

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

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**R.M., Appellant** )  
 )  
**and** ) **Docket No. 19-1406**  
 ) **Issued: February 11, 2020**  
**DEPARTMENT OF THE TREASURY,** )  
**INTERNAL REVENUE SERVICE,** )  
**Fresno, CA, Employer** )  
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*Appearances:*  
*Alan J. Shapiro, 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  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On June 13, 2019 appellant, through counsel, filed a timely appeal from a February 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

<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> The Board notes that following the February 12, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUE**

The issue is whether appellant has met her burden of proof to expand acceptance of her claim to include a degenerative cervical spine condition causally related to the accepted employment injury.

### **FACTUAL HISTORY**

On October 6, 2016 appellant, then a 51-year-old customer service representative, filed an occupational disease claim (Form CA-2) alleging that she sustained overuse syndrome of the upper extremity and arthritis in her fingers and thumbs causally related to factors of her federal employment. She noted that she first became aware of her condition and its relationship to her federal employment on January 1, 2007.<sup>4</sup> OWCP assigned OWCP File No. xxxxxx608.

OWCP had previously accepted appellant's January 11, 2000 occupational disease claim for bilateral carpal tunnel syndrome and cervical sprain, assigned OWCP File No. xxxxxx348, which has been administratively combined with the present file.

In a report dated October 12, 2016, Dr. Sanjay J. Chauhan, a Board-certified neurologist, evaluated appellant for swelling and pain in her hand joints and thumbs "due to her work activity at the [employing establishment] requiring repetitive use of [the] hands." He noted that she was working light duty due to another employment injury, but continued to perform "a fair amount of keyboard work and computer[-]related work." Dr. Chauhan diagnosed secondary osteoarthritis of the bilateral hands as a result of appellant's overuse of her hands and wrists at work.

In a November 7, 2016 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual information, noting that the medical and factual evidence was similar to that in OWCP File No. xxxxxx348. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter appellant submitted an October 26, 2016 e-mail message that indicated that she used a voice-activated program at work, but still needed to type due to software and computer issues. In a handwritten note, she advised that she had degenerative disc disease and cervical problems that had worsened with work and age. Appellant also experienced finger pain with extended typing.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The employing establishment indicated that appellant was last exposed to the employment factors identified as causing her condition on January 1, 2007. However, appellant subsequently clarified that she was attributing her condition to work duties that she had performed from 2001 to the present.

By decision dated December 12, 2016, OWCP denied appellant's occupational disease claim. It found that she had not submitted sufficient factual evidence to establish that the current claim differed from OWCP File No. xxxxxx348.

On January 9, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated May 31, 2017, OWCP's hearing representative set aside the December 12, 2016 decision. She found that appellant had distinguished the current claim from her prior claim as she had identified the duties of her modified position beginning in 2001 as a cause of her condition, while the implicated employment factors in OWCP File No. xxxxxx348 were her regular work duties. The hearing representative accepted the occurrence of the described employment factors and found that the evidence from Dr. Chauhan was sufficient to warrant further development of the medical evidence.

OWCP referred appellant to Dr. Mohinder Nijjar, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 18, 2017, Dr. Nijjar reviewed the history of injury, her current complaints of neck and bilateral hand pain, and the medical evidence of record, including the results of diagnostic studies. He diagnosed degenerative arthritis of the cervical spine at C4-5, C5-6, and C6-7 and degenerative arthritis of the bilateral hands and the distal interphalangeal (DIP) joint of the right index finger. Dr. Nijjar opined that appellant's employment duties had not aggravated the preexisting cervical arthritis and bilateral hand and finger arthritis, noting that diagnostic studies showed a normal progression of her cervical condition and that her bilateral hand condition revealed degenerative changes consistent with age.

On November 17, 2017 OWCP requested that Dr. Chauhan review Dr. Nijjar's report and advise whether he agreed or disagreed with his opinion.

In a report dated November 18, 2017, Dr. Chauhan disagreed with Dr. Nijjar's findings. He reviewed appellant's employment duties, noting that after beginning modified employment in 2001 she had worked with a keyboard and mouse. Dr. Chauhan opined that her light-duty employment had aggravated her osteoarthritis of the cervical spine and bilateral hand osteoarthritis.

By decision dated December 21, 2017, OWCP denied appellant's occupational disease claim. It found that Dr. Nijjar's opinion represented the weight of the evidence and established that she had not sustained cervical degenerative disc disease and hand and finger arthritis causally related to factors of her federal employment.

On January 3, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on June 12, 2018. Appellant described the duties of her modified employment from 2001 through the present.

By decision dated August 6, 2018, OWCP's hearing representative set aside the December 21, 2017 decision. She found that a conflict in medical opinion existed between

Dr. Chauhan and Dr. Nijjar and remanded the case for OWCP to refer appellant for an impartial medical examination.

