

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

K.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Andover, KS, Employer**

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**Docket No. 20-0100
Issued: June 2, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 10, 2019 appellant filed a timely appeal from an April 19, 2019 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 has met her burden of proof to establish a cervical spine condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On February 28, 2018 appellant, then a 54-year-old sales services/distribution associate, filed an occupational disease claim (Form CA-2) alleging that she sustained a chronic cervical strain and a bulging disc in her neck due to factors of her federal employment. She noted that she

¹ 5 U.S.C. § 8101 *et seq.*

first became aware of her condition and realized that it was caused or aggravated by her federal employment on September 22, 2017. Appellant explained that the physical demands on her upper body and neck were due to the overexertion and repetitive motions of bending, reaching, and lifting hampers to remove large volumes of mail and to perform hundreds of deliveries daily while in the performance of duty. She also asserted that she had no prior symptoms until she was placed into her current position on September 18, 2017. Appellant did not stop work.

In a February 6, 2018 statement, appellant related that she was reassigned to a new position consisting of both distribution and retail window duties. She described the work she performed from September 18 to 23, 2017 and explained that she began to experience fatigue, distortion, slight immobility of her neck, and pain in her neck and head. Appellant underwent an x-ray and magnetic resonance imaging (MRI) scan and was referred to physical therapy by her doctor. As of February 6, 2018, she asserted that she still experienced headaches and stiffness.

In a February 28, 2018 statement, L.S., appellant's postmaster, referred to an alleged October 1, 2017 Facebook post by appellant in which she stated that her neck pain from eight years prior was aggravated after work on September 18, 2017. She noted that appellant worked three and a half days before she claimed her neck injuries. L.S. also referenced the fact that appellant lived on acreage with horses and surmised that appellant must lift hay bales to feed her horses and perform other physical activities to maintain her residence and horses.

Appellant provided a position description of her duties as a sales services/distribution associate.

In a development letter dated March 8, 2018, OWCP advised appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion to provide further details regarding the activities she performed outside of her federal employment, including the physical activity required to take care of her horses. OWCP also requested a narrative medical report from appellant's treating physician, containing a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical conditions. In a separate development letter of even date, it requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements, and a copy of appellant's position description noting the physical requirements of her position. OWCP afforded both parties 30 days to respond.

In a September 25, 2017 medical report, Dr. Stephen Lemons, Board-certified in family medicine, examined appellant after experiencing neck pain and stiffness for the past three days. Appellant denied any previous injuries and informed Dr. Lemons that she was performing more lifting at work. In a diagnostic report of even date, Dr. Thomas Cox, a Board-certified radiologist, performed an x-ray of appellant's cervical spine and found straightening and reversing of the cervical lordosis. Based on the x-ray and his examination, Dr. Lemons diagnosed neck stiffness and cervical disc disease.

In a September 28, 2017 medical report, Dr. Lemons saw appellant for a follow-up appointment and noted that an injection helped with her neck stiffness for approximately 12 hours. He diagnosed chronic neck pain, anxiety, and depression and referred her to physical therapy.

In an October 16, 2017 diagnostic report, Dr. Darren Orme, a Board-certified radiologist, performed an MRI scan of appellant's cervical spine. Upon examination, he found multilevel cervical spondylosis and noted the presence of a mild spinal canal, as well as moderate foraminal narrowing at C5-C6 and C6-C7. Dr. Orme also noted straightening and reversal of the cervical lordosis. In an October 17, 2017 medical report, Dr. Lemons discussed the results of appellant's MRI scan with her and noted that she believed that she was about 50 percent better as a result of attending physical therapy. He diagnosed cervical spinal stenosis, foraminal stenosis of the cervical region, a cervical strain, and degenerative arthritis of the cervical spine.

In an October 20, 2017 letter, Dr. Lemons diagnosed spinal stenosis, bilateral foraminal stenosis, cervical degenerative disc disease, and chronic cervical strain. He recommended that she be placed on permanent light duty and indicated that he was referring appellant to physical therapy three times per week.

In an October 30, 2017 medical report, appellant informed Dr. Lemons that she felt between 50 and 75 percent improved at times with physical therapy. Dr. Lemons diagnosed cervical spinal stenosis, foraminal stenosis of the cervical region, degenerative arthritis of the cervical spine, and a history of phlebitis. He recommended that appellant return to work with restrictions and support socks.

