United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 11-288**
	)	**Issued: September 7, 2011**
DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Nashville, TN, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2010 appellant, through her representative, filed a timely appeal from a July 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim. Pursuant to the Federal Employees' Compensation Act (FECA)[1] 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 aggravated her left shoulder condition and sustained a back condition due to an April 24, 2008 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 13, 2006 appellant sustained a work-related left shoulder injury and was placed on limited duty. On May 19, 2008 she, then a 49-year-old secretary, filed a traumatic injury claim alleging that on April 24, 2008 she reinjured her shoulder and sustained a back condition after two chairs in her workstation broke when she sat down on them. A coworker stated that she did not see the actual incident, but saw the two broken chairs. Appellant stopped work on April 24, 2008 and returned on April 28, 2008.

In an April 24, 2008 discharge report, a registered nurse and physician's assistant stated that appellant was treated for left shoulder, left hand and low back pain secondary to a fall. Appellant was returned to work with no restrictions and advised to follow-up with her treating physician. Her pain was attributed to tendinitis, bursitis, or an injury to the tendons that surround the joint. Appellant was also diagnosed with a hand contusion.

In an April 24, 2008 diagnostic report, Dr. John G. Bartek, a Board-certified radiologist, noted appellant's complaints of low back pain after a fall and observed that her spinous, transverse processes and spaces were preserved. He noted that the vertebral height and alignment were normal and found no evidence of fracture or subluxation. Dr. Bartek listed minimal anterior spurring in the mid-lower lumbar spine and diagnosed mild degenerative changes with no acute process.

In an April 24, 2008 diagnostic report of appellant's left shoulder, Dr. John D. King, a Board-certified diagnostic radiologist, advised that she complained of left shoulder pain after a fall. He observed interval partial, well-defined resorption of the distal clavicle with no definite lytic lesion and small degenerative glenoid spurring. Dr. King diagnosed well-defined resorption of the distal left clavicle, likely nonneoplastic in nature.

In a May 8, 2008 slip, Dr. Son D. Le, Board-certified in physical medicine and rehabilitation, excused appellant from work that day when examined in his office. He limited her to four to six hour shifts for the next 14 days and restricted her from any lifting, carrying, pushing, pulling and performing any overhead activities with the left upper extremity. In a May 22, 2008 work restriction slip, Dr. Le extended appellant's restrictions for an additional 30 days.

On August 1, 2008 appellant submitted a claim for compensation for the period April 24 to June 12, 2008.

On April 20, 2009 OWCP advised appellant that the evidence submitted was insufficient to support her traumatic injury and April 24 to June 12, 2008 compensation claims. It requested additional medical evidence providing a diagnosis of appellant's condition and establishing that she claimed medical condition was causally related to the April 24, 2008 employment incident.

In a May 1, 2009 response letter, appellant stated that she had experienced asthma, diabetes and depression and that her supervisor was "messing up" her workers' compensation claim.

In a decision dated May 26, 2009, OWCP denied appellant's claim on the grounds that the medical evidence failed to establish that her claimed medical condition resulted from the accepted April 24, 2008 employment incident.

In a June 1, 2009 letter, appellant, through her attorney, stated that, after the April 24, 2008 incident, she reported to the emergency room and felt immediate, additional pain in her low back, left shoulder and left hand. She noted that these conditions were previously approved by OWCP and stated that the April 24, 2008 incident aggravated these conditions.

In an August 29, 2008 report, Dr. Le conducted botulinum toxin therapy and diagnosed symptomatic torsion dystonia. In an April 2, 2009 letter, he stated that appellant should be evaluated by a psychiatrist due to depression caused by her work-related injuries.

On June 18, 2009 appellant, through her representative, submitted a request for a telephone hearing along with additional evidence. In a May 28, 2009 follow-up report, Dr. Le noted her complaints of left shoulder pain and indicated that the date of injury was August 31, 2006. He diagnosed reflex sympathetic dystrophy (RSD) of appellant's left upper extremity and reviewed her history. Upon examination, Dr. Le opined that appellant had an acromioclavicular joint (ACJ) resection and partial acromioplasty, dystonia, symptomatic torsion and shoulder impingement syndrome. He stated that appellant was able to work light duty for six hours a day.

