

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

N.L., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1193
Issued: September 14, 2006**

Appearances:
N.L., *pro se*
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 23, 2006 merit decision. Under 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 established that she sustained a cervical herniated disc injury in the performance of duty on January 17, 2003.

FACTUAL HISTORY

This is the third appeal before the Board. Appellant, a 43-year-old mail processing clerk, filed a Form CA-1 claim for traumatic injury on January 28, 2003, alleging that she felt a burning sensation in her neck which radiated across her shoulders and down both arms into her hands on January 17, 2003. The claim was developed as one based on occupational disease. By decision dated April 9, 2003, the Office denied appellant's claim that she sustained employment-related cervical and bilateral arm conditions. By decision dated August 21, 2003, an Office

hearing representative affirmed the April 9, 2003 decision. In a November 1, 2004 decision,¹ the Board affirmed the Office's decision. The Board found that a May 6, 2003 report from Dr. Robert Vandrak, an attending osteopath, was not sufficient to meet appellant's burden of proof to submit probative, rationalized medical evidence to establish that the claimed cervical and bilateral arm conditions were causally related to her employment. The Board noted that, although her job required repetitively picking up manual letters and placing them in a letter case. Dr. Vandrak did not provide any further explanation of the duties appellant performed on January 17, 2003. The complete facts of this case are set forth in the Board's November 1, 2004 decision and are herein incorporated by reference.

By letter dated February 11, 2005, appellant's attorney requested reconsideration.

Appellant submitted a December 14, 2004 report from Dr. Vandrak, who addressed the deficiencies regarding work duties the Board noted in its November 1, 2004 decision. He stated that she experienced increased cervical pain and right shoulder pain on January 17, 2003 when she reached up to put a letter in the case at shoulder level. Dr. Vandrak advised that a magnetic resonance imaging (MRI) scan of the left shoulder revealed tendinitis at the supraspinatus myotendon region, with a small amount of subacromial bursa fusion. He further noted that appellant had bilateral range of motion limitations in her shoulders. Dr. Vandrak advised that she had a difficult time with complete shoulder retraction and tenderness of the rotator cuff muscles as well as scapular stabilization muscles. He also noted cervical range of motion limitations with pain in extension and tenderness of the right subacromial region. Dr. Vandrak stated:

“Although [appellant] was only asked to lift letters weighing one ounce, but asked to do that at a frequent, repetitive rate in a position to cause increased stress to the cervical spine. At that point due to the repetitive nature of the activity that she was asked to do, I think the disc finally gave out with herniation at that level causing her constellation of symptoms with persistent cervical pain and right shoulder pain. [Appellant] is prone to right shoulder impingement syndrome due to cumulative trauma. At this point, no gross rotator cuff pathology, but anticipate worsening if she would return to work. Exam[ination] reveals some range of motion dysfunction, I do feel that on January 17, 2003 she did herniate her disc at C4-5 with residual right C4-5 radiculopathy. [Appellant] did injure her right shoulder with rotator cuff tend[i]nitis.”

Dr. Vandrak advised that appellant's MRI scan results were consistent with his physical examination which showed continued range of motion limitations, pain complaints and decreased functional use despite limited activity. He opined that appellant's current condition and disability and symptomatology were related to the January 17, 2003 work incident; this was based on a comparison of the January 14, 2002 and March 15, 2003 MRI scan results. Dr. Vandrak noted that the January 14, 2002 MRI scan showed a right-sided disc bulge at the C4-5 level, which marked the start of the injury process, but felt that the disc became herniated as a result of the January 17, 2003 work incident.

¹ Docket No. 04-1328 (issued November 1, 2004).