In a November 23, 2017 medical report, Dr. Lemons reported that appellant was currently working four hours per day. Appellant explained that she was tired and stiff when she gets home, but is doing well with stretches and exercises.

In a January 25, 2018 medical report, Dr. Lemons recorded that appellant was now working six hours per day and noted that she was still experiencing pain in her neck, shoulders, and head. He provided a diagnosis of cervical disc disease and a cervical strain and opined that appellant would benefit from physical therapy.

Appellant submitted multiple light-duty restriction requests dated from October 30, 2017 to February 26, 2018 in which Dr. Lemons requested that she be placed on light-duty restrictions from November 13, 2017 to August 26, 2018.

In a February 27, 2018 letter, Dr. Lemons opined that, when appellant started her new position on September 18, 2017, she aggravated her neck. He provided that he had seen her multiple times since then to provide treatment for her neck pain.

In a March 20, 2018 letter, Dr. Lemons reported appellant's history of neck pain after beginning her new position on September 18, 2017. He opined that the repetitive motions and physical exertions required by that position caused a decrease in active tolerance, endurance deficits, pain limiting functions, range of motion, and strength deficits. Dr. Lemons reviewed pictures of appellant's work facility and noted that she had worked for the post office since 1984 and did not have any neck problems until she began her new position. He also referenced appellant's x-rays and MRI scans to support his findings.

Appellant submitted multiple physical therapy notes dated from October 2, 2017 to March 21, 2018 in which Molly Roepke, a physical therapist, provided updates of treatment relating to her neck pain.

In response to OWCP's development questionnaire, appellant submitted a March 22, 2018 statement in which she detailed the requirements of her new position, including pushing large mail containers and hampers, bending over to retrieve mail, and loading other equipment and mail numerous times a day. She described her extracurricular activities, including discontinued yoga and painting classes, as well as walking, family activities, and caring for her horse. Appellant asserted that she had never fallen off her horse and had not ridden it in approximately two years. Her involvement with the horse consisted of approximately 30 minutes of brushing and feeding it one-pound cans of grain. Bales of hay were delivered by an outside service. In a separate statement dated March 23, 2018, appellant's postmaster submitted a description of appellant's duties as well as her duties prior to September 18, 2017.

In an April 10, 2018 letter, Dr. Lemons provided a history of appellant's work beginning September 18, 2017, as well as his treatment of appellant for her neck pain. He opined that the increased activity, repetitive motions, and physical exertion, which included lifting, pushing, pulling, bending, and stooping caused appellant's neck problems.

In a May 17, 2018 letter, an OWCP claims examiner requested that Dr. Lemons provide a response diagnosing a specific cervical condition and explain how appellant's work activities caused, contributed, or aggravated her condition. She also requested that Dr. Lemons distinguish between the effects of appellant's federal work and the natural progression of any preexisting or underlying cervical conditions. The claims examiner requested a response within 30 days.

By decision dated June 18, 2018, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that her diagnosed condition was causally related to the accepted factors of her federal employment. It explained that she failed to submit a physician's opinion as to how her employment activities caused, contributed to, or aggravated her cervical conditions.

On July 10, 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 November 5, 2018. Appellant detailed her history of employment duties and neck pain she experienced in relation to her duties and asserted that her new position required her to perform more heavy labor. She provided testimony regarding the history of treatment for her neck pain beginning in September 2017. The hearing representative advised appellant of the medical evidence necessary in order to approve her claim and held the case record open for 30 days for the submission of additional evidence.

OWCP subsequently received a November 2, 2018 medical report, wherein Dr. Aly Gadalla, Board-certified in internal medicine, provided a history of appellant's complaints of neck pain and numbness in her arms due to her employment duties and referenced her treatment related to her complaints. On evaluation she opined that appellant's actions of repeatedly lifting and delivering heavy boxes over time caused her cervical disc to shift and pinch the adjacent nerve to

the spine. Dr. Gadalla recommended that appellant would need pain management for her aggravated cervical disc degeneration and aggravated cervical radiculopathy. On review of appellant's medical records she diagnosed cervical disc disease, cervical strain, bilateral foraminal stenosis, and cervical spondylosis. Dr. Gadalla explained that, even though cervical disc degeneration can be caused over time by aging, trauma and overuse can significantly increase the level of damage to the cervical spine. She reasoned that the repetitive job duties appellant performed from September 18 to 22, 2017 were the exact type of overuse that cause damage to an already compromised cervical spine.

