United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 11-807**
	)	**Issued: October 11, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, 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 February 11, 2011 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' January 13, 2011 merit decision denying her occupational disease 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 sustained an injury in the performance of duty.

FACTUAL HISTORY

On February 23, 2009 appellant, then a 47-year-old service sales associate, filed an occupational disease claim alleging that she sustained neck, shoulder and back injuries as a result of excessive standing and bending and repetitive right arm activities at work.

[1] 5 U.S.C. § 8101 *et seq.*

Appellant submitted largely illegible reports from Dr. Sikirat Yusuf, a chiropractor, for the period January 22 through February 7, 2009. Dr. Yusuf diagnosed sciatica and opined that appellant was totally disabled. He diagnosed subluxation of the cervical and lumbar spine.

The record contains a February 13, 2009 report of an x-ray of the cervical spine showing mild kyphosis; moderately advanced degenerative disc disease at C4-5 and C5-6, with mild disc narrowing and moderate discogenic osteophyte formation. A February 4, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine revealed L3-4 disc degeneration with mild circumferential annular bulging and reflected an impression of degenerative disc disease in L3-4 and L4-5.

By letter dated March 11, 2009, OWCP informed appellant that the information submitted was insufficient to establish her claim, noting that the evidence of record did not contain a medical report from a qualifying physician that established a disabling condition resulting from factors of her federal employment. It informed her that she had 30 days to submit additional evidence to support her claim.

Appellant submitted an April 10, 2009 narrative statement, advising that her employment activities for the past 22 years included repetitive use of a lever to open a cable window door. Moving her head up and down repetitively while standing for long periods at a window also placed stress on her cervical spine. Lifting heavy packages from the window to the scale, and then from the scale to the floor, placed stress on her lumbar spine.

Appellant submitted a March 30, 2009 report from Dr. Jack Henry, a chiropractor, who diagnosed facet arthritis of the lumbar spine; mild spondylosis of the lumbar spine with mild disc narrowing at L3 and L5; and spinal biomechanical alterations.

By decision dated April 29, 2010, OWCP denied appellant's claim. It found that the medical evidence did not establish that she had sustained a medical condition as a result of her work-related activities.

On April 15, 2010 appellant requested reconsideration.

Appellant submitted a January 27, 2010 report from Dr. Engin Yimaz, a treating physician, who noted complaints of constant excruciating right shoulder pain and diagnosed thoracic outlet syndrome and brachial plexopathy.

In a March 11, 2010 report, Dr. William Pearce, a Board-certified surgeon, noted appellant's history of upper extremity symptoms that occurred as a result of her repetitive employment activities. He opined that her upper extremity pain and numbness were related to lifting heavy boxes and opening and closing doors in her office. Dr. Pearce recommended light duty and physical therapy. On May 6, 2010 he diagnosed likely thoracic outlet syndrome in the right shoulder. The record also contains physical therapy notes for the period June 25 through July 30, 2010 and reports of MRI scans of the right shoulder, thoracic spine and head (dated April 1, 2009, January 15 and February 8, 2010).

OWCP referred appellant to Dr. R.M. Ubilluz, a Board-certified neurologist, for an examination and an opinion as to whether she had a diagnosed condition causally related to

employment activities. In an August 3, 2010 report, Dr. Ubilluz provided a factual and medical history and examination findings. He found no evidence of peripheral neuropathy, neurological thoracic outlet syndrome or disc herniation. A July 27, 2010 electromyogram revealed mild carpal tunnel syndrome, which he opined might be work related. A February 8, 2010 MRI scan of the thoracic spine was unremarkable. Dr. Ubilluz diagnosed right shoulder pain, right arm and finger pain and cervicalgia.

OWCP found a conflict in medical opinion evidence between Dr. Pearce appellant's treating physician and Dr. Ubilluz the second opinion physician. On September 8, 2010 it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Ricardo Kohn, a Board-certified neurologist, in order to resolve whether she developed a medical condition as a result of the accepted employment activities.

