

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

S.S., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, Dover, DE, Employer**

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**Docket No. 09-1299
Issued: January 8, 2010**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 22, 2009 appellant filed a timely appeal from an April 15, 2009 merit decision of the Office of Workers' Compensation Programs that denied his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board.¹ In a March 20, 2008 decision, the Board affirmed Office decisions finding that appellant did not meet his burden of proof to establish that he developed an occupational disease in the performance of duty. The Board found that appellant performed certain repetitive physical activities at work but did not submit a rationalized medical opinion establishing that the work factors caused or aggravated his low back condition. The Board found that the report of Dr. Robert Allen Smith, a Board-certified

¹ Docket No. 07-2189 (issued March 20, 2008).

orthopedic surgeon and second opinion physician, represented the weight of the medical evidence. The facts and the history of the case are incorporated by reference.

On March 18, 2009 appellant's representative requested reconsideration. In a March 12, 2009 report, Dr. Gary W. Muller, an orthopedic surgeon, reviewed appellant's work history, history of injury and medical treatment. He noted that appellant related that his condition was caused by "repetitive bending, lifting, reaching from awkward positions for extended periods of time." Appellant believed that using an "old single meat grinder system without a molder and conveyor" caused his condition. He related that from 1993 until about October 2001 he ground beef between three to four days for one week out of every three weeks and in 2004, he was grinding beef approximately three days a week. When a coworker was injured in May 2005, he began grinding beef about four days a week until September 2006. Dr. Muller advised that, on those days, appellant ground beef about three and a half to four hours daily. When not grinding beef, appellant performed repetitive movements like lifting, grasping, pushing and pulling of various types of beef. Dr. Muller explained that appellant worked with various sizes of beef, some of which were very large, heavy and awkward. Appellant's duties included trimming and boning using knives and hand tools. He related that in September 2004, the double grinder system was switched to a single grinder. Appellant advised Dr. Muller that the single grinder system turned a three step operation into a seven-step operation, which required more stooping and lifting. He noted that appellant, at six feet one inches tall, had to stoop and lift heavy pieces of meat from a height of four to five feet to place them into the grinder and run the meat through the grinder twice. Dr. Muller explained that this required repetitive stooping and lifting. Appellant related that, after the employing establishment changed to the single grinder system in 2004, he developed more achiness, pain and soreness and his condition just deteriorated. He noted that appellant was placed on light duty and then eventually released. Dr. Muller stated that appellant indicated that he had to walk or stand continuously for many years directly on cold concrete floors without mats in temperatures that did not exceed 50 degrees. He noted that appellant had motor vehicle accidents on April 30, 1981, in 1992 and May 2006, as well as a history of gout. On examination, appellant had tenderness across the paraspinals at L4-5, L5-S1, the right SI joint and sciatic notch, with limited range of motion, which included voluntary restrictions due to pain. He had negative straight leg raising, negative Waddell and normal sensation to pinprick. Dr. Muller diagnosed a lumbosacral sprain and strain pattern with an underlying annular tear at L3-4 with neuroforaminal narrowing, broad-based bulge, neuroforaminal stenosis and facet arthritis at L4-5 and L5-S1. He explained that "these are changes that can definitely result as of the natural aging process, but these changes are definitely worse than you would normally see in a 50 year old. These changes are definitely worsened by the physical demands of his job and the many years of physical activity and the repetitive nature of his job." Dr. Muller stated that appellant's work both contributed to his condition and accelerated his arthritis.

By decision dated April 15, 2009, the Office denied modification of its prior decisions, finding that Dr. Smith remained the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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 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.³ 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.⁴

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 causal relationship, generally, is 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.⁵

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 (known as a referee physician or impartial medical specialist) who shall make an examination.⁶

ANALYSIS

The Board finds this case is not in posture for decision due to a conflict in medical opinion between Dr. Muller, appellant's treating physician, and Dr. Smith, the second opinion physician, as to whether appellant's claimed conditions are related to factors of his employment.

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Id.*

⁶ 5 U.S.C. § 8123(a). *See* 20 C.F.R. § 10.321(b).

Dr. Muller conducted a comprehensive review of appellant's history and provided findings on examination. He diagnosed a lumbosacral sprain and strain pattern and underlying annular tear at L3-4 with neuroforaminal narrowing, broad-based bulge, neuroforaminal stenosis and facet arthritis at L4-5 and L5-S1. Dr. Muller explained that appellant's diagnoses were definitely worsened by the physical demands of his job and the many years of physical activity and repetitive work, he performed that appellant's employment had contributed to his diagnosed conditions and had accelerated the underlying arthritis condition. The Board notes that his opinion, which is thorough and rationalized, conflicts with that of Dr. Smith who found that appellant's condition and restrictions, were not work related.

The Office's regulations provide 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.⁷ The Board will set aside the Office's April 15, 2009 decision and remand the case for referral to an appropriate impartial medical specialist to determine whether appellant's conditions were caused or aggravated by his federal employment. Following such further development as may be deemed necessary, the Office shall issue an appropriate final decision on the issue of whether appellant sustained an occupational disease in the performance of duty.

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.

⁷ *Id.* See also *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2009 is set aside and remanded for further action consistent with this decision.

Issued: January 8, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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