

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

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C.W., Appellant)	
)	
and)	Docket No. 09-1836
)	Issued: June 9, 2010
DEPARTMENT OF AGRICULTURE, FOREST)	
SERVICE, Darrington, WA, Employer)	
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Appearances:
Appellant, pro se
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 July 13, 2009 appellant filed an appeal of the Office of Workers' Compensation Programs' February 5, 2009 merit decision denying her occupational disease claim, and the May 29, 2009 nonmerit decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she sustained an injury in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On November 27, 2007 appellant, then a 43-year-old writer-editor, filed an occupational disease claim (Form CA-2) alleging that she developed pain and spasms in her neck and back as

a result of sitting and working long hours at her computer.¹ She first realized that her condition was causally related to her employment on March 30, 2006.

In a November 27, 2007 statement, appellant noted that she experienced a severe muscle spasm in her neck and right shoulder on a two-week work-related trip to Washington, DC in the fall of 2007. She attributed her condition to lifting heavy luggage (two suitcases weighing 30 and 38 pounds respectively) on October 18 and 19, 2007, and to working at a “non-ergonomically set up desk.” Appellant indicated that, when she sneezed on October 23, 2007, she experienced a shooting pain between her shoulder blades and down her back. On November 23, 2007 she fell on ice while walking in the front door of her normal duty station, thereby exacerbating the pain in her shoulder, neck, arm and hand. Appellant also alleged that the stress level caused by critical deadlines added to the muscular tension and caused severe discomfort. She noted a prior neck injury due to a work-related motor vehicle accident,² and that her lower back sciatica had been ongoing for several years, first noticed following a fall while hiking.

Appellant submitted notes from Dr. Gary Schillhammer, Board-certified in the field of family medicine, dated January 23, 1998 through April 16, 2006. Dr. Schillhammer’s notes reflect that appellant sustained injuries to her shoulder and back as a result of a January 30, 1998 motor vehicle accident and that she had flare-ups approximately once a year. On April 16, 2006 appellant reported that she had recently experienced increased back pain, which radiated across her shoulders, due to her constant seated position at work. Dr. Schillhammer diagnosed lumbar strain.

On February 14, 2008 appellant stated that she had been diagnosed with herniated, bulging discs, tendinitis and bursitis in her right shoulder. She alleged that her job duties, which required her to work seven to eight hours per day on a keyboard and mouse, exacerbated the pain in her neck and shoulders into her hands and arms.

In a decision dated March 10, 2008, the Office denied appellant’s claim on the grounds that the medical evidence did not establish that the claimed medical conditions were causally related to the accepted work events. It accepted that appellant worked extensive hours while sitting and using the computer, but found that the record did not contain a well-rationalized medical opinion explaining how an injury resulted from her work duties.

On March 20, 2008 appellant requested an oral hearing. In a March 23, 2008 report, Dr. Schillhammer noted appellant’s complaints of constant neck and right shoulder pain beginning in October 2007, which she originally attributed to carrying luggage on a work-related trip. The pain became worse after working at the computer for two to three hours and extreme after seven hours. Physical examination revealed laxity and tenderness at the neck and shoulder. A magnetic resonance imaging (MRI) scan of the shoulder showed bursitis and tendinosis. An

¹ The record also contains a notice of traumatic injury, dated April 26, 2006, alleging that appellant injured her neck and sciatic nerve on March 30, 2006 due to repeated long hours and work at her computer. The form was not received by the Office until January 28, 2008. The Office combined the claims and developed them under File No. xxxxxx881.

² Appellant’s March 23, 1998 traumatic injury claim (File No. xxxxxx422) was accepted for cervical strain.

MRI scan of the neck showed mild to moderate degenerative changes, including a small herniation at C4-5 and a moderate herniation at C5-6, with moderate narrowing.³

At the August 7, 2008 hearing, appellant reiterated her claim that her neck and shoulder conditions were due to her prolonged sitting and keyboarding activities. She stated that her conditions were not caused by a specific traumatic event.

In an August 6, 2008 report, Dr. Schillhammer stated that he had treated appellant for a variety of musculoskeletal problems for over 20 years. In October 2007, appellant injured her right neck and shoulder while on a business trip to Washington, DC. MRI scans demonstrated acute tendinosis and bursitis of the right shoulder as well as a type II accordion. A neck MRI scan demonstrated facet arthritis as well as chronic disc herniation. Dr. Schillhammer stated that shoulder muscle tension, created by holding arms extended, or neck muscle tension could certainly explain the aggravation of her underlying arthritis and tendinitis. He opined that prolonged time spent keyboarding at a computer workstation had aggravated the condition in her neck and right shoulder, with recurring bouts of pain and spasm and palpable inflammation of her neck and shoulder.

By decision dated October 8, 2008, the Office hearing representative vacated the March 10, 2008 decision. He found that Dr. Schillhammer generally supported that appellant's claimed injury was caused by the accepted employment incidents. The case was remanded for further development of the medical evidence.

