

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

P.F., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Columbia, SC, Employer**

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**Docket No. 10-2330
Issued: August 2, 2011**

Appearances:

*Jeffrey P. Zeelander, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2010 appellant filed a timely appeal from Office of Workers' Compensation Programs' (OWCP) decisions dated April 9 and July 20, 2010, which denied modification of prior decisions denying certain conditions as not causally related to her accepted employment injuries. 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.²

ISSUE

The issue is whether appellant met her burden of proof to establish that her right shoulder and cervical disc condition are causally related to her October 2, 2005 work injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The record contains a May 6, 2010 nonmerit decision. Appellant's representative did not appeal from this decision.

FACTUAL HISTORY

OWCP accepted that, on October 2, 2005, appellant, then a 49-year-old registered nurse, sustained neck sprain/strain and temporary aggravation of cervical disc disease when she pushed a medication cart down a hallway.³ She received compensation benefits.

Treatment notes dated October 10 and 31, 2005 from Dr. Roger K. Griggs, a Board-certified family practitioner, advised that appellant was seen for pain and numbness in her right neck and for shoulder symptoms. Diagnostic testing revealed degenerative joint disease and facet narrowing. Dr. Griggs stated that appellant was seen for a similar condition in August 2004. He diagnosed neck pain and strain and advised that her condition was an aggravation or reinjury of a previous injury. On November 3, 2005 Dr. Griggs placed appellant off work due to shoulder symptoms. An October 20, 2005 x-ray of the cervical spine showed degenerative changes at C5-6 and C6-7 and the left neural foramina osteophytic encroachments. A February 8, 2006 nerve conduction study and electromyogram for the right arm was normal.

On July 12, 2006 OWCP referred appellant to Dr. James Bethea, a Board-certified orthopedic surgeon, to determine whether her cervical strain had resolved and the extent of any disability. In a July 28, 2006 report, Dr. Bethea advised that her October 2, 2005 injury aggravated her preexisting cervical disc disease. In an August 17, 2006 addendum, he advised that the cervical strain had resolved. Dr. Bethea noted that degenerative disc disease at C5-6 and C6-7 was confirmed by magnetic resonance imaging (MRI) scan.⁴ On December 11, 2006 he listed temporary work restrictions due to her cervical condition. On December 14, 2006 Dr. Bethea noted that the MRI scan showed degenerative disc disease at two levels and opined that her aggravation should cease in about three months and she could return to normal work activities.

In a November 2, 2006 letter, appellant asserted that her right shoulder condition was employment related. On February 3, 2007 she requested that OWCP accept a C5-6 herniated disc.

In a February 13, 2007 report, Dr. Gajewski discussed the relationship between appellant's degenerative disc disease and herniated disc and her work injury. She noted that appellant had a new finding of a herniated disc at C5-6 which was not present on the initial MRI scan in 2005; however, it "appears to be related to her degenerative disc disease." Dr. Gajewski noted that appellant did not have any trauma in the interim and had received treatment for her degenerative disc disease but not for the herniated disc. She opined that there was "a relationship between degenerative disc disease and herniated disc, and most likely her herniated disc is related to her degenerative disc disease." Dr. Gajewski placed appellant off work pending a neurological evaluation.

³ On August 6, 2004 under claim No.xxxxxx957, appellant sustained an injury to her right shoulder and neck while pushing a medical cart. This claim is not before the Board.

⁴ An August 16, 2006 MRI scan read by Dr. Stacy Gajewski, a Board-certified family practitioner and treating physician, revealed a left-sided disc herniation at C5-6.

On March 19, 2007 OWCP referred appellant to Dr. Alfred G. Dawson, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinions between Dr. Gajewski and Dr. Bethea regarding appellant's ability to work and the cause of her herniated disc. In an April 18, 2007 report, Dr. Dawson reviewed appellant's history and medical treatment. He diagnosed, neck pain, shoulder pain and cervical disc disease. Dr. Dawson explained that the aggravation of degeneration of cervical intervertebral disc disease was consistent with his examination. He stated that the degenerative disc disease was old and the aggravation was new due to the work injury. Dr. Dawson found that appellant reached maximum medical improvement with a permanent impairment of the neck due to the cervical disc disease and aggravation of the neck strain. He opined that the herniated nucleus pulposus and her shoulder pain were unrelated to the work injury.