On November 13, 2018 OWCP referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon, for an impartial medical examination.<sup>5</sup>

In a report dated December 22, 2018, Dr. Hanley discussed appellant's complaints of cervical pain and pain in her arms and hands bilaterally. He reviewed the history of injury and the medical evidence of record, including the results of diagnostic testing. Dr. Hanley provided examination findings, including range of motion measurements for the cervical spine. He diagnosed chronic cervical degenerative disc disease, degenerative osteoarthritis of the hands affecting multiple distal joints bilaterally, and chronic maladaptive pain syndrome. Dr. Hanley opined that appellant's "hand condition can be attributed to a permanent aggravation from her work activities...." Regarding her neck condition, he indicated that she had preexisting cervical disc disease and related:

"Again, this underlying problem has a natural progression and history to continue to degenerate with time; however, I think it is much more difficult to suggest that the simple activities of looking at a computer screen, turning towards the phone, or turning towards a keyboard would be enough to significantly accelerate her cervical condition. Her cervical condition has been quite bothersome for many years now, prompting her to have to take very extended breaks from her regular work duties, and I do not think that she would be any worse today from the cervical spine standpoint absent her work exposure."

Thereafter, on January 10, 2019, OWCP received a report dated December 20, 2018 from Dr. Chauhan, submitted in OWCP File No. xxxxxx348. Dr. Chauhan noted appellant's current complaints of bilateral numbness, tingling, and arthritic changes of the hands, arthritic changes of the thumbs, neck pain, and bilateral shoulder pain. He reviewed the medical reports of record and her work history, noting that she had performed repetitive typing and computer work, and also engaged in extended neck flexion using a telephone. On examination, Dr. Chauhan found a loss of cervical lordosis and paracervical muscle spasms. Regarding the cervical spine, he diagnosed chronic strain, disc degeneration, and disc displacement. Dr. Chauhan opined that appellant had sustained cervical strain, stenosis, and cervical disc degeneration causally related to using her hands repetitively at work and "prolonged neck positioning due to her tasks...."

On February 12, 2019 OWCP accepted appellant's claim for a permanent aggravation of primary osteoarthritis of the hands bilaterally.

By separate decision dated February 12, 2019, OWCP denied appellant's claim for a degenerative cervical condition causally related to factors of her federal employment. It found that Dr. Hanley's opinion as the impartial medical examiner (IME) represented the special weight

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<sup>5</sup> OWCP originally referred appellant to Dr. Ernest B. Miller, a Board-certified internist, for an impartial medical examination. It rescheduled the examination, however, as Dr. Miller used to work at the same location as Dr. Nijjar, who had provided a second opinion examination.

of the evidence and established that her cervical condition was not caused or aggravated by her employment.

### **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>6</sup>

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, 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>8</sup> The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>9</sup>

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>10</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>11</sup> Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.<sup>12</sup>

It is well established that OWCP must review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision.<sup>13</sup> As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the

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<sup>6</sup> *S.B.*, Docket No. 19-0634 (issued September 19, 2019).

<sup>7</sup> *T.K.*, Docket No. 18-1239 (issued May 29, 2019).

<sup>8</sup> *R.P.*, Docket No. 18-1591 (issued May 8, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *K.C.*, Docket No. 18-0378 (issued June 18, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *J.H.*, Docket No. 19-0513 (issued September 24, 2019).

<sup>13</sup> *See Y.T.*, Docket No. 19-0234 (issued July 3, 2019); *A.C.*, Docket No. 16-1670 (issued April 6, 2018); *William A. Couch*, 41 ECAB 548 (1990).

claim, which was properly submitted to OWCP prior to the time of issuance of its final decision, be addressed by OWCP.<sup>14</sup>

### ANALYSIS

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

On January 10, 2019, prior to the issuance of OWCP's February 12, 2019 decision, OWCP received a December 20, 2018 report from Dr. Chauhan in OWCP File No. xxxxxx348. Dr. Chauhan discussed appellant's complaints of neck pain, bilateral shoulder pain, numbness and tingling of the fingers, and arthritic changes of the bilateral hands and thumbs. He obtained a history of her experiencing cervical pain performing typing and computer work and working with a fixed neck position using the telephone and computer. Dr. Chauhan opined that appellant's repetitive keyboarding and neck flexion with extended computer use had resulted in chronic cervical strain, cervical spinal stenosis, and cervical disc degeneration.

OWCP's regulations require it to consider all evidence submitted appropriately.<sup>15</sup> OWCP did not consider Dr. Chauhan's report submitted in OWCP File No. xxxxxx348. Accordingly, it did not review all evidence received prior to the issuance of its February 12, 2019 decision.

Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before OWCP at the time of its final decision,<sup>16</sup> it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision.<sup>17</sup> As Board decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted prior to the time of issuance of its final decision be addressed by OWCP.<sup>18</sup>

OWCP failed to review the evidence received prior to the issuance of its February 12, 2019 decision. The Board, therefore, must set aside the decision and remand the case to OWCP to fully consider the evidence which was properly submitted by appellant. Following this and any further development as deemed necessary, it shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.119.

<sup>16</sup> *See id.* at § 501.2(c)(1).

<sup>17</sup> *See L.T.*, Docket No. 19-0145 (issued June 3, 2019); *William A. Couch*, *supra* note 13.

<sup>18</sup> *See M.J.*, Docket No. 18-0605 (issued April 12, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 11, 2020  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board