



condition was of a psychiatric origin. Dr. Isaac Schmidt, a Board-certified orthopedic surgeon and appellant's treating physician, opined that she sustained a work-related cervical sprain/strain, bilateral carpal tunnel syndrome, lumbar sprain/strain, lumbar facet syndrome, bilateral chondromalacia and fibromyalgia.<sup>1</sup> The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.<sup>2</sup>

To resolve the conflict the Office referred appellant to Dr. Robert D. Shlens, a Board-certified orthopedic surgeon, selected as the impartial referee. In a report dated October 16, 2006, Dr. Shlens performed an independent review of the medical records. In a separate report dated October 27, 2006, he performed a physical examination and evaluation of appellant. Dr. Shlens noted a history of appellant's work-related injury. With regard to the cervical spine, there were no trigger areas or isolated tenderness but limited range of motion. Appellant's shoulders revealed no atrophy or tenderness, Dr. Shlens found a normal neurological examination, negative Phalen's sign and there was no evidence of carpal tunnel syndrome. As to her lumbar spine, he noted that examination revealed no nodules, trigger areas or spasms but limited range of motion. On gait examination, appellant dragged her feet but there was no sensory deficit or atrophy of the upper and lower extremities. Straight leg raises were negative and there was no chondromalacia patella of either knee. Dr. Shlens noted that appellant had no evidence of musculoskeletal injury or disability. He opined that appellant had no objective orthopedic findings and there was no evidence of cervical lumbar strain or sprain, chondromalacia patella, carpal tunnel syndrome or fibromyalgia. Dr. Shlens opined that her work duties as a window clerk would not create appellant's symptoms and complaints.

Appellant, through her attorney, submitted letters dated October 27 and November 6, 2006 and advised that the medical referee physician forced her to undress in front of him and her goddaughter which caused her embarrassment. She indicated that Dr. Shlens instructed her to touch her toes, walk on her heels and walk in the room; however, she was unable to perform any of the tasks.

In a letter dated November 13, 2006, the Office requested that Dr. Shlens respond to appellant's complaints.

In a supplemental report dated November 17, 2006, Dr. Shlens indicated that his purpose in observing appellant was to determine how much she could do by herself without the assistance of her goddaughter, who was present. Appellant presented in his office as a total invalid, therefore, he remained in the examining room so that he could observe how she moved around the room and sat on the examining table during the evaluation. Dr. Shlens noted that he held the dressing gown in front of appellant to block his view of her while she removed her clothing to prevent her from becoming embarrassed. In a letter dated November 30, 2006, the Office advised appellant that Dr. Shlens response to her allegations were found to be credible.

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<sup>1</sup> On May 28, 2003 appellant, then a 47-year-old distribution window clerk, filed an occupational disease claim alleging that she developed a condition of the muscles, joints, bones and nerves while performing her clerk duties. She became aware of her condition on December 23, 2002. Appellant stopped work on January 7, 2003 and did not return. She filed a prior claim for injuries sustained on June 14, 1996 when she tripped while in the performance of duty. The Office accepted appellant's claim for a cervical strain, in file number 13-1109946.

<sup>2</sup> Docket No. 06-1189 (issued September 15, 2006).

In a decision dated December 4, 2006, the Office denied appellant's claim on the grounds that the weight of the medical evidence, as requested by the referee physician, did not demonstrate that she developed the diagnosed conditions as a result of her employment duties.

On December 11, 2006 appellant requested an oral hearing which was held on April 4, 2007. She reiterated her allegations that Dr. Shlen's demeanor during the examination was inappropriate and attached a complaint she filed with the medical board of California. She submitted correspondence from the California Medical Board dated April 23, 2007, which advised that her allegations against Dr. Shlens could not be substantiated. Appellant submitted a brief in which she asserted that Dr. Shlens was of the wrong specialty to provide an opinion on whether she had fibromyalgia and contended that the Office should have referred her to a specialist in internal medicine. She submitted a March 27, 2007 report from Dr. Schmidt who noted that appellant presented with significant triggering points across the neck and back and listed marked improvement after receiving trigger point blocks. A magnetic resonance imaging (MRI) scan of the right knee showed a small tear of the lateral meniscus and an MRI scan of the cervical spine showed cervical spondylosis with discogenic process. Dr. Schmidt advised that he based his diagnosis of fibromyalgia on his clinical notes and the MRI scans which assisted in identifying focal problems that explained fibromyalgia.