In a June 14, 2007 report, Dr. Gajewski noted that appellant had neck and shoulder pain which worsened after returning to work. She advised that appellant pursue a disability claim since working worsened her pain. In a July 9, 2007 disability certificate, Dr. Gajewski placed appellant off work from June 28, 2007 to "indefinitely." Appellant stopped work on June 28, 2007.

By decision dated August 13, 2007, OWCP denied appellant's claim to include a cervical herniated nucleus pulposus (HNP) or a shoulder condition.

Appellant submitted a December 11, 2006 report from Dr. Gajewski, who advised that appellant had neck pain stemming from a fall a year and a half prior that initially revealed degenerative change which "worsened" to disc disease. On January 10, 2007 Dr. Gajewski noted that appellant had neck and shoulder pain since a 2005 injury and diagnosed cervical disc pain with neuropathy. In a December 7, 2007 report, Dr. Gajewski asserted that the medical evidence supported that appellant's chronic neck and shoulder pain conditions were work related.

In a January 30, 2008 decision, OWCP affirmed the denial of appellant's claim for a right shoulder condition. It allowed appellant an opportunity to provide additional medical evidence addressing causal relationship of her cervical herniated disc. On February 1, 2008 OWCP advised appellant of the medical evidence needed. No additional evidence was submitted.

In a March 25, 2008 decision, OWCP denied appellant's claim for a recurrence of disability beginning June 28, 2008.

Appellant requested reconsideration on May 27, 2008. In a May 15, 2008 report Dr. Gajewski opined that "a herniated disc would be a reasonable course for someone having persistent degenerative changes. It would be medically reasonable to assume that her neck pain is the result of years of pulling and pushing carts and patients, and therefore would be consistent with [w]orkers' [c]omp[ensation]." Regarding the shoulder pain, Dr. Gajewski explained that the MRI scan revealed the shoulder condition was "indeed a separate problem with the MRI scan showing bursitis and degenerative changes of the AC joint as well as tendinitis. This would be consistent with chronic overuse syndrome, which again would be reasonable to assume this is from years of pulling on carts and patients. She does not have any other risk factors or known cause, for this type of pain." Dr. Gajewski opined that both conditions were most likely "from

repetitive use from her occupation.” She recommended that appellant “return to an occupation which does not involve repeated pushing and pulling since both situations are considered degenerative changes, and she should instead choose an occupation with less physical labor.”

By decision dated July 18, 2008, OWCP denied modification of its prior decisions with regard to the claimed cervical condition. In an October 7, 2008 decision, OWCP denied modification of its prior decision with regard to the claimed shoulder condition.

Appellant requested reconsideration. On June 5, 2009 Dr. Gajewski noted that appellant was off work until June 10, 2007 when she returned to light duty. Thereafter appellant’s symptoms worsened and she quit work on June 28, 2007. Dr. Gajewski advised that, with the original injury, appellant had neck and shoulder pain. She advised that the MRI scan revealed mild arthritis; however, appellant “really had not had too much problem with her shoulder or neck prior to this injury.” Dr. Gajewski noted that appellant had severe neck and shoulder pain at the time of the injury but there was more concern about the neck and, thus, the shoulder had not been evaluated. She indicated that the shoulder symptoms began with her October 2, 2005 injury and were consistent with the actions that appellant was doing at the time. Dr. Gajewski noted that the shoulder pain injury caused pain into appellant’s neck and resulted in total disability of the shoulder and neck. Furthermore, when appellant returned to work, the repetitive action caused both the shoulder and neck to worsen and there was no reason to believe that these were two separate incidences. Dr. Gajewski explained that “[w]henver someone has a shoulder injury, the pain does go into the neck, and this may explain why the concern was initially just the neck. The patient has persistently had shoulder pain with decreased range of motion with poor healing, all resulting from the above injury.”

