United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 08-474**
	)	**Issued: June 20, 2008**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Fort Belvoir, VA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 12 and July 26, 2007 merit decisions concerning his claims for a recurrence of disability and an employment-related occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and whether he met his burden of proof to establish that he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005.

FACTUAL HISTORY

The Office accepted that on July 12, 1995 appellant, then a 44-year-old contract specialist, sustained right lateral epicondylitis and a right elbow contusion when a 600-pound

mail wagon struck his right elbow.[1] He had intermittent periods of disability and on July 9, 1997 he underwent a right radial tunnel release with neurolysis superficial nerve, posterior interosseous nerve, lateral epicondylectomy and ostectomy. The surgical procedure was authorized by the Office. In April 1998, appellant returned to work for the employing establishment. He initially performed limited-duty work, but he gradually increased his duties such that he was performing regular, full-time work.[2]

Appellant stopped work on November 15, 2005 and suggested that he sustained a recurrence of total disability due to his July 12, 1995 employment injury. At the time, he was performing regular, full-time work working as a contract specialist. On December 27, 2005 appellant filed an occupational disease claim (file number 03-2045182) alleging that he sustained injury to his right upper extremity due to his work duties. Regarding the nature of the injury, he stated, "Numbness in right fingers, pain in right wrist, hand, pain and burning in forearm, elbow area to upper arm, pain in right shoulder…." In accompanying statements, appellant asserted that the condition was caused by typing on a keyboard, using a computer mouse, answering telephones and performing such clerical duties as filing, handwriting and scanning documents.

In a February 1, 2006 report, Dr. Scott M. Fried, an attending Board-certified orthopedic surgeon, noted that he first evaluated appellant for his upper extremity problems on August 17, 2005. He detailed appellant's medical history since his July 12, 1995 employment injury and noted that he reported numerous upper extremity complaints, more on the right than the left. Dr. Fried indicated that appellant sustained a contusion to the right radial nerve on July 12, 1995. He concluded that October 2005 electromyogram (EMG) and nerve conduction velocity (NCV) studies showed that appellant continued to have disabling residuals of the July 12, 1995 injury. Dr. Fried also concluded that appellant had right carpal tunnel syndrome, right overuse syndrome with magnetic resonance imaging (MRI) evidence of rotator cuff involvement and right shoulder capsulitis due to his repetitive work activities.[3]

In a March 2, 2006 decision, the Office denied appellant's occupational disease claim on the grounds that he did not submit sufficient medical evidence in support thereof. In a June 5, 2006 decision, an Office hearing representative set aside the Office's March 2, 2006 decision and remanded the case to the Office for further development of the medical evidence. The Office hearing representative found that the opinion of Dr. Fried raised an uncontradicted inference that appellant either had disability after November 14, 2005 due to his July 12, 1995 injury or a new right-sided occupational injury. The Office hearing representative indicated that appellant should be referred to a physician by the Office for further evaluation.

On remand appellant was referred to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon.[4] On July 11, 2006 Dr. Hanley provided a description of appellant's factual and medical

[1] This claim bore the file number 03-210790.

[2] Appellant attempted to use assistive devices with varying success.

[3] Dr. Fried also stated, "His overuse on the left has continued, resulting in his median nerve carpal tunnel and repetitive strain basis as well as his radial nerve involvement." The present case does not concern appellant's left arm and the matter is not currently before the Board.

[4] Prior to the referral, the Office added documents from file number 03-210790 to the record.

history, including his medical treatment since the July 12, 1995 employment injury and his right arm complaints since returning to work in 1998. He indicated that appellant had full range of motion of the right arm but that he withdrew from even light touch of the right forearm, hand and elbow area. Dr. Hanley indicated that he did not believe appellant had any objective abnormality due to work factors and indicated that he did not believe that his work duties were sufficiently repetitive or varied to cause injury. He made note of appellant's significant nonorganic and emotional overlay and stated, "I do not believe that he suffers at the present time from either a recurrent injury of the 1995 episode or a new injury due to subsequent work exposure." In an accompanying form, Dr. Hanley indicated that appellant could perform his regular work.

