

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

B.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Marlton, NJ, Employer**

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**Docket No. 11-1493
Issued: February 7, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 9, 2011 appellant, through her attorney, filed a timely appeal from the January 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met her burden of proof to establish that she sustained an injury in the performance of duty causally related to factors of her federal employment.

On appeal, appellant's attorney contends that the reports of appellant's treating physician established a causal relationship between appellant's back condition and her employment and that the second opinion is deficient and speculative. He argued that at a minimum there was a conflict in the medical evidence sufficient to require remand for further medical development.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 26, 2009 appellant, then a 48-year-old city letter carrier, filed an occupational disease claim alleging that she suffered from an injury to her low back and right leg as a result of carrying mail for approximately 11 years. She indicated that she had a prior injury to her left ankle on October 14, 2005 and that, following that injury, she was able to return to carrying mail. However, appellant contended that, as a result of the physical requirements of that job, which included walking for long periods of time and lifting and carrying and twisting at the waist, she developed a low back and right leg condition.

Dr. Brian T. Brislin, appellant's treating Board-certified orthopedic surgeon, submitted progress notes commencing January 6, 2009. In his December 11, 2008 progress note, he noted that appellant's magnetic resonance imaging (MRI) scan demonstrated broad-based disc protrusion without stenosis. In an April 22, 2009 report, Dr. Brislin questioned whether the left lower extremity impairment in her ankle is the source of her back pain. He stated, "Certainly altered gait pattern as well as alterations in lifting and strenuous activity with [appellant's] job could be a possible contributor to low back pain. Certainly, these may be a possible contributor to the disc protrusions [as] noted on the old MRI [scan] from [November 2008]."

In a June 10, 2009 report, Dr. Gene Salkind, a Board-certified neurosurgeon, noted his impression that appellant was troubled by lumbar spondylosis and stenosis. In an August 6, 2009 report, he stated that she complained of low back pain, right buttock and right lower extremity pain as well as severe tailbone pain and numbness in her low back. Dr. Salkind noted that an MRI scan of the lumbar spine dated November 14, 2008 showed evidence of degenerative disc disease with disc desiccation at L3-4 and L5-S1 and that there appeared to be lumbar spondylosis and stenosis at L3-4 and L4-5. He noted that he had initiated a program of physical therapy three times weekly. Dr. Salkind opined that within a reasonable degree of medical certainty appellant suffers from lumbar spondylosis and stenosis which is a direct result of the repetitive movements of her job, a mail carrier.

By decision dated August 18, 2009, OWCP denied appellant's claim as it found that the medical evidence failed to establish that she sustained a medical condition related to the accepted incident.

On August 20, 2009 appellant, through counsel, filed a request for a telephone hearing.

In an August 25, 2009 report, Dr. Brislin summarized his treatment of appellant. He noted that she was seen in his office on January 6, 2009 for an injury she sustained while working for the employing establishment. Dr. Brislin noted that appellant was performing her duties as a mail carrier, which included walking, driving and carrying of a mailbag. He noted that she began to have pain in the low back pressing down the right leg, starting in the area of the buttock and radiating down the entire leg which he diagnosed as lumbar radiculopathy. Dr. Brislin noted that a subsequent MRI scan evaluation demonstrated a broad-based disc protrusion at L3-4 as well as a mild broad-based disc protrusion at L4-5. He noted that appellant had been seen for epidural steroid injections and has also been seen by a neurosurgeon. Dr. Brislin indicated that her current diagnoses included low back pain and discogenic back pain. He opined that the exacerbation of symptoms on January 3, 2009 were a result of her

employment. Dr. Brislin also stated that appellant's treatment to date has been appropriated and that she will continue with physical therapy.

In a report dated June 10, 2009, Dr. Salkind stated that he first saw appellant for a neurosurgical consultation on June 10, 2009. He noted that in the fall of 2008 she started to complain of right buttock and right lower extremity pain. Dr. Salkind noted that on January 3, 2009 appellant developed severe tailbone pain such that she had to leave work and went to the emergency room where she was given a morphine injection and prescribed Percocet. He discussed her treatment and physical therapy with Dr. Brislin. Dr. Salkind noted that presently appellant complained of low back pain that radiated through the right lower extremity to the ankle. He opined that she had lumbar spondylosis and stenosis. In the October 4, 2009 report, Dr. Salkind thoroughly discussed the duties of appellant's employment as she described them to him. Appellant returned to work in September 2004 doing exclusively clerical work, but in November 2004 she started to case mail, load the truck, hit the street and was doing driving and mail delivery. By January 2005, she was casing mail for one to two hours, loading her truck and ultimately hit the street where she would walk and carry her bag for two to three hours a day. On March 25, 2007 appellant had a bid route that had more limited duties, but that in August 2007 she lost her bid route and went from casing four shelves to five shelves and had to step on tip toes to reach the top shelf. Although she requested a platform, Dr. Salkind noted that she did not receive it until January 2008. Appellant was walking two to three and a half hours a day with her mailbag and would tire easily. She would drag her leg, favoring and putting all her weight on her right side. Pain increased with walking on a daily basis. Appellant was off work for stress for about four weeks in October 2007, but returned to work in November 2007 and was casing for one to two hours, pulling down the route, loading her truck and ultimately hitting the street. In November 2008, she received a new bid route, which involved one-hour and twenty minutes of business helping out with heavy mail and walking for one hour with her heavy mailbag. Dr. Salkind concluded that based on this history appellant's back condition was aggravated by her work duties. He opined that, although she clearly had preexisting asymptomatic lumbar degenerative disc disease and stenosis, it was aggravated by her repetitive lifting, carrying, standing on her tiptoes and sorting mail. Dr. Salkind believed that appellant was disabled from January 3, 2009 to the present time and he recommended surgical intervention.