On June 15, 2009 OWCP referred appellant for a second opinion examination to Dr. James A. Loging, a Board-certified orthopedic surgeon, who was asked to address causal relationship and her work capacity. In an August 12, 2009 report, Dr. Loging noted appellant’s history and findings. He advised that appellant’s pain had been present since the work injury and that she had little relief from treatment. Examination revealed limited neck range of motion due to pain while there was a positive impingement sign for both shoulders. Shoulder range of motion was full but with pain at the extremes of motion. Dr. Loging advised that it was difficult to determine why appellant had not recovered from the initial injury. He noted that her symptoms might not be due to a cervical sprain but to her herniated disc at C5-6. Dr. Loging opined that appellant’s work-related aggravation of her preexisting cervical disc disease had not returned to base line. He determined that she had some degree of shoulder pathology and opined that it was “more medically probable that her neck sprain and aggravation of her cervical degenerative disease has not resolved at this point and is not likely the result of a natural progression of her underlying cervical degenerative disc disease, although there would probably be some natural progression associated with this as well.” Dr. Loging recommended an MRI scan of the cervical spine and “further treatment of appellant’s shoulders as this is potentially part of her initial injury as well” as her symptoms “did seem to start during the same time as the injury.” He stated that she would work full time within restrictions.

By decision dated September 4, 2009, OWCP denied modification of its prior decisions.

Thereafter, OWCP received a September 2, 2009 report from Dr. Loging who noted that appellant's neck sprain had not resolved due to continuous pain and limited activity with regard to symptomatology sustained after the injury. Dr. Loging reiterated that it was difficult to say why she had not recovered since her initial injury noting that "potentially" the neck injury is not a sprain but her symptoms are a result of her herniated disc at C5-6 and disc osteophyte complex, as well as potential injury to the shoulders. He noted that her MRI scan was consistent with her symptomatology, as well as the fact that the injections to the shoulders improved some of her symptoms. Dr. Loging opined that he did not believe that the work-related aggravation of the preexisting cervical disc disease had returned to baseline, as she was not symptomatic with this prior to the injury. He explained that there was no follow up MRI scan since the injury to evaluate her cervical spine to see if there was improvement in her herniated disc. Dr. Loging opined that she had some shoulder pathology associated with her injury that was overlapping and continued to be problematic. He stated that the connection between her work-related injury in 2005 and her current condition was persistent with regard to her neck, shoulder and arm pain. Dr. Loging explained that it was "simply because her physical examination is unchanged since that time, as well as her pain distributions." He opined that it was medically probable that her neck sprain and aggravation of her cervical degenerative disc disease had "not resolved at this point and is not likely to result in a natural progression of her underlying cervical degenerative disease, although there would probably be some natural progression associated with this, as well." Dr. Loging noted that appellant continued to have residuals which would be chronic pain, limited strength and mobility from her injury. He opined that appellant was not able to perform her nurse duties as a nurse due to her symptoms. Dr. Loging recommended a repeat MRI scan to further examine her cervical spine; and also possibly, further treatment of her shoulders as this was potentially part of her initial injury as well, since the symptomatology seemed to start during the time of the injury. He recommended injections to the cervical spine, and shoulders and a cervical decompression and fusion at the C5-6 level to try to resolve her symptomatology. Dr. Loging recommended therapy for the shoulders and a possible arthroscopy.

On October 5, 2009 appellant requested reconsideration and submitted additional evidence. In a September 18, 2009 report, Dr. Bethea examined appellant and provided findings. He opined "[f]rom my understanding of her injury, it does appear that her shoulder problems are indeed related to her accident at work in 2005."

By decision dated December 31, 2009, OWCP denied modification of its prior decisions.

On February 11 and March 12, 2010 appellant requested reconsideration and submitted additional evidence. In a January 15, 2010 report, Dr. Bethea noted that it appeared that "her shoulder problem is due to cumulative trauma from her work as an RN." In a March 8, 2010 report, Dr. Gajewski diagnosed shoulder pain and noted that she agreed that it was due to her work injury.

In an April 9, 2010 decision, OWCP denied modification of its prior decisions.

On April 29, 2010 appellant requested reconsideration and submitted additional evidence. In an April 14, 2010 report, Dr. Bethea noted that appellant had pain in both shoulders and her neck. He examined appellant and opined that "her shoulder problem is due to cumulative trauma and that she pushed medicine carts as RN for 18 years. It is my opinion that there is a definite

causal relationship.” In an April 26, 2010 report, Dr. Bethea noted that appellant could return to work and provided permanent restrictions for appellant.