In a July 19, 2006 decision, the Office denied appellant's claim that he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005. It indicated that the opinion of Dr. Hanley was well rationalized, but that the opinion of Dr. Fried was of limited probative value.[5] In an October 3, 2006 decision, an Office hearing representative set aside the Office's July 19, 2006 decision and remanded the case to the Office for referral of appellant to an impartial medical specialist. He found that there was a conflict in the medical evidence between Dr. Fried and Dr. Hanley regarding whether appellant sustained an employment-related recurrence of disability and regarding whether he sustained a new right-sided occupational disease.[6]

The Office referred appellant and the case record to Dr. Richard G. Schmidt, a Board-certified orthopedic surgeon, for an examination and evaluation regarding whether he sustained an employment-related recurrence of disability and whether he sustained a new right-sided occupational disease.[7] On November 29, 2006 Dr. Schmidt provided an extensive discussion of appellant's factual and medical history, including his medical treatment since his July 12, 1995 injury and upper extremity complaints since returning to work. He noted that appellant described his job as a contract specialist as a sedentary-type job where he has to use the computer. Dr. Schmidt indicated that on examination appellant exhibited normal range of motion of the upper extremities with normal motor strength and intact sensation. However, appellant showed subjective pain complaints on palpation. Dr. Schmidt indicated that March 5, 1996 EMG and NCV testing showed evidence of bilateral radial tunnel syndrome and radial

[5] The Office did not appear to make any finding regarding appellant's claim that he sustained a recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury

[6] The Office hearing representative asked appellant to submit documents regarding his hobby of riding motorcycles.

[7] The Office produced a new statement of accepted facts. The document indicated that appellant's job duties consisted of answering telephones, filing folders, writing, using a keyboard, and using a computer mouse. Appellant submitted numerous documents regarding his motorcycle hobby and indicated that his three-wheeled motorcycle was specially outfitted to accommodate his handicap.

nerve entrapment, but stated that his examination did not show any evidence of lateral epicondylitis or bilateral radial tunnel syndrome. He stated:

> "My impression at this time is that this patient's clinical examination today is objectively within normal limits. Frankly, the patient's subjective complaints are nonphysiological and are consistent with dramatic symptom magnification. The patient complains of diffuse tenderness on palpation essentially in all areas of the upper extremities, neck and posterior trapezial muscle regions in the face of a totally normal clinical exam[ination] without loss of motion, neurologic disturbance or any evidence of swelling.
>
> "My impression at this time is that this patient is fully recovered from his work injury of July 12, 1995. I cannot correlate any problems to the patient's work injury of July 12, 1995 or from his work activities since his return to work in April of 1998.
>
> "In addition, it is my opinion within a reasonable degree of medical certainty that this patient being out of work since November 14, 2005 is not the result of either the July 12, 1995 work injury or from his work activities since his return to work in April of 1998.
>
> "During today's evaluation the patient indicated that he came out of work primarily on November 14, 2005 because of an intentional tremor. The patient does have a very minimal tremor at rest today with arms extended. He does not have an intention tremor. In other words, when he moves his fingers purposefully he does not show a tremor."

In a January 12, 2007 decision, the Office denied appellant's claims that he sustained a recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and that he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005. The Office found that the weight of the medical evidence rested with the well-reasoned opinion of the impartial medical specialist, Dr. Schmidt.

Appellant requested a hearing before an Office hearing representative. At the May 16, 2007 hearing, appellant's attorney argued that Dr. Schmidt's opinion was not sufficiently well reasoned to constitute the weight of the medical evidence. He contended that Dr. Schmidt did not have a complete picture of appellant's work duties and that he did not adequately consider certain evidence, such as recent EMG and NCV study findings. Appellant submitted a January 31, 2007 report of Dr. Fried and additional results of diagnostic testing.

