

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

T.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 10-2280
Issued: August 16, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 10, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) June 3, 2010 merit decision denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 injury in the performance of duty.

On appeal, counsel argues that the case must be remanded for further development. He contends that the second opinion physician based his report, upon which the June 3, 2010 decision was based, upon an inaccurate and biased statement of accepted facts.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board. On May 1, 2007 appellant filed an appeal of OWCP's November 8, 2006 decision denying her occupational disease claim. In an order dated October 3, 2007, the Board remanded the case to OWCP for consolidation of File Nos. xxxxxx530, xxxxxx154, and xxxxxx860 and a *de novo* decision on the merits of the claim.² In a September 16, 2009 decision, the Board set aside OWCP's November 1, 2007 and May 6, 2008 merit decisions denying her occupational disease claim and remanded the case for further development of the medical evidence.³ The facts and law contained in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 12, 2005 appellant had filed an occupational disease claim alleging an aggravation of ulnar nerve damage, carpal tunnel syndrome and complex regional pain syndrome of her upper extremities due to employment activities. She alleged that her employment position required her to open heavy doors and repeatedly exposed her to drafty and cold conditions.

In the September 16, 2009 decision, the Board set aside OWCP's November 1, 2007 and May 6, 2008 merit decisions denying her occupational disease claim and remanded the case for further development of the medical evidence. The Board instructed OWCP to prepare a statement of accepted facts (SOAF) that included a detailed employment history, job descriptions for each position held, specific functions performed by appellant in each position, and the restrictions imposed by her treating physicians. OWCP was advised to submit the SOAF to appellant's treating physician, or to a second opinion examiner, in order to obtain a rationalized opinion as to whether her current conditions were causally related to factors of her employment, either directly or through aggravation, precipitation or acceleration.

The record contains an October 23, 2009 report from Dr. Hanley, who served as second opinion examiner in File No. xxxxxx741, which was accepted for aggravation of right lateral epicondylitis. The purpose of the evaluation was to obtain an opinion on whether appellant had residuals from her May 21, 2008 injury and whether she could return to her date-of-injury job. Dr. Hanley described the results of his physical examination as follows:

“PHYSICAL EXAMINATION: In any case, [appellant's] physical examination is difficult. She comes to the appointment wearing extensive

² Docket No. 07-1422 (issued October 3, 2007).

³ Docket No. 08-2147 (issued September 16, 2009). Appellant's March 26, 1985 traumatic injury claim was accepted for cervical and left shoulder strain and cubital palsy of the left elbow. (File No. xxxxxx154). OWCP denied her claim for a recurrence of disability as of January 17, 2005 in a March 7, 2005 decision, which was affirmed by the Office of Hearings and Review on November 7, 2005. In a May 1, 2007 decision, the Board affirmed the denial of the recurrence claim. Docket No. 06-1087 (issued May 1, 2007). On September 12, 2003 appellant filed a separate occupational disease claim alleging that she developed right hand, elbow and arm conditions due to repetitive work activities. Her claim was accepted for lateral epicondylitis of the right elbow. (File No. xxxxxx860) Appellant's October 14, 2004 traumatic injury claim alleging that she injured her back and shoulder while opening a stuck door was denied on January 20, 2005. (File No. xxxxxx142) File Nos. xxxxxx530, xxxxxx142, xxxxxx154, and xxxxxx860 have been consolidated, with File No. xxxxxx154 serving as the master file.

trappings of disability. [Appellant] has bilateral elbow pads covered by a strip of stockinette. She has a large, cumbersome appearing brace on the left wrist. The right ring finger and the left middle finger have a tube of neoprene and they are held in an extended position. The obvious perceived discomfort on the part of the patient makes it difficult to do anything more than simply identify the soreness in the lateral elbow since that is the point of concern for this exam[ination].”

Dr. Hanley diagnosed “perceived upper extremity discomfort, bilateral, severe.” He opined that she no longer had residuals of the accepted injury.

OWCP prepared a statement of accepted facts dated October 29, 2009. The SOAF reflected that appellant filed a timely notice of occupational injury for an aggravation of ulnar nerve damage, carpal tunnel syndrome and complex regional pain syndrome of her upper extremities, which she attributed to exposure to cold in her work environment over several years (October 2003 to January 2005).

Appellant’s work assignment from October 2003 until July 2004 was described as a:

“limited-duty assignment for 4 hours per day, which “consisted of checking vehicles at the Truck Terminal Annex or Processing & Distribution Center platforms to insure that their wheels were properly chocked (stabilized). The position required little use of either arm, and no repetitive activities of the arms. It did involve spending some time in areas that were chilly during the winter. The claimant performed this position until July 2004.”

Part-time duties as of July 2004 were described as requiring walking through the building to observe whether employees and visitors were properly wearing and showing their identification badges and occasionally delivering light items to offices in the building. The SOAF indicated that appellant “was only required to go through swinging, unsealed, rubber doors to the dock two to three times per week and the doors were so easy to open that a slight draft would open them. This position required little or no use of the upper extremities.”

On October 29, 2009 OWCP referred appellant, together with the statement of accepted facts, to Dr. Hanley for another second opinion evaluation. Dr. Hanley was asked to determine if appellant sustained an upper extremity condition, or aggravation of a condition, as a result of her federal employment (restricted-duty position for four hours per day) from October 2003 to January 2005 as a result of “limited exposure to cold.” If an aggravation was sustained, he was to explain, with detailed reasoning, whether it was temporary or permanent. Dr. Hanley was instructed to rely exclusively on the October 29, 2009 SOAF in forming his opinion, which was to be supported with rationale.