In a May 6, 2010 decision, OWCP denied appellant’s request for reconsideration without further review of the merits of the claim.

On May 14, 2010 appellant requested reconsideration and submitted a May 5, 2010 report from Dr. Bethea who opined that “[p]ushing and shoving a large bulky medication cart has aggravated the tendinosis, AC arthritis and bursitis in her shoulders.” Dr. Bethea advised that appellant was not able to work since her injury in October 2005 and that she was in need of further medical care regarding her shoulders.

By decision dated July 20, 2010, OWCP denied modification of its prior decisions. It found that the record contained no medical explanation to describe how the October 2, 2005 event caused additional cervical and shoulder conditions.

LEGAL PRECEDENT

When an employee claims that he or she sustained an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury. Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, which the employee claims compensation, is causally related to the accepted injury.⁵ To meet his or her burden of proof, an employee must submit a physician’s rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.⁶ Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.⁷

ANALYSIS

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

OWCP referred appellant to Dr. Logging to further develop the medical evidence with regard to the nature of any work-related conditions stemming from her October 2, 2005 work injury. Dr. Logging provided two reports that generally supported causal relationship between appellant’s shoulder and neck conditions and the original work injury. He noted that appellant had some degree of shoulder pathology and opined that it was medically probable that her neck sprain and aggravation of her cervical degenerative disease were not just the result of a natural progression of her underlying cervical degenerative disc disease. Dr. Logging opined that the work-related aggravation of the preexisting cervical disc disease had not returned to baseline,

⁵ See *Leon Thomas*, 52 ECAB 202 (2001).

⁶ See *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *Albert C. Brown*, 52 ECAB 152 (2000).

and she was asymptomatic prior to the injury. He explained that it was “simply because her physical examination is unchanged since that time, as well as her pain distributions.” Dr. Logging opined that appellant’s symptoms could be due to her herniated nucleus pulposus at the C5-6 level. He recommended a repeat MRI scan to further examine her cervical spine. Dr. Logging did not specifically address whether the herniated cervical disc was caused or aggravated by the October 2, 2005 work injury and he did not provide sufficient rationale to explain why the shoulder condition was attributable to that injury.⁸ However, his reports provide some support for causal relationship and OWCP request clarification or authorize the additional medical testing that he recommended.

It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁹ When OWCP obtains an opinion from a referral physician, it has the responsibility to obtain an evaluation from the referral physician that resolves the issue involved in the case.¹⁰

Furthermore, other recent reports in the record, while insufficiently rationalized, are generally supportive of causal relationship. They include reports from Dr. Gajewski, a treating physician, who opined that the neck and shoulder conditions were work related. Likewise, Dr. Bethea, previously a second opinion physician, began to treat appellant and provided some support that appellant’s shoulder condition is employment related.¹¹

As OWCP has a responsibility to obtain an opinion from Dr. Logging that resolves the issues in this case, the case must be remanded to obtain a supplemental report. OWCP shall authorize appropriate testing and request that Dr. Logging provide a reasoned opinion regarding whether appellant has any shoulder condition and cervical condition, including the herniated disc at C5-6, caused or aggravated by the October 2, 2005 work injury. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision.

On appeal, appellant’s attorney essentially asserts that the medical evidence establishes that the additional conditions should be accepted. As explained, the case is not in posture for a decision as the medical evidence requires further development. Counsel also asserts that appellant’s recurrence of disability claim should have been accepted. The Board does not have jurisdiction over this matter as OWCP’s July 20 and April 9, 2010 decisions did not address this matter.¹²

⁸ *John F. Glynn*, 53 ECAB 562 (2002) (an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship).

⁹ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁰ *See Richard F. Williams*, 55 ECAB 343 (2004); *Mae Z. Hackett*, 34 ECAB 1421 (1983).

¹¹ Dr. Bethea’s reports appear to relate shoulder conditions to appellant’s employment over a number of years instead of to the October 2, 2005 work injury. This suggests an occupational disease. *See* 20 C.F.R. § 10.5(q), 10.5(ee). The record does not indicate that appellant has filed an occupational disease claim regarding this matter.

¹² *See* 20 C.F.R. § 501.2(c).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 20 and April 9, 2010 Office of Workers' Compensation Programs' decisions are set aside and remanded.

Issued: August 2, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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