

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

S.S., Appellant)
and) Docket No. 10-1369
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 9, 2010
Phoenix, AZ, Employer)

)

Appearances:

John E. Goodwin, Esq., for the appellant

No appearance, for the Director

Oral Argument September 7, 2010

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2010 appellant filed a timely appeal of a February 1, 2010 decision of the Office of Workers' Compensation Programs affirming the denial of her claim for compensation for an occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On March 10, 2006 appellant, then a 43-year-old modified window clerk,¹ filed an occupational disease claim alleging that she sustained increased right shoulder and scapula pain

¹ In September 2004, appellant accepted a job offer for this position, which consisted of work restrictions including no lifting over 10 pounds.

in the performance of duty. She first became aware of her condition on November 1, 2004 and first realized that it was caused or aggravated by her employment condition on May 1, 2005.² Appellant stopped work on September 1, 2006 and did not return.

In a February 2006 statement, appellant noted experiencing chronic pain into her scapula and spine. She began work as a relief window clerk in November 2004 and developed pain through the end of 2005 from working the window and performing duties that exacerbated her symptoms. Appellant noted that her pain made it difficult to work with her arms away from her body and pulling packages across the counter.

In a December 2, 2005 report, Dr. L. Markham McHenry, an osteopath specializing in family medicine, opined that appellant's inability to function at work was directly due to increased pain, stress and depression related to working the window position and a hostile work environment from her supervisor. On February 28, 2006 he noted treating appellant for preexisting shoulder pain from a 1995 rotator cuff work injury, which resulted in chronic pain syndrome of the right shoulder. Dr. McHenry diagnosed chronic right shoulder pain, calcific tendinitis of the rotator cuff, biceps tenosynovitis, synovitis, acromioclavicular joint degeneration, right shoulder impingement and suprascapular neuritis. He opined that appellant's ongoing shoulder pain and deterioration over the past year was directly attributed to increased time working the customer service position. Dr. McHenry advised that, the more she worked, the worse her shoulder pain became from repetitive lifting. He advised that her shoulder pathology could not tolerate the physical demands of a window clerk position. In an April 13, 2006 report, Dr. McHenry clarified that repetitive motions of appellant's job were "to and fro motions" of the arms performed while standing at a counter reaching for packages and receiving and giving money to customers. He opined that these motions exacerbated her pain making the customer service counter job unacceptable.

On April 18, 2006 the Office referred appellant, with a statement of accepted facts, to Dr. Joseph Scoggin, a Board-certified orthopedic surgeon, for a second opinion. In a May 3, 2006 report, Dr. Scoggin diagnosed right shoulder periscapular pain, mainly myofascial in nature. He opined that appellant had no permanent aggravation of the right shoulder as there was no evidence of any new or recurrent injury to the right shoulder in 2004 or 2005. Dr. Scoggin noted she had subjective complaints of right shoulder pain minimally supported by physical examination and diagnostic studies. He advised that appellant could work eight hours daily and there was no evidence of any work-related disability. Dr. Scoggin noted that appellant already had permanent work restrictions related to the 1995 injury, including no lifting over 10 pounds and no overhead lifting and that appellant was able to perform her window clerk position with these restrictions. He advised that there was no evidence of injury in 2004 or 2005 and that any residuals she suffered from were due to the 1995 work injury.

In a May 22, 2006 decision, the Office denied appellant's claim, finding the medical evidence insufficient to establish that the claimed condition was caused by work activities.

² In 1995, the Office accepted appellant's claim for right shoulder injury in claim File No. xxxxxx557. That claim is not before the Board on the present appeal.

Appellant requested an oral hearing that was held on February 22, 2007. In August 16, 2006 and February 25, 2007 statements, her attorney asked that the case be remanded to the Office to prepare a statement of accepted facts that reflected the amount of weight that appellant lifted at work. Counsel indicated that this information was not listed when Dr. Scoggin performed his evaluation and that no employment factors were listed in the statement of accepted facts.

In an August 10, 2006 report, Dr. McHenry disputed Dr. Scoggin's opinion. He noted that appellant's chronic shoulder pain had evolved to myofascial pain syndrome and had become less orthopedic in nature. Dr. McHenry stated that examination showed appreciable right arm atrophy by visual inspection and measurement. He opined that appellant's diagnosed conditions were causally related to pain and her current claim was an aggravation, not a continuation. Dr. McHenry further opined that work duties of repetitive motions of lifting the right arm caused aggravated chronic pain disorder. Dr. Scoggin indicated that repetitive duties triggered myofascial pain and shoulder impingement syndrome. He reiterated that appellant's current claim was an aggravation of the original injury and was a residual from the accepted diagnoses.