In a November 30, 2009 report, Dr. Hanley indicated that he had reviewed the October 29, 2009 SOAF. He stated that he did not perform an evaluation of appellant, as he examined her in October 2009 and felt that another examination was unnecessary. Dr. Hanley stated that there was no reason to believe that exposure to cold for a brief period of time would have led to a change in appellant’s condition. He indicated that “cold can cause injuries” when

low enough to damage the nerves, as in frost bite. Dr. Hanley stated that weather change and damp, cold periods can cause people with degenerative disease or other musculoskeletal problems to have increased symptomology. He stated:

“There is no reason to believe that[,] if [appellant] did have an aggravation, it was anything but temporary and lasted only for the period of time with the cold exposure. No permanent injury occurred, no acceleration of her condition occurred and there is no reason to believe that any complaints referable to cold exposure in that time frame [from October 2003 to January 2005] should be considered an industrial injury.”

By decision dated December 21, 2009, OWCP denied appellant’s claim on the grounds that the medical evidence did not establish a causal relationship between appellant’s work activities and her claimed condition.

On December 30, 2009 appellant, through counsel, requested an oral hearing.

At an April 19, 2010 hearing, counsel argued that OWCP had failed to follow the Board’s instructions to develop the evidence regarding appellant’s job duties between October 2003 and January 2005. He contended that the statement of accepted facts was inaccurate and leading, noting that portions were highlighted. As Dr. Hanley’s report was based on an inaccurate SOAF, it could not constitute the weight of the medical evidence. Counsel requested that the case be remanded for compliance with the Board’s September 16, 2009 decision.

Appellant submitted a February 16, 2008 statement from Coworker Brian Ulrich, who indicated that in order to access the receiving docks, he was required to pass through two heavy black rubber swinging doors. On numerous occasions, Mr. Ulrich observed appellant pass through those doors. He also witnessed appellant attempting to open an inside door, which had become “stuck.”

In a letter dated May 2, 2010, appellant stated that she submitted grievances to both her supervisor, Gerald Gribling, and the union shop steward, but never received responses or copies of my grievances from either one. One of the resolutions to her grievance was the removal and replacement of the black rubber industrial doors with lightweight, plastic doors in early 2007.

In a June 3, 2010 decision, OWCP’s hearing representative affirmed the December 21, 2009 decision. He found that Dr. Hanley’s report was well rationalized and based upon a correct statement of employment factors, as identified in the SOAF. Therefore, the hearing representative’s opinion was accorded the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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.⁴ 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.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 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.⁶

The Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director. Otherwise, there could be no finality of decisions and the whole procedure would be nullified and questions would remain moot.⁷

OWCP procedures provide that in the preparation of a statement of accepted facts, the use of vague or generic terms such as "light," "heavy," "undue," "severe," "irregular" and "abnormal" are to be avoided, since they are subject to great differences of interpretation.⁸

ANALYSIS

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

In its September 16, 2009 decision, the Board instructed OWCP to submit a newly-prepared SOAF to appellant's treating physician, or to a second opinion examiner, in order to obtain a rationalized opinion as to whether her current conditions were causally related to factors of her employment. The SOAF was to include a detailed employment history, job descriptions

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *Id.*

⁷ *See Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949).

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.4.a(4) (September 2009).

for each position held, specific functions performed by appellant in each position, and the restrictions imposed by appellant's treating physicians. On remand, OWCP prepared a SOAF, which it submitted to Dr. Hanley with instructions to rely exclusively on its content in forming his opinion. The Board finds that OWCP did not prepare the SOAF in accordance with the Board's instructions.

The SOAF did not contain a detailed employment history, job descriptions for each position held, or the restrictions imposed by appellant's treating physicians. Although OWCP identified some specific functions performed by appellant in some positions, its description of those functions was both selective and subjective, and consisted of vague and generic terms. Appellant's work assignment from October 2003 until July 2004 was described as requiring "little" use of either arm and spending "some" time in "chilly areas" during the winter. The description of part-time duties as of July 2004 included "occasionally" delivering light items to offices in the building. The SOAF indicated that appellant "was only required to go through swinging, unsealed, rubber doors to the dock two to three times per week and the doors were so easy to open that a slight draft would open them." The terminology used to describe appellant's job duties and employment environment was not specific, but rather was vague and highly suggestive of a desired response. OWCP procedures provide that vague or generic terms are to be avoided, since they are subject to great differences of interpretation.⁹

The record does not reflect that OWCP engaged in any additional discovery in an attempt to obtain the information requested by the Board. Rather, it relied on information provided by the employing establishment in a February 24, 2006 letter. As noted above, the Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP.¹⁰ The Board finds that OWCP failed to develop the evidence or to prepare a proper SOAF as directed.

As Dr. Hanley's October 29, 2009 report was based upon an insufficient SOAF, it cannot represent the weight of the medical evidence.

For the reasons stated herein, the case will be set aside and remanded to OWCP for further development in accordance with the Board's September 16, 2009 decision.

CONCLUSION

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

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.4.a(4) (September 2009) (vague or generic terms such as light, heavy, undue, severe, irregular and abnormal are to be avoided, since they are subject to great differences of interpretation).

¹⁰ See *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976), *Anthony Greco*, *supra* note 7. See also *Frank W. White*, 42 ECAB 693 (1991) (Board's order in a prior appeal imposed an obligation on the Director to take particular actions as directed).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: August 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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