

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

C.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 07-1756
Issued: January 11, 2008**

Appearances:

*John J. Higgins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2007 appellant filed a timely appeal from an April 27, 2007 decision of the Office of Workers' Compensation Programs denying her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained an injury in the performance of duty.

FACTUAL HISTORY

This case is before the Board for the third time. On January 10, 2006 the Board set aside the Office's nonmerit denial of appellant's request for reconsideration and remanded the case for further merit review.¹ In a decision dated November 15, 2006, the Board set aside the Office's February 9, 2006 decision denying appellant's occupational disease claim and remanded the case

¹ Docket No. 05-99 (issued January 10, 2006).

for further development of the medical evidence.² The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On May 7, 2003 appellant, then a 49-year-old clerk, filed an occupational disease claim alleging that she sustained a cervical neuropathy with impingement of the right and left shoulders and injuries to both wrists and elbows as a result of repetitive motion associated with sorting mail.³ On May 27, 2003 she stated that she began working for the employing establishment in 1997 in a position that required her to case mail and bend her neck repetitively. In 1998, appellant cased letters and flats and bent her neck repetitively. Her duties allegedly included lifting letter and flat trays and transferring mail from flat and letter cases to other trays. Appellant contended that the repetitive motion of her arm and neck for eight hours per day, five days per week, resulted in neck pain. She indicated that her pain worsened in the winter of 1999 to the degree that she was able to work only three days per week. After shoulder surgery, appellant worked facing a table, which required her to bend her neck, resulting in increased pain. She stated that she had continuous pain since approximately February 2003, when she developed a stiff neck and shock pains to the base of her skull, after bending her neck at work for about 30 minutes. Duties of a regular clerk, as reflected in a February 24, 2003 job description, included handling telephones and paperwork, printing labels, verifying mail and walking around.

In a February 6, 2004 attending physician's report, Dr. Elvira Rios, diagnosed discogenic disease; impingement syndrome; and chronic neck, shoulder, arm and elbow pain. In response to the question as to whether appellant's condition was caused or aggravated by employment activity, she stated that appellant's condition "will be exacerbated by repetitive activity." In a February 25, 2004 attending physician's report, Dr. Patrick Bowman, a Board-certified orthopedic surgeon, diagnosed cervical spine syndrome. In response to the question as to whether appellant's condition was caused or aggravated by employment activity, he stated that "the demands of the patient's job affect [her] shoulders bilaterally.

On April 21, 2004 Dr. Bowman stated that he had been treating appellant since September 2003 for a cervical spine condition. He provided a diagnosis of cervical disc syndrome with active radiculopathy and stated that her condition was severely impacted by the repetitive nature of her job. Dr. Bowman stated that appellant "developed a breakdown of several cervical dis[c]s as a result of repetitive work activity which ultimately resulted in severe intractable neuropathic pain in her upper extremities." He noted that he had "reviewed with [appellant] in detail her job profile as a mail processing clerk. In particular, the need for repetitive look[ing] up and rotation of the neck would be, in [his] opinion, strictly contraindicated because of her cervical spine condition." In unsigned notes dated May 5, 2004, Dr. Bowman opined that appellant was disabled from performing her job at the employing establishment, stating that she had significant residual shoulder blade pain, right shoulder pain

² Docket No. 06-1120 (issued November 15, 2006).

³ Appellant filed two previous occupational disease claims alleging a cervical injury. Her April 10, 2002 file number 112008112 was denied by decision dated July 19, 2002 for failure to establish causal relationship. Appellant's February 6, 2003 file number 112014804 was denied on March 28, 2003 on the grounds that the medical evidence did not contain a diagnosis. On June 17, 2003 the Office consolidated files numbers 112008112; 112014804; and 112015953 under master file number 112015953, as they all related to appellant's allegations of a cervical condition.

and right upper extremity pain. He indicated that her condition would be severely exacerbated by the repetitive nature of her job. In a June 13, 2004 report, Dr. Bowman related that appellant had a history of occupational injury relating to repetitive work duties, which began in 1997. He noted that appellant had a severe spine pathology and severe shoulder disease. Dr. Bowman stated: "In my opinion it is clear that the significant herniated dis[c] at C5 on the cervical spine imagery carried on February 24, 2004, was indeed a significant pain generator, participating in her neck, shoulder and upper extremity symptoms." He opined that appellant's cervical dis[c] syndrome "could, as a result of her employment activities, participate as an additional pain generator." On May 5, 2004 Dr. Bowman opined that appellant's condition "would be severely exacerbated and impacted by the repetitive nature of her job."