In a June 29, 2007 decision, an Office hearing representative remanded the case. She found a conflict of medical opinion between Drs. Scoggin and McHenry. The Office hearing representative directed that the statement of accepted facts be amended to include a detailed description of appellant's modified job duties.

On September 12, 2007 the Office referred appellant, with a statement of accepted facts, to Dr. Douglas Kelly, a Board-certified orthopedic surgeon, for a referee examination.³ In an October 15, 2007 report, Dr. Kelly opined that appellant had aggravated symptoms of her underlying condition but this was not considered an aggravation of her underlying condition. He indicated there was no evidence of any acceleration of physiological condition by her work exposure subsequent to July 20, 1998 and that there was no evidence of any nonindustrial or preexisting disability that accounted for appellant's current findings or symptoms. Dr. Kelly found that the overall prognosis was mainly based on a diagnosis of chronic pain syndrome and depression. He opined that pain perception was also likely affected by environmental factors like stress related to appellant's supervisor. Dr. Kelly noted that appellant had physical limitations resulting from work-related disability but that there were no physical limitations due to preexisting conditions. He opined that appellant could perform modified maintenance clerk duties and that this position was within her physical limitations. Dr. Kelly noted that he did not receive a job description for the modified window clerk position. He also noted that appellant continued to have residuals from her 1995 work injury.

On November 15, 2007 the Office requested a supplemental report from Dr. Kelly. It enclosed a job description of a modified window clerk and asked if the diagnosed conditions were medically connected to the factors of employment of a modified window clerk.

³ The Office provided Dr. Kelly with its list of definitions to show him how it viewed and adjudicated claims. In particular, it stated under the definition of aggravation that "aggravation of the symptoms of an underlying condition is not considered an aggravation of the underlying condition."

In a November 26, 2007 supplemental report, Dr. Kelly stated that the diagnosed conditions noted in his October 15, 2007 report were not medically connected to the factors of employment of a modified window clerk. He opined that appellant was able to perform the duties of a modified window clerk based on a review of the job description.

In a December 12, 2007 decision, the Office denied appellant's claim finding the medical evidence insufficient to establish causal relationship.

Appellant requested an oral hearing that was held on June 19, 2008. In a July 28, 2008 statement, counsel contended that the claims examiner sent Dr. Kelly his own definition of aggravation, not generally used by the Office. It was contended that this did not allow Dr. Kelly to consider symptoms as an aggravation of an underlying condition.

In an August 6, 2008 report, Dr. McHenry opined that appellant continued to have right shoulder impingement caused by repetitive arm movements that were motions in her job description. He further opined that shoulder motions working as a window clerk materially worsened appellant's previously accepted right shoulder impingement as she increased the work hours of lifting parcels of mail.

In a September 15, 2008 decision, an Office hearing representative remanded the case finding that Dr. Kelly should review the statement of accepted facts with respect to the duties appellant performed as a modified window clerk beginning September 2004 and that he should also review the Office's list of definitions.

On December 18, 2008 the Office provided Dr. Kelly with an updated statement of accepted facts and Office definitions.⁴ It also provided him with a list of questions asking whether appellant's work duties as a modified window clerk beginning in September 2004 materially worsened her existing right shoulder condition. The Office inquired whether the worsening of this condition prevented appellant from performing her duties full time. It informed Dr. Kelly that he had to use the statement of accepted facts as the only factual framework for his opinion.

In an April 20, 2009 supplemental report, Dr. Kelly reviewed his prior reports and the updated statement of accepted facts. He opined that appellant's work duties as a window clerk beginning September 2004 did not materially worsen or adversely affect her existing right shoulder condition. Dr. Kelly based his opinion on objective findings outlined in his October 15, 2007 report showing slight atrophy of the right shoulder, no weakness detectable in the right upper extremity and no sensory abnormalities. He determined that there were no objective findings to indicate worsening or acceleration or aggravation of a right shoulder condition that preexisted September 2004. Dr. Kelly opined that work activities of September 2004 produced pain and discomfort, but this did not indicate aggravation of an underlying condition on a physiologic basis. He noted the Office's definition of aggravation and opined that there was an

⁴ The Office provided Dr. Kelly with an identical list of definitions as previously received from the Office. The definitions also reiterated that "aggravation of the symptoms of an underlying condition is not considered an aggravation of the underlying condition."

aggravation of underlying symptoms, but not an actual aggravation of an underlying condition on a physiologic basis.

In a May 7, 2009 decision, the Office denied appellant's claim finding the medical evidence did not demonstrate that the claimed medical condition was causally related to the established work-related events.

On May 15, 2009 appellant requested an oral hearing that was held on November 12, 2009. In a December 7, 2009 statement, she disputed Dr. Kelly's application of the definition of "aggravation." Appellant argued that the evidence of record was sufficient to establish aggravation of her condition.