OWCP advised that Dr. Kohn was authorized to arrange for any reasonable and necessary diagnostic tests. In a report dated October 4, 2010, he noted appellant's complaints of left-sided back pain and severe right shoulder pain. Dr. Kohn provided a review of her medical history and examination findings. Appellant had pain in her neck when turning her head to the right. She had tenderness to palpation in the right trapezius and right-sided neck muscles. Appellant had no muscle spasms in her anterior or posterior neck muscles or in her shoulder muscles. The Spurling test caused right neck and shoulder pain but did not cause radiating symptoms down her arm. Shoulder elevation and head rotation were normal. There was normal symmetric strength in the upper and lower extremities, with right-sided shoulder and neck pain when assessing the proximal muscles in the right arm. No pathological reflexes were appreciated. When the Roos stress test was performed, appellant developed heaviness and fatigue in her right shoulder but no numbness or tingling in her arm. The Adson maneuver was negative bilaterally. Appellant had negative straight leg raise test bilaterally. She had tenderness to palpation of her left lower back. Dr. Kohn found no evidence of thoracic outlet syndrome based on appellant's physical examination or previously conducted tests. He recommended, however, that she undergo an MRI scan of the brachial plexus with and without contrast in order to determine the presence or absence of thoracic outlet syndrome.

In an October 28, 2010 letter, OWCP informed appellant that further diagnostic testing was necessary in order to obtain a more definitive opinion from the referee physician. To that end, Dr. Kohn recommended that she undergo an MRI scan of the brachial plexus with and without contrast in order to determine whether she suffered from thoracic outlook syndrome. OWCP noted that it was attempting to schedule appellant for an MRI scan and would send her written notice of her appointment in a separate letter. Dr. Kohn would be asked to provide a supplemental opinion based upon the results of the scan.[2]

By decision dated January 13, 2011, OWCP denied modification of the April 29, 2009 decision based on the report of the impartial medical examiner, which represented the weight of the medical evidence. The claims examiner noted that the record did not contain the results of the requested MRI scan and, therefore, the record was devoid of evidence establishing the existence of thoracic outlet syndrome.

[2] Appellant was also informed that she was authorized to obtain an MRI scan at a facility of her choice.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of 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, that an injury was sustained in the performance of duty as alleged, and that any disability and specific condition for which compensation is claimed are causally related 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, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[5]

Section 8123 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.[6] 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.[7]

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[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Id.*

[6] 5 U.S.C. § 8123.

[7] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell*, Jr., 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[8]

ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant sustained an injury in the performance of duty, as there remains an unresolved conflict in the medical evidence.

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. Pearce and the second opinion physician, Dr. Ubilluz, as to whether she developed a diagnosed condition as a result of the accepted employment activities. In order to resolve the conflict, OWCP properly referred her to Dr. Kohn for an impartial medical examination. The Board finds, however, that Dr. Kohn's October 4, 2010 report is insufficient to resolve the conflict. Therefore, the case must be remanded for further development of the medical evidence.

Dr. Kohn provided a review of appellant's medical treatment and examination findings. Appellant complained of left-sided back pain and severe right shoulder pain, as well as pain in her neck when turning her head to the right. She had tenderness to palpation in the right trapezius, right-sided neck muscle and left lower back. Dr. Kohn found no evidence of thoracic outlet syndrome based on the physical examination or previously conducted tests. He recommended, however, that appellant undergo an MRI scan of the brachial plexus, with and without contrast, in order to determine the presence or absence of thoracic outlet syndrome. Dr. Kohn was unable to provide a definitive opinion on the relevant issue without reviewing the results of further diagnostic testing. As noted, the September 8, 2010 referral letter to the impartial specialist advised that additional diagnostic testing could be arranged in order to form an opinion on the questions to be resolved.

OWCP informed appellant that further diagnostic testing was necessary in order to obtain a more definitive opinion from the referee physician. The record does not reflect that she was ever scheduled for the recommended MRI scan, nor did OWCP seek a supplemental report from Dr. Kohn. As OWCP referred appellant to Dr. Kohn, it has the duty to obtain a report sufficient to resolve the issues raised and the questions posed to the specialist.[9] In this case, Dr. Kohn made it clear that he could not render a final opinion on the issue presented to a reasonable degree of medical certainty without further MRI scan testing. Therefore, the case will be remanded to OWCP for further development of the medical evidence and a supplemental opinion from Dr. Kohn. If Dr. Kohn is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.[10] After such further

[8] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[9] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case. *Melvin James*, 55 ECAB 406 (2004).

[10] *See supra* note 9.

development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision. The case shall be remanded for further development of the medical evidence, to be followed by an appropriate merit decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 13, 2011 decision is set aside. The case is remanded for action consistent with this decision of the Board.

Issued: October 11, 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