise test, and did not exhibit atrophy. Therefore, there was no clinical evidence to verify that she had any type of radicular pain complaints and her subjective complaints were not verified by any specific clinical or radiographic finding. Dr. Wehner concluded that appellant had not sustained an aggravation or acceleration of her preexisting lumbar degenerative condition due to her work duties performed from December 26, 2012 to February 29, 2013. She found that appellant's continuing back and lower extremity complaints were related to the nonwork-related progression of appellant's preexisting degenerative condition. Dr. Wehner further opined that there was no medical reason to provide limitations for appellant's job as a letter carrier.

By decision dated August 3, 2016, OWCP found that appellant had not established that she sustained a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment. It determined that the special weight of the medical evidence with respect to this matter rested with the well-rationalized opinion of Dr. Wehner.

On August 2, 2017 appellant requested reconsideration of her claim. In an accompanying statement, she argued that the reports of Dr. Chmell established her claim.

Appellant submitted a September 30, 2016 report from Dr. Chmell who reported the findings of his physical examination on September 22, 2016. Dr. Chmell opined that she had an employment-related disc herniation at L5-S1 and right leg radiculopathy.

By decision dated April 17, 2018, OWCP denied modification of its August 3, 2016 decision. It determined the special weight of the medical evidence continued to rest with the well-rationalized opinion of Dr. Wehner.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>8</sup> 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 timely filed within the applicable time limitation period of FECA,<sup>9</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>10</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>11</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.<sup>12</sup>

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence.<sup>13</sup> 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 established employment factors.<sup>14</sup>

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.”<sup>15</sup> In situations where

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<sup>8</sup> *Supra* note 2.

<sup>9</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>10</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>11</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>12</sup> *E.V.*, Docket No. 18-1617 (issued February 26, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>13</sup> *F.S.*, Docket No. 15-1052 (issued July 17, 2015); *Tomas Martinez*, 54 ECAB 623 (2003).

<sup>14</sup> *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *John W. Montoya*, 54 ECAB 306 (2003).

<sup>15</sup> 5 U.S.C. § 8123(a).

there exist 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 upon a proper factual background, must be given special weight.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Chmell, an attending physician, and Dr. Brecher, an OWCP referral physician, on the issue of whether appellant sustained a pinched nerve in her back and/or degenerative disc disease that had been caused or aggravated by the accepted factors of her federal employment. In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Wehner for an impartial medical examination and an opinion on the matter.<sup>17</sup>

The Board finds that the special weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Wehner, the impartial medical specialist selected to resolve the conflict in the medical opinion.<sup>18</sup> The report of Dr. Wehner establishes that appellant did not sustain a pinched nerve in her back and/or degenerative disc disease that was caused or aggravated by the accepted factors of appellant's federal employment.

In her July 1, 2016 report, Dr. Wehner noted that, upon physical examination, appellant did not exhibit any objective clinical findings of a pinched nerve such as positive straight leg raise test or diminished motor strength. She indicated that appellant's subjective complaints upon examination needed to be verified by clinical or radiographic correlation. Appellant's radiographic findings showed some mild-to-moderate degenerative changes at L5-S1 that were entirely age-appropriate, but not clinically significant. Dr. Wehner noted that appellant's MRI scan findings revealed a normal aging process and had no traumatic etiology. She emphasized that there was no clinical evidence to verify that appellant had any type of radicular pain complaints and her subjective complaints were not verified by any specific clinical or diagnostic test finding. Dr. Wehner concluded that appellant did not sustain any aggravation or acceleration of her preexisting lumbar degenerative condition due to her work duties performed from December 26, 2012 to February 29, 2013.

The Board has carefully reviewed the opinion of Dr. Wehner and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Wehner provided a thorough factual and medical history and accurately summarized the relevant medical evidence. She provided medical rationale for her opinion by

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<sup>16</sup> *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>17</sup> *See supra* note 15.

<sup>18</sup> *See supra* note 16.

explaining that appellant did not exhibit objective findings, on physical examination or diagnostic testing, of an employment-related pinched nerve or degenerative disc disease. Dr. Wehner also explained that appellant's continuing back and lower extremity complaints were related to the nonwork-related progression of her preexisting degenerative condition.<sup>19</sup>

After Dr. Wehner produced her July 1, 2016 report, appellant submitted a September 30, 2015 report in which Dr. Chmell opined that appellant had an employment-related disc herniation at L5-S1 and right leg radiculopathy. However, as Dr. Chmell was on one side of the conflict in this case, his additional report is essentially duplicative of his prior opinion and is insufficient to give rise to a new conflict.<sup>20</sup>

Therefore, the Board finds that appellant has not met her burden of proof to establish a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a pinched nerve in her back and/or degenerative disc disease causally related to the accepted factors of her federal employment.

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<sup>19</sup> See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).

<sup>20</sup> See *S.I.*, Docket No. 13-1880 (issued April 18, 2014); *Richard O'Brien*, 53 ECAB 234 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2019  
Washington, DC

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

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

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