



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> In a May 10, 2011 decision, the Board found that OWCP properly reduced appellant's compensation to zero, effective December 12, 2008, under 5 U.S.C. § 8113(b), but she was entitled to monetary compensation beginning December 17, 2008 due to the results of a functional capacity evaluation of January 22, 2009. The Board also found that OWCP properly denied a merit review of the claim under 5 U.S.C. § 8128(a).<sup>3</sup> The law and the facts of the previous Board decision are incorporated herein by reference.

Appellant continued to receive wage-loss compensation on the periodic compensation rolls. On May 3, 2010, through her representative, she requested that additional conditions be accepted as employment related. These included: degenerative joint disease of the glenohumeral joint; subacromial bursitis; bicipital tendinitis; subacromial impingement syndrome; aggravation of sleep disorder; and major depression, single episode, severe. To support this claim, appellant submitted copious medical evidence dating from October 15, 2003.<sup>4</sup>

In May 2010, OWCP referred appellant to Dr. Stephen Ramondino, a Board-certified psychiatrist, and Dr. Aubrey A. Swartz, Board-certified in orthopedic surgery, for second-opinion evaluations. Both physicians noted their review of the statement of accepted facts and medical record and described appellant's complaints. In a June 11, 2010 report, Dr. Ramondino described testing and examination results. He diagnosed major depressive episode, single and moderate severity; anxiety disorder, not otherwise specified; insomnia; chronic neck, back and shoulder pain, per appellant's report. Dr. Ramondino advised that it appeared that her psychiatric condition started after the August 2004 work injury and appeared to accelerate and increase in severity after she returned to full-time work in 2007.

In a July 23, 2010 report, Dr. Swartz noted physical examination findings. He diagnosed chronic cervical spondylosis with multilevel degenerative disc disease of the cervical spine and advised that she had degenerative changes in both shoulders, the right arm and hand,

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<sup>2</sup> On August 23, 2004 appellant, a letter carrier, sustained injuries to her cervical spine when her postal vehicle was rear ended. She returned to modified duty for four hours daily on October 26, 2004 and missed intermittent periods thereafter. On October 3, 2007 appellant began an eight-hour workday. She stopped work on October 5, 2007, did not return and was placed on the periodic compensation rolls. The 2004 injury, adjudicated by OWCP under File No. xxxxxx831, was accepted for cervical strain/sprain, aggravation of degenerative disc disease and cervicalgia. OWCP also accepted cervical spondylosis at Form C4-7, aggravation of cervical degenerative disc disease and cervical radiculopathy, adjudicated under File No. xxxxxx601, bilateral shoulder strains, adjudicated under File No. xxxxxx600, bilateral carpal tunnel syndrome, adjudicated under File No. xxxxxx602; and right shoulder strain and aggravation of cervical degenerative disc disease, adjudicated under File No. xxxxxx142. All claims were doubled, with File No. xxxxxx601 becoming the master file. By order dated April 29, 2008, Docket No. 08-97, the Board dismissed appellant's appeal under File No. xxxxxx831 because there was no OWCP decision over which the Board had jurisdiction.

<sup>3</sup> Docket No. 10-1725 (issued May 10, 2011).

<sup>4</sup> This medical evidence included diagnostic studies and reports from Lynne Fiore, Ph.D., a psychologist, Dr. Jay S. Roitman, an attending Board-certified family physician, and Dr. James D. Tate, a Board-certified neurosurgeon.

permanently aggravated by employment factors and that her sleep disturbances were aggravated by the employment injuries.

The physicians provided reports dated June 11 and July 23, 2010 respectively. On September 20, 2010 Dr. James D. Tate, an attending Board-certified neurosurgeon, requested authorization for an anterior fusion procedure at C4-5 with iliac graft.

On November 29, 2010 OWCP requested that Dr. Arthur S. Harris, OWCP's medical adviser, who is a Board-certified orthopedic surgeon, review the record and provide an opinion as to whether the proposed surgery should be authorized and whether appellant had additional employment-related conditions. In reports dated December 4 and 21, 2010, Dr. Harris stated that he had reviewed the entire medical record and statement of accepted facts. He discussed the medical evidence, noting Dr. Swartz's report and the accepted conditions. Dr. Harris indicated that the diagnoses of cervical radiculopathy and cervical disc bulging with degeneration at C4-5, C5-6 and C6-7 were established and that the requested cervical fusion should be authorized. He concluded that he felt the accepted conditions adequately addressed appellant's employment-related residuals and did not support accepting additional conditions. On March 22, 2011 Dr. Tate performed the authorized cervical procedure.

By decision dated April 7, 2011, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Harris, OWCP's medical adviser and denied appellant's claim to expand the accepted conditions.