In a June 18, 2009 follow-up report, appellant complained of worsening pain because she felt the pain medication was not working. Dr. Le reviewed her history and conducted an examination. He diagnosed ACJ resection and partial acromioplasty, lumbar sprain/strain and shoulder impingement syndrome.

On October 9, 2009 a telephonic hearing was held with appellant and Capp Taylor, her attorney, who related that she sustained a rotator cuff tear in her left shoulder as a result of the accepted August 31, 2006 employment incident. As a result of this injury, appellant was placed on restricted duty and underwent surgery for repair of the left shoulder.

Appellant stated that on April 24, 2008 she reinjured her left shoulder and injured her back when her chair broke at work. She explained that the April 24, 2008 incident aggravated the previous August 31, 2006 injury. Appellant was eventually placed on limited-duty and restricted to four- to six-hour shifts. The employing establishment, however, stated that it did not have work for her to do and terminated her employment.

Regarding her employment history, appellant stated that she began working for the employing establishment on January 18, 1988 as a secretary. She explained that, before the August 2006 incident, she did not have any difficulty performing her work duties. After the August 2006 incident and subsequent surgery, appellant was excused from work for about six weeks and returned to light duty with the restriction that she could only lift her right shoulder lightly for eight hours a day.

Appellant also provided a history of injury. She explained that, on April 24, 2008, she entered her office and sat down in her chair at her cubicle. As appellant pulled herself up to the computer, the left side of her chair broke, causing her to fall on her left side and ram her shoulder

against a big filing cabinet. She tried to sit in a different chair, but that also broke, causing her to fall. Appellant denied any additional injuries between the August 2006 and April 2008 employment incidents. She stated that since the April 2008 incident she continued to experience problems with her left shoulder and was unable to lift her arm or put it out to the side. OWCP's hearing representative advised appellant that, although the evidence of record revealed that her work restrictions changed and her medical condition worsened, the record did not contain medical evidence providing a firm diagnosis and opinion on causal relationship. OWCP stated that it would hold the record open for 30 days in order for appellant to submit additional evidence.

By decision dated December 23, 2009, OWCP's hearing representative affirmed the May 26, 2009 denial decision because appellant did not provide probative medical evidence demonstrating that she sustained any medical condition causally related to the April 24, 2008 employment incident.

On June 3, 2010 appellant, through her representative, submitted a request for reconsideration and additional evidence. In a December 31, 2009 signed statement, she reiterated the history of her alleged injury.

In an April 19, 2010 report, Dr. Le confirmed that appellant had been his patient for several years since the August 31, 2006 injury involving her neck, left shoulder and left upper extremity and noted the April 24, 2008 work incident when she fell to the floor after a chair broke. He stated that the specific diagnosed conditions as accepted were contained in the May 6, 2008 letter from the employing establishment to appellant. Dr. Le opined that the April 24, 2008 fall aggravated appellant's accepted conditions. He explained that, after the April 2008 incident, appellant's complaints of pain increased, which coincided with his objective findings of decreased range of motion of the left shoulder, spasms and swelling. Dr. Le pointed out that the mechanism of falling from the chair to the floor and extending ones upper extremities provided the causation between the fall and aggravation of the condition. He also pointed out that appellant's work restrictions increased after the April 24, 2008 work event in order to avoid further exacerbation of her condition.

In a decision dated July 29, 2010, OWCP denied modification of the December 23, 2009 denial decision on the grounds that the medical evidence did not contain an unequivocal physician's opinion establishing that appellant's claimed medical condition was caused by the April 24, 2008 work event.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence[2] including that she sustained an injury in the performance of duty and that any specific condition

[2] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

or disability for work for which she claims compensation is causally related to that employment injury.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[4] There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[6] An employee may establish that the employment incident occurred as alleged but fail to show that her disability or condition relates to the employment incident.[7]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.[8] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.[9] 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 specific employment factors identified by the employee.[10]

Under FECA, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[11] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.[12] If the employment

[3] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

[4] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[5] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[6] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[8] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

[11] *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

[12] *Id.*

exposure causes a permanent condition, the employee may be entitled to continuing compensation;[13] a medical restriction that is based on a fear of future aggravation due to employment exposure is not an injury under FECA and therefore no compensation can be paid for such a possibility.[14]

ANALYSIS

The issue is whether the medical evidence establishes that appellant sustained a left shoulder and back condition causally related to the April 24, 2008 employment incident. OWCP has accepted that appellant fell on April 24, 2008 when two chairs broke when she attempted to sit down.