By decision dated January 7, 2019, the hearing representative vacated the June 18, 2018 decision and instructed OWCP to prepare a statement of accepted facts (SOAF) and refer appellant to a second opinion orthopedic specialist to determine whether she developed a cervical spine condition in any way causally related to the accepted employment factors.

On January 30, 2019 OWCP referred appellant to Dr. Michael Johnson, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her alleged employment-related conditions.

In his March 28, 2019 report, Dr. Johnson reviewed the SOAF, history of injury, and the medical evidence of record. He noted appellant's diagnoses of cervical spine multilevel degenerative disc disease, spondylosis, bulging discs, osteophytes, and stenosis and opined that the findings found on the imaging studies were representative of the natural aging process and not associated with acute events. Dr. Johnson reasoned that because there was no specific injury, any opinion on aggravation due to injury or work environment was not objectively supported. He referenced medical literature which provided that cumulative lifting, pushing, and pulling were weakly associated with neck and shoulder pain. Dr. Johnson concluded that, based on his evaluation and medical research, appellant's job requirements would not cause or aggravate her degenerative neck condition.

By decision dated April 19, 2019, OWCP denied appellant's claim. It found that Dr. Johnson's second opinion carried the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,² 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

² *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.³ 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.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (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.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.⁷ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors.⁸

Section 8123(a) of FECA provides that, 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.⁹ 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 a DMA, OWCP shall appoint a third physician to make an examination.¹⁰ When 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.¹¹

³ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁴ *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).

⁵ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

⁸ *Id.*; *Victor J. Woodhams*, *supra* note 5.

⁹ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *K.S.*, Docket No. 19-0082 (issued July 29, 2019); *V.G.*, 59 ECAB 635 (2008).

ANALYSIS

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

OWCP referred appellant to Dr. Johnson for a second opinion evaluation and, in his March 28, 2019 medical report, he opined that appellant's cervical conditions were the result of the natural aging process and not associated with any acute work events. Dr. Johnson explained that medical literature provides that cumulative lifting, pushing, and pulling were weakly associated with neck and shoulder pain and that the medical evidence and diagnostic studies of record were suggestive of the natural aging process and not an aggravation of her condition. He concluded that, based on his evaluation and medical research, appellant's job requirements would not cause or aggravate her degenerative neck conditions.

In her November 2, 2018 medical report, Dr. Gadalla opined that appellant's actions of repeatedly lifting and delivering heavy boxes over time caused her cervical disc to shift and pinch the adjacent nerve to the spine. She explained that, even though cervical disc degeneration can be caused over time by aging, trauma and overuse can significantly increase the level of damage to the cervical spine. Dr. Gadalla reasoned that the repetitive job duties appellant performed from September 18 to 22, 2017 were the exact type of overuse that cause damage to an already compromised cervical spine. Further, in Dr. Lemons' March 20, 2018 letter, he reported appellant's history of treatment for her neck pain and opined that the repetitive motions and physical exertions she performed at work caused a decrease in active tolerance, endurance deficits, pain limiting functions, range of motion, and strength deficits. He referenced appellant's diagnostic studies that supported his diagnoses of cervical spinal stenosis, foraminal stenosis of the cervical region, and degenerative arthritis of the cervical spine.

The Board finds that a conflict in medical opinion has been created between appellant's attending physicians and that of the second opinion physician regarding whether appellant's preexisting cervical condition was aggravated by factors of her federal employment.¹² Section 8123 of FECA 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.¹³

As there remains an unresolved conflict in medical opinion regarding whether appellant's diagnosed cervical conditions are causally related to, or a consequence of, the accepted employment factors the case shall be remanded to OWCP for creation of an updated SOAF and referral to an appropriate specialist to obtain an impartial medical opinion regarding whether appellant sustained a cervical condition causally related to the accepted factors of her federal employment. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹² See *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

¹³ *Supra* note 12.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 19, 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: June 2, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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