In a July 26, 2007 decision, the Office hearing representative affirmed the Office's January 12, 2007 decision. He indicated that Dr. Schmidt's opinion was well reasoned and adequately considered all the relevant factual and medical evidence.[8]

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[9] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[10] Where no such rationale is present, medical evidence is of diminished probative value.[11]

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 medical evidence required to establish a causal relationship is rationalized medical opinion evidence.[12]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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."[13] In situations 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

[8] The Office hearing representative noted that the record contained a claim form (CA-2) alleging an employment-related occupational disease of the left arm, but that the employing establishment had not completed its portion of the form. She indicated that the Office should consider this claim once it was properly completed. The record does not contain any final decision of the Office regarding this claim and it is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

[9] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

[10] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[11] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[12] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[13] 5 U.S.C. § 8123(a).

resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Office accepted that on July 12, 1995 appellant, then a 44-year-old contract specialist, sustained right lateral epicondylitis and a right elbow contusion when a 600-pound mail mobile stuck his right elbow. He stopped work on November 25, 2005 and did not return. Appellant claimed both that he sustained a recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and that he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005.

The Office properly determined that there was a conflict in the medical opinion between Dr. Fried, appellant's attending Board-certified orthopedic surgeon, and Dr. Hanley, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding whether appellant sustained an employment-related recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and regarding whether he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005.[15] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Schmidt, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[16]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Schmidt, the impartial medical specialist selected to resolve the conflict in the medical opinion.[17] The report of Dr. Schmidt establishes that appellant did not sustain an employment-related recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and that he did not sustain an occupational disease of his right arm which caused disability on or after November 14, 2005.

On November 29, 2006 Dr. Schmidt provided an extensive discussion of appellant's factual and medical history, including his medical treatment since his July 12, 1995 injury and upper extremity complaints since returning to work. He indicated that on examination appellant exhibited normal range of motion of the upper extremities with normal motor strength and intact sensation. Dr. Schmidt stated that appellant's subjective complaints were "nonphysiological and "consistent with dramatic symptom magnification" and noted, "The patient complains of diffuse

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] In a February 1, 2006 report, Dr. Fried concluded that October 2005 EMG and NCV studies showed that appellant continued to have disabling residuals of the July 12, 1995 injury. He also concluded that appellant had right carpal tunnel syndrome, right overuse syndrome with MRI scan evidence of rotator cuff involvement, and right shoulder capsulitis due to his repetitive work activities. In contrast, Dr. Hanley indicated in a July 11, 2006 report that appellant had significant nonorganic and emotional overlay and was not suffering from either a recurrence of disability due to his July 12, 1995 injury or a new injury due to subsequent work exposure.

[16] *See supra* note 13 and accompanying text.

[17] *See supra* note 14 and accompanying text.

tenderness on palpation essentially in all areas of the upper extremities, neck and posterior trapezial muscle regions in the face of a totally normal clinical examination without loss of motion, neurologic disturbance or any evidence of swelling." He noted that appellant related his work stoppage to an intention tremor in his right hand, *i.e.*, a tremor that gets worse when the member is moved, but indicated that he did not observe an intention tremor on examination or see one mentioned in the medical records. Dr. Schmidt concluded, "My impression at this time is that this patient is fully recovered from his work injury of July 12, 1995. I cannot correlate any problems to the patient's work injury of July 12, 1995 or from his work activities since his return to work in April of 1998."

The Board has carefully reviewed the opinion of Dr. Schmidt and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Schmidt's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[18] He provided medical rationale for his opinion by explaining that appellant did not exhibit any objective signs of having sustained an employment-related recurrence of disability or a new right-sided occupational disease causing disability on or after November 25, 2005.

Appellant's attorney contended that Dr. Schmidt did not have a complete picture of appellant's work duties and that he did not adequately consider certain evidence, such as recent EMG and NCV study findings. The Board finds that Dr. Schmidt adequately addressed the relevant factual and medical evidence. He discussed appellant's work duties in his report and the statement of accepted facts he was provided contained an adequate description of these duties. Dr. Schmidt adequately considered the relevant diagnostic testing. He noted that March 5, 1996 EMG and NCV testing showed evidence of bilateral radial tunnel syndrome and radial nerve entrapment, but stated that his examination did not show any evidence of lateral epicondylitis or bilateral radial tunnel syndrome.[19]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after November 14, 2005 due to his July 12, 1995 employment injury and that he did not meet his burden of proof to establish that he sustained an occupational disease of his right arm which caused disability on or after November 14, 2005.

[18] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[19] After the termination of his compensation, appellant submitted additional medical evidence including a January 31, 2007 report of Dr. Fried. However, as Dr. Fried was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 26 and January 12, 2007 decisions are affirmed.

Issued: June 20, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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