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

In its July 29, 2010 decision, OWCP found that the medical evidence did not contain a firm diagnosis of appellant's condition and an unequivocal physician's opinion establishing that her claimed medical conditions were caused by the April 24, 2008 work event. On appeal, appellant, through her representative, alleges that Dr. Le's April 19, 2010 medical report sufficiently establishes that appellant's April 24, 2008 fall at work aggravated her August 2006 accepted left shoulder condition and caused her back condition. The Board finds that the medical evidence of record supports appellant's claim and that this case is not in posture for decision.

An employee who claims benefits under FECA has the burden of establishing the essential elements of her claim.[15] As part of this burden, the employee must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[16] However, it is well established that proceedings under FECA are not adversarial in nature and while the employee has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[17] In this case, the Board finds that appellant has provided sufficient evidence to require further development of the medical record to determine whether she sustained an aggravation or exacerbation of her accepted left shoulder condition and a back condition as a result of the April 24, 2008 employment incident.

Appellant was treated primarily by Dr. Le. In a May 28, 2009 follow-up report, Dr. Le noted her complaints of left shoulder pain and the date of injury as August 31, 2006. He diagnosed RSD of appellant's left upper extremity and opined that she suffered from an ACJ resection and partial acromioplasty, dystonia, symptomatic torsion and shoulder impingement

[13] *James C. Ross*, 45 ECAB 424, 429 (1994); *Gerald D. Alpaugh*, 31 ECAB 589, 596 (1980).

[14] *Carlos A. Maurero*, 50 ECAB 117, 119 (1998); *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

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

[16] *G.T.*, *supra* note 3; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[17] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

syndrome. In a June 18, 2009 follow-up report, Dr. Le reviewed her history and conducted an examination. He diagnosed ACJ resection and partial acromioplasty, lumbar sprain/strain and shoulder impingement syndrome. In an April 19, 2010 report, Dr. Le related appellant's accepted August 31, 2006 injury for her left shoulder and left upper extremity and the April 24, 2008 employment incident when she fell on the floor. He opined that the April 24, 2008 work event aggravated her accepted conditions based on her complaints of increased pain and his objective findings, which revealed decreased range of motion of her left shoulder, spasms and swelling. Dr. Le stated that falling from the chair to the floor and extending ones upper extremities caused the aggravation of her condition.

The remaining medical evidence of record includes a hospital discharge report by a registered nurse and physician's assistant, which does not constitute competent medical evidence,[18] and several diagnostic reports from the hospital, which do not provide an opinion on causal relationship. Although these reports are insufficient to establish causal relationship, they do support that appellant experienced a fall on April 24, 2008 and sustained injuries.

Dr. Le's reports, however, provided a history of injury regarding appellant's August 2006 and April 2008 injuries, treatment, examination findings and diagnoses. He relied on objective findings to support his opinion that the April 24, 2008 incident aggravated appellant's accepted left shoulder condition. Although Dr. Le's opinion is not completely well rationalized as he does not provide the mechanism of injury fully explaining how the April 24, 2008 incident aggravated appellant's 2006 injury or caused a back condition, his reports are consistent in indicating that she sustained an employment-related injury or aggravation of a previous condition on April 24, 2008 and are not contradicted by any substantial medical or factual evidence of record. Therefore, while the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between her claimed condition and the employment incident of April 24, 2008 and are sufficient to require OWCP to further develop the medical evidence and the case record.[19]

CONCLUSION

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

[18] Section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

[19] *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, 41 ECAB 354, 360 (1989).

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for further development consistent with this decision of the Board.

Issued: September 7, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board