On April 11, 2011 appellant requested reconsideration. Her representative prepared an 18-page pleading in which she asserted that OWCP erred in finding that the weight of the medical evidence rested with the opinion of Dr. Harris, and asked that his medical reports be excluded from the record. Appellant maintained that 27 additional conditions should be accepted<sup>5</sup> and submitted additional medical evidence including reports from Dr. Tate and Dr. Roitman.

In a merit decision dated July 14, 2011, OWCP found that Dr. Harris' reports need not be excluded. It noted that the majority of the conditions appellant asked to be accepted had already been accepted, and again found that the weight of the evidence rested with the opinion of Dr. Harris, OWCP's medical adviser.

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<sup>5</sup> The claimed conditions were: chronic pain; permanent cervical spinal stenosis, moderate/severe, at C4-5, C5-6, and C6-7; permanent bulging cervical disc at C3-4, C4-5, C5-6 and C6-7; permanent bulging thoracic disc at T1; permanent degenerative joint disease in the right humeral head; bilateral stiffness of shoulder joints; permanent chronic pain; permanent spasms; dropping, dominant right hand; uncinat spurting; aggravation chronic pain; aggravation of permanent cervical spinal stenosis, moderate/severe, at C4-5, C5-6 and C6-7; aggravation of permanent bulging cervical disc at C3-4, C4-5, C5-6 and C6-7; aggravation of permanent bulging thoracic disc at T1; aggravation of permanent degenerative joint disease in the right humeral head; aggravation of bilateral stiffness of shoulder joints; aggravation of permanent chronic pain; aggravation of permanent spasms; aggravation of dropping, dominant right hand; aggravation of uncinat spurting; aggravation cervical spondylosis with myelopathy; aggravation brachial neuritis or radiculitis; aggravation major depression; aggravation anxiety state; aggravation sleep disorder; aggravation rotator cuff syndrome, left shoulder; and aggravation traumatic arthropathy left shoulder.

## LEGAL PRECEDENT

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulations to make findings of fact. Section 8124(a) of FECA provides: “OWCP shall determine and make a finding of facts and make an award for or against payment of compensation.”<sup>6</sup> Section 10.126 of OWCP’s regulations specifically provides that a final OWCP decision “shall contain findings of fact and a statement of reasons.”<sup>7</sup> OWCP procedures further specify that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”<sup>8</sup> These requirements are supported by Board precedent.<sup>9</sup>

## ANALYSIS

The Board finds this case not in posture for decision because of April 7 and July 14, 2011 OWCP decisions and finds that the decisions do not comport with FECA, OWCP regulations and procedures and Board case law.

As noted above, in determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulations to make findings of fact.<sup>10</sup> In the April 7, 2011 decision in which OWCP concluded that appellant had not established additional conditions, OWCP did not attempt to discuss the medical evidence submitted by appellant in support of her claim that additional conditions be accepted and did not discuss the opinions of Dr. Ramondino and Dr. Swartz, the second-opinion examiners. OWCP merely relied on the opinion of Dr. Harris, OWCP’s medical adviser, stating that he had reviewed the medical evidence and indicated that the weight of the medical evidence as contained in this case file does not support the acceptance of any additional conditions. In the July 14, 2011 merit decision on reconsideration, while OWCP recognized that appellant had submitted additional medical evidence, the weight of these reports was not assessed. Again, OWCP did not discuss the second-opinion evaluations and again credited the medical adviser’s opinion. The decision also stated that “the majority” of the claimed conditions had been

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<sup>6</sup> 5 U.S.C. § 8124(a).

<sup>7</sup> 20 C.F.R. § 10.126 (1999).

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(e) (March 1997).

<sup>9</sup> See *James D. Boller, Jr.*, 12 ECAB 45 (1960).

<sup>10</sup> *Supra* notes 7 to 10.

accepted without further explanation, and the decision also contained language relevant to a nonmerit decision as a “basis for decision.”<sup>11</sup>

The Board finds that neither the April 7 nor the July 14, 2011 decision contain sufficient findings of fact regarding whether any additional conditions were caused by employment factors or were a consequence of accepted conditions.<sup>12</sup>

The Board finds that this case is not in posture for a decision as the April 7 and July 14, 2011 decision do not contain sufficient factual findings, explanation or rationale such that the Board can conduct an informed adjudication of the case on the issue of whether appellant established that she sustained additional conditions causally related to or a consequence of the August 23, 2004 employment injury or other employment factors. The case must therefore be remanded for a *de novo* decision on the merits of the claim that comports with FECA, decisions of the Board, and OWCP regulations and procedures.

### **CONCLUSION**

The Board finds this case not in posture for decision.

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<sup>11</sup> The decision advised that the “Basis for Decision” was that counsel failed to show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP. 20 C.F.R. § 10.606(2) (1999).

<sup>12</sup> The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee’s own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual of an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable. *S.S.*, 59 ECAB 315 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14 and April 7, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 20, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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