In a February 1, 2010 decision, an Office hearing representative affirmed the May 7, 2009 decision finding that the evidence did not establish that appellant's work duties caused worsening of a preexisting right shoulder condition.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act 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. 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.⁵

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 diagnosed condition is causally related to the employment factors identified by the claimant.⁶

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

⁵ *J.E.*, 59 ECAB 119 (2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *D.I.*, 59 ECAB 158 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

It is well established that where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable. However, the normal progression of untreated disease cannot be said to constitute aggravation of a condition merely because the performance of normal work duties reveal the underlying condition. For the conditions of employment to bring about an aggravation of preexisting disease, the employment must be such as to cause acceleration of the disease or to precipitate disability.⁸

ANALYSIS

The Board finds that this case is not in posture for a decision.

The issue is whether appellant's employment duties as a modified window clerk beginning in September 2004 aggravated her preexisting right shoulder condition. An Office hearing representative affirmed the denial of appellant's claim based on Dr. Kelly's April 20, 2009 report and found that the physician had provided a rationalized medical opinion based on the updated statement of accepted facts and the Office's definitions. However, the Office misinformed Dr. Kelly as to the definition of aggravation by stating that "aggravation of the symptoms of an underlying condition is not considered an aggravation of the underlying condition." The definition provided Dr. Kelly departs from the explanation of aggravation as found in the Office's procedure manual. In the discussion of aggravation, the procedure manual provides that "[t]emporary aggravations may involve either symptoms or short-term worsening of a condition."⁹ This is contrasted with the definition of permanent aggravation which "occurs when a condition will persist indefinitely due to the effects of the work-related injury or when a condition is materially worsened such that it will not revert to its previous level of severity."¹⁰ The definition provided by the claims examiner to Dr. Kelly did not adequately conform to the Office's procedure manual. The claims examiner departed from the use of the term as generally accepted by the Office and failed to ask Dr. Kelly to state an opinion on whether appellant sustained a temporary aggravation of her preexisting right shoulder condition or whether conditions of her employment were sufficient to cause a permanent aggravation or material worsening of the underlying condition. This renders his opinion on causal relation of reduced

⁷ *Id.*

⁸ A.C., 60 ECAB ____ (Docket No. 08-1453, issued November 18, 2008).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2(b)(1) (June 1995).

¹⁰ *Id.* at Chapter 2.805.2(b)(2).

probative value. The Board has held that a claimant is entitled to compensation where the evidence establishes an aggravation necessitated treatment or caused disability.¹¹

Dr. Kelly generally stated in his September 12, 2007 and April 20, 2009 reports that appellant had aggravated symptoms of chronic pain syndrome due to her existing right shoulder condition but, by the Office's definition, he did not consider this an aggravation of her underlying right shoulder condition. He attempted to distinguish between the fact that symptoms of appellant's right shoulder condition had been aggravated due to her work duties and the fact that her right shoulder condition was not physiologically due to these work duties. Dr. Kelly's reports failed to provide a fully rationalized opinion based on the Office's accepted definitions. This prejudiced his opinion on causal relationship.

Where a claimant has a preexisting condition which is not disabling, but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment related for purposes of compensation under the Act.¹²

The Board notes that appellant's duties as a modified window clerk included permanent work restrictions due to her accepted work-related injury from 1995, which precluded lifting over 10 pounds. These work restrictions were noted in her modified window clerk job offer as well as Dr. Scoggin's May 3, 2006 report. Appellant contends that she aggravated her right shoulder condition by lifting over 10 pounds at work. The statement of accepted facts does not list any work restrictions or physical limitations. As a physician is to rely only on the statement of accepted facts as the factual basis for his or her report, the statement of accepted facts should clearly set forth appellant's limitations. As Dr. Kelly relied on an erroneous definition and inadequate statement of accepted facts, the Board will remand the case for further development of the medical evidence. Following this and such other development as is deemed necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant sustained an occupational injury in the performance of duty.

¹¹ See *Thomas N. Martinez*, 41 ECAB 1006 (1990) (where the Board accepted appellant's claim as the medical evidence showed that his symptom of heel pain was not merely revealed by the employment, but was caused or aggravated by it); *Sylvia Lucas*, 32 ECAB 1582 (1981) (the Board found that the evidence established that the employee's angina pectoris was related to factors of her employment and that the employee was entitled to compensation for the period of disability due to her angina pectoris).

¹² *Arnold Gustafson*, 41 ECAB 131 (1989); see *Glenn C. Chasteen*, 42 ECAB 493 (1991); *Henry Klaus*, 9 ECAB 333 (1957).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further development consistent with this decision.

Issued: November 9, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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