

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

D.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 14-332
Issued: May 14, 2014**

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 November 27, 2013 appellant, through her attorney, filed a timely appeal from the October 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.²

ISSUE

The issue is whether appellant sustained an occupational disease in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant did not appeal OWCP's October 30, 2013 nonmerit decision denying a hearing before an OWCP hearing representative; thus, the Board will not review it. *See* 20 C.F.R. § 501.3(a).

FACTUAL HISTORY

On the prior appeal of this case,³ the Board found an unresolved conflict in medical opinion between Dr. William Pearce, appellant's Board-certified surgeon, and Dr. R.M. Ubilluz, a Board-certified neurologist and second-opinion physician. Dr. Pearce diagnosed likely thoracic outlet syndrome in the right shoulder and opined that this condition was related to lifting heavy boxes and opening and closing doors at work. Dr. Ubilluz found no evidence of peripheral neuropathy, neurological thoracic outlet syndrome or disc herniation.

The first impartial medical specialist, Dr. Ricardo Kohn, a Board-certified neurologist, found no objective evidence of thoracic outlet syndrome based on physical examination findings and previous testing. He was unable to render a definitive opinion on the issue without further testing. When the Board found that Dr. Kohn's report was insufficient to resolve whether appellant developed a medical condition as a result of the accepted employment activities, OWCP referred appellant to Dr. Volker Bertrand, a Board-certified neurologist, to resolve the conflict. The Board found, however, that Dr. Bertrand's reports were also insufficient to resolve the conflict. The facts of the case as set forth in prior Board decisions are hereby incorporated by reference.

OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Syed Sohail Ahmed, a Board-certified neurologist, for an impartial medical evaluation. On April 8, 2013 Dr. Ahmed reviewed appellant's medical records, history and complaints. He described his findings on physical examination. It was Dr. Ahmed's opinion that appellant's symptoms were likely due to muscle strain. There was no evidence clinically or by diagnostic testing of radiculopathy, plexopathy or polyneuropathy.

Answering questions posed by OWCP, Dr. Ahmed advised that appellant did not have thoracic outlet syndrome. There were no objective findings such as neuropathy or objective vascular changes and there were also negative tests of the brachial plexus. Dr. Ahmed could not say that appellant's symptoms were brought on by her employment, but it was possible that her symptoms were aggravated by job functions requiring movements like flexing and extending the arm repeatedly and raising the arm above the shoulder and lifting heavy packages repeatedly. It did not appear that appellant's symptoms were progressing. Similarly, although appellant's low back pain may not necessarily have been caused by employment, it could have been aggravated because of prolonged standing, bending and twisting.

Dr. Ahmed clarified that appellant had no current condition involving her upper extremities, lower extremities or spine. Appellant did not complain of specific shoulder pain, and an imaging study was normal. She had subjective complaints possibly consistent with ulnar nerve irritation on the right, but diagnostic studies did not substantiate an ulnar nerve problem. Another study showed mild carpal tunnel syndrome, but appellant had no current complaints consistent with that. Appellant had normal motor and sensory function of the lower extremities. She carried the nonwork-related diagnoses of thyroid disorder, which was associated with

³ Docket No. 12-1380 (issued December 12, 2012); *see* Docket No. 11-807 (issued October 11, 2011). On February 23, 2009 appellant, then a 47-year-old service sales associate, claimed that she sustained neck, shoulder and back injuries due to excessive standing, bending and repetitive right arm activities at work.

peripheral nerve problems such as median neuropathy and ulnar neuropathy. Appellant also carried the diagnosis of fibromyalgia, which was often associated with widespread musculoskeletal complaints.

Dr. Ahmed stated that appellant may have sustained a temporary aggravation of her underlying cervical and lumbar degenerative disease as a result of her work activities. Appellant may also have sustained a temporary strain of her right shoulder as a result of her work activities. Dr. Ahmed explained that the date of resolution would be the date she stopped work, as there was no longer any provocative activity. “Extensive investigation has failed to reveal any significant abnormality that might be attributed to [appellant’s] work at the [employing establishment].”

OWCP requested a supplemental report from Dr. Ahmed. It asked whether any muscle strain observed while examining appellant medically connected to the work she performed until 2010. OWCP also asked whether the restrictions Dr. Ahmed imposed were warranted by conditions related or unrelated to her federal employment.

On June 14, 2013 Dr. Ahmed clarified that a muscle strain cannot be objectively documented on examination or with an imaging study. The diagnosis was based on history, complaints and subjective examination findings. Appellant’s muscle strain-type symptoms were in no way related to her work at the employing establishment. Any work-related component of her symptoms had resolved by the time she stopped work in 2010. Appellant also carried the diagnosis of fibromyalgia, which is often associated with widespread musculoskeletal complaints. “I believe her fibromyalgia and deconditioning are the most likely explanation for her complaints. These are not in any way related to her employment at the [employing establishment].” As any work-related component of appellant’s symptoms resolved at the time she stopped work in 2010, her restrictions would be for conditions unrelated to her federal employment.

In a decision dated October 3, 2013, OWCP denied appellant’s occupational disease claim. It found that the opinion of Dr. Ahmed, the impartial medical specialist, represented the weight of the medical opinion evidence and established that the claimed medical conditions of the spine and right shoulder/arm were not medically connected with appellant’s postal employment. OWCP found that the evidence failed to establish that appellant’s duties as a sales and service associate resulted in or worsened any neck, shoulder or spine problems.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or

⁴ 5 U.S.C. § 8102(a).

exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.⁵

Causal relationship is a medical issue⁶ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty⁸ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁹

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.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

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.¹² Unless this procedure is carried out by OWCP, the intent of section 8123(a) will be circumvented and the impartial specialist's medical report insufficient to resolve the conflict of medical evidence.¹³

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁹ *See William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

¹² *See Nathan L. Harrell*, 41 ECAB 402 (1990).

¹³ *Harold Travis*, 30 ECAB 1071 (1979).

ANALYSIS

The issue to be resolved is whether appellant developed a medical condition as a result of the accepted employment activities. Dr. Ahmed, the neurologist and impartial medical specialist, made clear that appellant currently has no medical condition related to her federal employment. He advised, however, that she may have sustained a temporary aggravation of her underlying cervical and lumbar degenerative disease as a result of her work activities and may have sustained a temporary strain of her right shoulder, resolving in the absence of provocative activity after she stopped work in 2010. Dr. Ahmed identified particular job functions such as flexing and extending the arm repeatedly, raising the arm above the shoulder, lifting heavy packages repeatedly and prolonged standing, bending and twisting.

The Board finds that Dr. Ahmed's opinion is equivocal. Dr. Ahmed did not express his opinion to a reasonable medical certainty. Instead, he repeatedly couched his opinion in terms of "may have."

The Board finds that further medical development is warranted. OWCP should ask Dr. Ahmed whether he can clarify whether the job functions he identified caused a temporary symptomatic exacerbation or aggravation of appellant's underlying cervical or lumbar degenerative disease and a temporary strain of her right shoulder. Following such further development as may become necessary, it shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for decision. A supplemental report from the impartial medical specialist is warranted.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: May 14, 2014
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