By decision dated June 15, 2007, the hearing representative affirmed the Office's December 4, 2006 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or his 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 the 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. 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.<sup>3</sup>

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) 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 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

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<sup>3</sup> Gary J. Watling, 52 ECAB 357 (2001).

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.<sup>4</sup>

### ANALYSIS

On May 28, 2003 appellant filed an occupational disease claim alleging that she developed a cervical sprain/strain, bilateral carpal tunnel syndrome, lumbar sprain/strain, lumbar facet syndrome, bilateral chondromalacia and fibromyalgia while performing her clerk duties. The Board found that a conflict of medical opinion existed between the second opinion physician, Dr. Bleeker, who determined that appellant had no objective orthopedic findings and that her condition was of a psychiatric origin, and Dr. Schmidt, appellant's treating physician, who attributed her claimed conditions to her federal employment. As there was a conflict in the medical opinion evidence, the Office properly referred appellant for an impartial medical examination by Dr. Shlens, a Board-certified orthopedic surgeon, selected as the medical referee.<sup>5</sup>

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>6</sup>

In his October 16 and 27, 2006 reports, Dr. Shlens reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Shlens noted, with regard to the cervical spine, that there were no trigger areas or isolated tenderness but limited range of motion, her shoulders revealed no atrophy or tenderness, normal neurological examination, negative Phalen's sign and no evidence of carpal tunnel syndrome. Dr. Shlens noted that an examination of appellant's back revealed no trigger areas or spasms, limited range of motion, no sensory deficit or atrophy of the upper or lower extremities, the straight leg raises were negative and there was no chondromalacia patella of either knee. He opined that appellant had no objective orthopedic findings of musculoskeletal injury or disability and there was no evidence of cervical lumbar strain or sprain, chondromalacia patella, carpal tunnel syndrome or fibromyalgia. Dr. Shlens further opined that her work duties as a window clerk would not create appellant's symptoms and complaints.

The Board finds that the opinion of Dr. Shlens is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight. His reports establish that appellant's cervical sprain/strain, bilateral carpal tunnel syndrome, lumbar sprain/strain, lumbar facet syndrome, bilateral chondromalacia and fibromyalgia are not causally related to her

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<sup>4</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>5</sup> 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

<sup>6</sup> *Solomon Polen*, *supra* note 4.

employment duties as a window clerk. Dr. Shlens reviewed the entire case record and statement of accepted facts and examined appellant. He provided rationale as to why appellant's claimed conditions were not causally related to her work duties.

Appellant submitted a report from Dr. Schmidt dated March 27, 2007, who noted that she presented with significant triggering points across the neck and back. Dr. Schmidt noted that findings on an MRI scan of the right knee revealed a tear of the lateral meniscus and an MRI scan of the cervical spine showed cervical spondylosis with discogenic process. He advised that his diagnosis of fibromyalgia was based on his clinical notes and the MRI scans. However, Dr. Schmidt's report is insufficient to establish the claim as he did not provide a history of injury or specifically address whether appellant's employment activities had caused or aggravated a diagnosed medical condition including fibromyalgia.<sup>7</sup> Therefore, this report is insufficient to meet appellant's burden of proof. Additionally, Dr. Schmidt's report is similar to his prior reports and is insufficient to overcome that of Dr. Shlens or to create a new medical conflict.<sup>8</sup>

On appeal, appellant asserts that Dr. Shlens acted inappropriately when she disrobed for examination. The Board finds that her assertion is without merit. The Office secured a supplemental report from Dr. Shlens who explained that he needed to observe appellant to determine her physical capabilities in light of her presentation at the examination. The Board finds that Dr. Shlens sufficiently explained the circumstances of the examination and provided a reasonable explanation, reasonable in light of the circumstances presented. Furthermore, the record contains an April 23, 2007 letter from the medical board of California which found that appellant's allegations of misconduct could not be substantiated.<sup>9</sup>

The Board finds that Dr. Shlens' opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's denial of appellant's claim for compensation.

### **CONCLUSION**

The Board finds that appellant has failed to establish that she developed a cervical sprain/strain, bilateral carpal tunnel syndrome, lumbar sprain/strain, lumbar facet syndrome, bilateral chondromalacia and fibromyalgia in the performance of duty.

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<sup>7</sup> *A.D.*, 58 ECAB \_\_\_\_ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>8</sup> See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Schmidt's report does not contain new findings or rationale upon which a new conflict might be based.

<sup>9</sup> See *William Fidurski*, 54 ECAB 146 (2002) (an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 15, 2007 and December 4, 2006 are affirmed.

Issued: March 4, 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