On remand, the Office referred appellant to Dr. Paul H. Reiss, a Board-certified orthopedic surgeon, together with a statement of accepted facts, for an opinion as to whether she had a diagnosed condition causally related to the accepted work-related events.⁴ In a report dated December 19, 2008, Dr. Reiss diagnosed degenerative disc disease of the cervical spine with right C6 radiculopathy, which he stated represented a "worsening of the previous condition noted on the MRI scan of June 22, 1996." He found that appellant's current condition was due to the natural aging of the cervical spine and was unrelated, on a more-probable-than-not basis, to using a computer, which did not provide an occupational risk for worsening of degenerative disc disease of the cervical spine over and above the activities of daily living. Dr. Reiss also opined that the minimal impingement of the right shoulder was not due to a specific traumatic injury or to keyboarding, as working on a keyboard was not an occupational risk for impingement of the shoulder. Rather, he concluded that the condition was due to age-related changes and that the majority of appellant's symptoms were coming from the cervical spine, specifically, the right C6 radiculopathy. Dr. Reiss opined that appellant's documented multiple musculoskeletal conditions were not related to the use of keyboarding or the alleged 2007 injury.

³ The record contains copies of notes from Dr. Schillhammer from February 24, 1998 through February 22, 2008; reports of MRI scans of the cervical spine dated June 24, 1998 and November 15 and December 18, 2007; and a listing of visits to Dr. Schillhammer for the period April 25, 1995 to June 14, 2007.

⁴ The Office's November 10, 2008 statement of accepted facts reflected that appellant sat at and used a computer 7 to 8 hours per day, 5 days per week, and sometimes used the computer up to 16 hours per day to meet deadlines.

By decision dated February 5, 2009, the Office denied appellant's claim based on Dr. Reiss' December 19, 2008 report, which established that appellant had no work-related condition that could be causally related to the accepted employment activities.

On April 16, 2009 appellant requested an oral hearing.

By decision dated May 29, 2009, an Office hearing representative denied appellant's request for an oral hearing as untimely.

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 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.⁶ 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.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 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.⁸

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

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Id.*

a referee physician or impartial medical specialist) who shall make an examination.⁹ A difference in medical opinion sufficient to be considered a conflict occurs when two reports of virtually equal weight and rationale reach opposing conclusions.¹⁰

ANALYSIS

The Board finds this case is not in posture for decision due to a conflict in medical opinion between Dr. Schillhammer, appellant's treating physician, and Dr. Reiss, the second opinion physician, as to whether her claimed conditions are related to her accepted employment activities.

Dr. Schillhammer opined that appellant's neck and shoulder condition was causally related to the identified work activities. On March 23, 2008 he noted appellant's complaints of constant neck and right shoulder pain beginning in October 2007, which was reportedly worse after working at the computer for two to three hours and extreme after seven hours. Dr. Schillhammer provided examination findings, which revealed laxity and tenderness at the neck and shoulder. An MRI scan of the shoulder showed bursitis and tendinosis. An MRI scan of the neck showed mild to moderate degenerative changes, including a small herniation at C4-5 and a moderate herniation at C5-6, with moderate narrowing. On August 6, 2008 Dr. Schillhammer noted that he had treated appellant for a variety of musculoskeletal problems for over 20 years and stated that shoulder muscle tension, created by holding arms extended, or neck muscle tension could certainly explain the aggravation of her underlying arthritis and tendinitis. He opined that prolonged time spent keyboarding at a computer workstation had aggravated appellant's neck and right shoulder conditions, causing recurring bouts of pain and spasm and palpable inflammation of her neck and shoulder.

Dr. Reiss opined that appellant's degenerative disc disease with right C6 radiculopathy and her minimal shoulder impingement were not employment related, but rather were due to age-related changes. He stated that her condition was unrelated, on a more-probable-than-not basis, to using a computer, which did not provide an occupational risk for the worsening of degenerative disc disease of the cervical spine or for shoulder impingement.

The Board finds that there is a conflict in the medical opinion evidence between appellant's treating physician and the Office's second opinion examiner. Dr. Schillhammer stated that appellant's neck and shoulder conditions were causally related to her computer duties and prolonged sitting at work. Dr. Reiss found that her symptoms were due to age-related changes, rather than to employment activities. The opinions of both physicians are of virtually equal weight and rationale but reach opposing conclusions.¹¹ The case will be remanded to the Office for further development in order to resolve the conflict.¹² Following such development as deemed necessary, the Office shall issue an appropriate decision in the case.

⁹ 5 U.S.C. § 8123(a). See also *R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008).

¹⁰ See 20 C.F.R. § 10.321(b). See also *James P. Roberts*, 31 ECAB 1010 (1980).

¹¹ See 20 C.F.R. § 10.321(b). See *James P. Roberts*, *supra* note 10.

¹² 5 U.S.C. § 8123(a).

CONCLUSION

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.¹³

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2009 is set aside and remanded for further action consistent with this decision.

Issued: June 9, 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

¹³ In light of the Board's ruling on the first issue, the second issue is moot.