By decision dated May 10, 2005, the Office denied appellant's claim, finding that she failed to submit sufficient medical evidence in support of her claim. In a September 23, 2005 decision, the Board set aside the May 10, 2005 decision.² The Board found that Dr. Vandrak, in his December 14, 2004 report, had addressed the deficiencies in his description of appellant's duties on January 17, 2003 and submitted medical rationale supporting the fact that she sustained a herniated disc at the C4-5 level in the course of her employment on January 17, 2003 to warrant further development of the medical evidence.³

On December 6, 2005 the appellant was referred for a second opinion examination with Dr. Charles S. Stone, a Board-certified orthopedic surgeon. In a January 3, 2006 report, he stated findings on examination, reviewed the medical history and statement of accepted facts and found that she showed no positive objective physical findings to support disc herniation. He noted that the March 2003 cervical MRI scan reported disc herniation at C4-5, but found no evidence that these MRI scan findings were extant as of January 17, 2003. Dr. Stone stated:

“It is my opinion that [appellant] has chronic myofascial pain syndrome in both shoulders. This diagnosis is based on range of motion examination. The diagnosed condition is not medically connected to the work factors of January 17, 2003 by direct cause. [Appellant's] symptoms have been present since April 13, 1999. [She] has chronic myofascial pain syndrome in both shoulders from which she has reached maximum medical improvement. There is no specific treatment that will alter the course of this condition.

“I find no evidence of injury on January [17], 2003. No medical treatment is indicated. I find no disability related to the incident of January 17, 2003.”

By decision dated January 23, 2006, the Office denied appellant's claim, finding that she failed to submit sufficient medical evidence in support of her claim. It found that Dr. Stone's opinion rejecting a causal relationship between her diagnosed condition and the alleged work incident of January 17, 2003 represented the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential

² Docket No. 05-1217 (issued September 23, 2005).

³ The Board found, however, that Dr. Vandrak did not provide sufficient rationale to explain how appellant injured her right shoulder with rotator cuff tendinitis while in the course of her employment on January 17, 2003.

⁴ 5 U.S.C. § 8101-8193.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. 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.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸ The medical evidence required to establish causal relationship is usually rationalized medical 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.⁹

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁰

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.¹¹ Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

ANALYSIS

In this case, it is uncontested that appellant experienced the employment incident at the time, place and in the manner alleged. However, the question of whether an employment incident caused a personal injury generally can be established by medical evidence.¹²

The only medical evidence appellant submitted were the reports from Dr. Vandrak. The Board found in its September 23, 2005 decision that his December 14, 2004 report contained medical rationale supporting the fact that appellant sustained a herniated disc at the C4-5 level in

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

⁸ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(a)(14).

⁹ *Id.*

¹⁰ *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

¹¹ *Id.*

¹² *John J. Carlone*, *supra* note 7.

the course of her employment on January 17, 2003. This report, however, was not sufficient by itself to constitute rationalized medical opinion evidence establishing a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The Board remanded the case to the Office for further development of the medical evidence and the Office referred the case file to Dr. Stone for a second opinion examination. Dr. Stone stated findings on examination, thoroughly reviewed the medical history and the statement of accepted facts and found that the diagnosed condition, herniated disc at C4-5, was not directly related to the work factors of January 17, 2003 and that appellant had no injury or disability related to the January 17, 2003 work incident

Dr. Stone explained that appellant sustained no injury on January 17, 2003 but, that she sustained an injury on April 13, 1999 which caused chronic myofascial pain syndrome of both shoulders. It was this condition, not a herniated disc, which caused her complaints on and after January 17, 2003.

When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in medical opinion. 5 U.S.C. § 8123(a).

The Board finds that the Office improperly relied on Dr. Stone's referral opinion in finding that appellant had no condition or disability causally related to any factors of her employment as a conflict exists in the medical opinion evidence between appellant's physician, Dr. Vandrak and the Office second opinion physician, Dr. Stone. This case must, therefore, be remanded to an impartial medical specialist for resolution of the conflict.

CONCLUSION

The Board finds that this case is not in posture for decision as a conflict remains in the medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings inconsistent with this opinion.

Issued: September 14, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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