On April 9, 2003 Dr. R. Schuyler Gooding, a Board-certified neurosurgeon, examined appellant for the first time. Physical examination revealed that appellant's right biceps and brachial radialis reflexes were absent, as was the biceps reflex on the left. The left triceps reflex was significantly depressed. Dr. Gooding concluded that the objective findings "strongly reinforced suspicion" that appellant's discomforts involving her right and left upper extremities were due to her neck. He noted that the report of her cervical myelogram revealed significant nerve root entrapment abnormalities on the right at C5-6 and C6-7. Appellant's computerized tomography scan revealed a disc herniation with an extruded disc fragment on the right. Dr. Gooding stated that the findings suggested that appellant's neck "problem" was the result of her repetitive head and neck movement activities in the workplace, an unavoidable aspect of being a mail handler.

The Office prepared a statement of accepted facts, which delineated appellant's employment history and job duties. The statement provided that appellant was employed as a clerk on October 6, 1996 as a rural letter carrier and worked as a casual clerk intermittently from November 1996 through June 1997. As a casual clerk, she loaded machines with mail; swept the machine; and lifted trays of mail weighing from 12 to 20 pounds. As a part-time flexible clerk from June 7, 1997 to June 15, 2001, her duties included lifting up to 70 pounds intermittently; intermittently sitting, standing, walking, climbing, kneeling, bending, stooping, twisting, pulling, pushing, reaching above the shoulder and fine manipulation throughout the day. From March 8 to April 12, 2000, she worked with restrictions for 30 minutes per day, ensuring that labels faced in the proper direction. Appellant continued to work limited duty until May 24, 2000, when she stopped working. On July 6, 2000 she returned to full-time duty as an outgoing clerk, where she was required to lift and load her ledge with a 15- to 20-pound tray of mail and to sort trays into the appropriate containers twice an hour. Following a February 2001 shoulder surgery, appellant returned to work on March 13, 2001 as an outgoing clerk, where she was required to place letter mail into holdouts according to zip codes, but was not required to lift trays. Beginning August 6, 2001, she divided her eight-hour day between the message center, where she answered telephones and performing the duties of an outgoing clerk. As of November 14, 2001, appellant's physician restricted her from casing mail. On December 1, 2001 she underwent left shoulder surgery and remained off work until January 2001, when she returned to work in a part-time limited-duty status, which restricted her from lifting more than 10 pounds occasionally

or 5 pounds frequently. Appellant worked four hours per day with a five-pound lifting restriction from October 8, 2002 to October 17, 2003, when she stopped working.⁴

The Office referred appellant, together with the statement of accepted facts, to Dr. Daniel Larose, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether her alleged cervical condition was causally related to factors of her federal employment and, if so, how her work duties caused or contributed to the condition. In a report dated March 29, 2007, Dr. Larose stated that he had reviewed the records provided by the Office, including appellant's job description. He related the history of injury and treatment, noting that appellant had undergone three left shoulder surgeries and a discectomy of the cervical spine at the C5-6 level with fusion. On examination, Dr. Larose found that she had abnormal reflexes at C6-7 on the left and at C6 on the right, suggesting that she "she does indeed have cervical pathology, left and right upper extremity pathology." He opined, however, that the multilevel disc disease was not work related, as there was "nothing in her occupation that should explain [the condition]." Dr. Larose stated that the repetition at work was probably a significant contributing factor regarding her tennis elbow and right shoulder condition and that the left shoulder condition was more than likely work related. In a supplemental report dated April 12, 2007, he stated that appellant's cervical condition was not work related and that the upper extremity condition was "either related or an aggravation."