In a November 4, 2009 report, Dr. Brislin reviewed his treatment of appellant and opined that the exacerbation of her symptoms on January 3, 2009 was a result of her employment. He opined that, although she had a preexisting condition, the symptoms she reported on January 3, 2009 do represent a clear exacerbation of her current symptoms and that her clear exacerbation of symptoms happened in the course of employment.

At the hearing held on December 18, 2009, counsel stated that the issue was whether appellant's carrier duties caused or aggravated the low back problem. He noted that she believed her prior ankle injury changed the way she walked and caused irritation to her low back. Counsel contended that the medical evidence submitted after OWCP's decision demonstrated the causal relationship between appellant's duties and her back injury. He asked the hearing representative to reverse OWCP's decision or at a minimum, remand for additional development.

On November 20, 2009 Dr. Salkind performed a bilateral decompressive laminectomy with bilateral nerve root decompression.

By decision dated February 19, 2010, OWCP's hearing representative found that the opinion of Dr. Salkind was sufficient to warrant further development of the evidence and remanded the case for referral to a second opinion physician.

On remand, OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 27, 2010 report, Dr. Smith indicated that he needed further information and reports in order to reach an informed opinion. OWCP provided him with the requested documents. In a July 26, 2010 report, Dr. Smith stated that, after reviewing the imaging studies, there does not appear to be any evidence of any structural insult to appellant's spine that would have linked her degenerative disease causing stenosis to her duties as a city mail carrier. He opined that her spinal condition was obviously degenerative in nature and nonindustrial and was not structurally aggravated by her work activities or her claim that an altered gait caused some problems in her spine that required surgery. Therefore, Dr. Smith concluded that the work appellant missed commencing January 2009 and the operation performed by Dr. Salkind in November 2009 was not related to her work activities.

By decision dated August 6, 2010, OWCP denied appellant's claim for the reason that the medical evidence did not demonstrate that her claimed medical condition was related to the established work event.

On August 11, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on December 7, 2010, counsel argued that there was at least *prima facie* proof of the work injury. He also contended that there was no medical rationale for the opinions of the second opinion physician, Dr. Smith.

By decision dated January 25, 2011, OWCP's hearing representative affirmed the August 6, 2010 decision finding Dr. Smith's report sufficiently rationalized to represent the weight of the evidence.

LEGAL PRECEDENT

An employee seeking compensation under FECA² has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,³ including that she is an "employee" within the meaning of FECA⁴ and that she filed her claim within the applicable time limitation.⁵ The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.⁶ These are the essential elements of each and every

² *Id.*

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁵ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁶ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

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.⁸

To establish a 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.⁹ 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 their relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of the 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.¹⁰

Section 8123 of FECA¹¹ provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹² The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³

ANALYSIS

OWCP denied appellant's claim because it found that she failed to establish that she suffered from a work-related injury. However, the Board finds that this case must be remanded

⁷ See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁹ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

¹⁰ *James Mack*, 43 ECAB 321 (1991).

¹¹ *Supra* note 5.

¹² *Id.* at § 8123(a); see also *Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).

¹³ 20 C.F.R. § 10.321.

for further development of the medical evidence due to an unresolved conflict in medical opinion evidence.

Appellant's physicians opined that appellant's back injury was related to her federal employment. In his April 22, 2009 report, Dr. Brislin indicated that her altered gait pattern as well as alterations in lifting and strenuous activity with her job could be a possible contributor to her back pain. He clarified his opinion in an August 25, 2009 report, wherein he listed appellant's work duties, and noted that her diagnoses of low back pain and discogenic back pain was exacerbated by her employment. In a November 4, 2009 report, Dr. Brislin stated that, although she had a preexisting condition, the symptoms she reported on January 3, 2009 do represent a clear exacerbation of her current symptoms and that her clear exacerbation of symptoms happened in the course of her employment. Appellant's claim received greater support from the opinions of Dr. Salkind, who went into a detailed description of appellant's duties as a city letter carrier, detailing the amount of walking and lifting required and the problems she encountered in casing mail. Dr. Salkind opined that, although she had preexisting asymptomatic lumbar degenerative disc disease and stenosis, it was aggravated by her repetitive lifting, carrying, standing on her tip toes and sorting mail. His opinion is based upon his multiple examinations of appellant and his consideration of the duties of her employment.

However, the second opinion physician, Dr. Smith, stated that, after reviewing the imaging studies, there did not appear to be any evidence of any structural insult to appellant's spine that would have linked her degenerative disease causing stenosis to her duties as a city mail carrier. He opined that her spinal condition was degenerative in nature and not structurally aggravated by her work activities or an altered gait. Dr. Smith concluded, therefore, that appellant's claimed disability was not employment related.

The Board finds that there is an unresolved conflict in the medical evidence regarding whether appellant's work aggravated her back condition requiring a referral to an impartial medical specialist, pursuant to 5 U.S.C. § 8123(a). Therefore, the case will be remanded to OWCP to refer appellant to a physician in the appropriate field of medicine to resolve the conflict. Following such further development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2011 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: February 7, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board