By decision dated April 27, 2007, the Office denied appellant's claim. Finding that Dr. Larose's opinion represented the weight of the medical evidence, the Office determined that appellant had failed to establish that her diagnosed cervical condition was causally related to conditions of her employment.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden of establishing 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 filed within the applicable time limitation; that an injury was sustained while 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.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

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

⁴ The statement of accepted facts reflects that appellant's February 8, 2000 occupational injury claim was accepted for right shoulder impingement and that her May 7, 2000 traumatic injury claim was accepted for left rotator cuff tear and left shoulder arthroscopy.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

presence or existence of the disease or condition for which compensation is claimed; (2) 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 medical evidence required to establish causal relationship is generally 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.⁸

Section 8123(a) 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 states 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 an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ Where 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

ANALYSIS

Appellant filed an occupational disease claim alleging that she sustained a cervical neuropathy with impingement of the right and left shoulders and injuries to both wrists and elbows as a result of repetitive motion associated with sorting mail. Her treating physicians opined that her cervical disc condition was a result of repetitive work activities. The Office initially denied appellant's claim, finding the evidence insufficient to establish a causal relationship between appellant's diagnosed cervical condition and duties of her federal employment. In its November 15, 2006 decision, the Board remanded the case to the Office for further development of the medical evidence. Pursuant to the Board's instruction, the Office obtained a second opinion examination by Dr. Larose, who concluded that appellant's cervical condition was not work related. The Board finds that this case is not in posture for a decision, as

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

there is a conflict in medical opinion between appellant's treating physicians and the Office referral physician.

On April 21, 2004 Dr. Bowman stated that he had been treating appellant since September 2003 for a cervical spine condition. He provided a diagnosis of cervical disc syndrome with active radiculopathy and stated that her condition was severely impacted by the repetitive nature of her job. Dr. Bowman stated: "[that appellant] developed a breakdown of several cervical dis[c]s as a result of repetitive work activity which ultimately resulted in severe intractable neuropathic pain in her upper extremities." He noted that he had "reviewed with appellant in detail her job profile as a mail processing clerk. In particular the need for repetitive look[ing] up and rotation of the neck would be, in [his] opinion, strictly contraindicated because of her cervical spine condition." In reports dated May 5 and June 13, 2004, Dr. Bowman reiterated his opinion that appellant's cervical disc syndrome resulted from her job activities. On April 29, 2003 Dr. Gooding opined that appellant's significant nerve root entrapment abnormalities on the right at C5-6 and C6-7 and disc herniation with an extruded disc fragment on the right, was the result of her repetitive head and neck movement activities in the workplace, an unavoidable aspect of being a mail handler.

On the other hand, the Office referral physician opined that there was no causal relationship between appellant's diagnosed cervical condition and her job duties. Dr. Larose found that appellant had abnormal reflexes at C6-7 on the left and at C6 on the right, suggesting that "she does indeed have cervical pathology, left and right upper extremity pathology." He opined, however, that the multilevel disc disease was not work related, as there was "nothing in her occupation that should explain [the condition]." Thus, the Board finds that there is a conflict between the opinions of appellant's treating physicians and the government's referral physician. The Board notes that, while Dr. Larose referred generally to appellant's "occupation," he did not explain his opinion by addressing specific employment duties identified in the statement of accepted facts and did not address the opinions of her treating physicians that her cervical condition was caused by the repetitive nature of her activities in the workplace. Nor did he explain why he believed, on the one hand, that repetition at work caused or aggravated her tennis elbow and right shoulder condition, but, on the other hand, did not cause or exacerbate her cervical condition.

Where 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.¹² The case will be remanded to the Office to resolve the conflict. On remand, the Office shall prepare an updated statement of accepted facts and refer it, the medical record and appellant to an appropriate specialist to obtain an impartial medical opinion as to whether there exists a causal relationship between her cervical conditions and her federal employment. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

¹² *Id.*

CONCLUSION

The Board finds that the case is not in posture for a decision due to a conflict of medical opinion. The case must be remanded for further development to resolve the conflict.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: January 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board