

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

G.H., Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Washington, DC, Employer**

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**Docket No. 10-1788
Issued: June 21, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 24, 2010 appellant filed a timely appeal of the February 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his occupational disease claim. Pursuant to the Federal Employees' Compensation Act¹ 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 sustained back, neck and right shoulder injuries causally related to factors of his federal employment.

On appeal, appellant contends that there is a conflict in medical opinion between his physicians and OWCP's referral physician. He further contends that OWCP's referral physician's opinion was equivocal.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 14, 2008 appellant, then a 50-year-old safety and occupational health specialist, filed an occupational disease claim alleging that on January 1, 2008 he became aware of his back, neck and right shoulder conditions and realized that these conditions were caused by his employment duties. He stopped work on January 15, 2008.

Appellant submitted medical reports dated October 31, 2007 through October 10, 2008 from physicians and physical therapists which addressed, among other things, diagnostic test results and treatment regarding his right shoulder and arm, cervical and lumbar conditions.

In reports dated March 31 through May 21, 2008, Dr. Michael A. Franchetti, an attending Board-certified orthopedic surgeon, obtained a history that appellant was severely visually challenged. At work, appellant needed to lean forward on his desk until the computer screen was two inches away in order to see it. He leaned with more weight on his right upper extremity. On or about January 4, 2008 appellant began to experience right shoulder pain which worsened. Dr. Franchetti listed his findings on physical examination and reviewed diagnostic test results. He advised that appellant suffered from occupationally-related cervical strain with right cervical radiculitis, lumbosacral strain and overuse, sprain and strain with bursitis and tendinitis, partial rotator cuff tear and probable labral tear of the right shoulder. Dr. Franchetti concluded that appellant was unable to work in his usual employment position due to the diagnosed conditions.

In a June 16, 2008 report, Dr. Robert W. Macht, a Board-certified surgeon, obtained a history of a prior motor vehicle accident which resulted in injuries to appellant's neck and back. He also obtained a history of appellant's medical background and reviewed diagnostic test results. Dr. Macht noted that appellant worked in an awkward position at the computer due to his poor eyesight. Appellant leaned on his right arm to be close to the computer. Dr. Macht listed his findings on physical examination and diagnosed occupational rotator cuff tear and possible labral tear of the right shoulder and musculoligamentous sprain of the neck and back. He found no evidence of radiculopathy. Dr. Macht advised that there was a causal relationship between the diagnosed conditions and appellant's work duties as a safety specialist. He determined that appellant had eight percent impairment of the right upper extremity and three percent impairment of the left upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

By letter dated August 13, 2008, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit factual and medical evidence, including a rationalized medical report from an attending physician which described his symptoms, examination and test results, diagnosis, treatment provided, effect of treatment and opinion with medical reasons on how the diagnosed condition was caused or contributed to by the claimed injury. OWCP also requested that the employing establishment submit factual evidence regarding appellant's claim.

Appellant submitted reports and a prescription dated April 28 through January 22, 2008 from physicians including, Dr. Fredric L. Salter, a Board-certified orthopedic surgeon and Dr. Sheldon L. Margulies, a Board-certified neurologist, respectively, who found that he

sustained cervical and lumbar strains and post-traumatic migraines secondary to an April 22, 2006 motor vehicle accident.

In reports dated April 15 through August 5, 2008, Dr. Franchetti noted appellant's continuing complaints of back and neck pain. Appellant also had bilateral radicular and carpal tunnel symptoms and right shoulder pain. Dr. Franchetti listed his findings on physical examination and diagnosed work-related disc protrusion at L5-S1 with confirmed mild L4 bilateral radiculopathies and bilateral moderate L5-S1 radiculopathies worse on the left side. He also diagnosed multilevel cervical spondylosis, stenosis, right C5-6 radiculopathy and bilateral carpal tunnel syndrome. Dr. Franchetti advised that appellant was unable to work as a safety specialist.

In a September 9, 2008 report, Dr. Macht stated that the neck and back injuries appellant sustained due to the April 22, 2006 motor vehicle accident had resolved by history. He noted appellant's work duties which involved sitting at a desk and using a computer three quarters of his eight-hour workday and copying and filing the rest of the workday while standing, walking, bending, squatting and kneeling. Dr. Macht reiterated that appellant's diagnosed neck, back and right shoulder conditions were causally related to the stated work duties. Appellant's poor eyesight changed the mechanics of his neck and back and put additional stress on his neck and right shoulder region. He consistently put the weight of his upper body on his right arm as he leaned onto his desk. Dr. Macht concluded that since appellant did not participate in any outside sports or hobbies and he did not have any other employment or volunteer work, his neck, back and right shoulder conditions were causally related to his work duties.

By letter dated November 18, 2008, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. William I. Smulyan, a Board-certified orthopedic surgeon, for a second opinion to determine whether he sustained a medical condition caused, aggravated, precipitated or accelerated by his federal employment.

In a February 10, 2009 report, Dr. Smulyan reviewed a history of appellant's eye, neck, back and right shoulder conditions. He also reviewed appellant's medical records. On physical examination of the head and neck, Dr. Smulyan reported that appellant denied any localizing tenderness with palpation of the cervical spine. No localizing reflex changes were noted in the upper limbs. Supple and symmetrical motion was noted in the elbows, wrists and hands. A Tinel's sign was negative over the median and ulnar nerves. On examination of the lumbar spine, Dr. Smulyan reported that appellant stood smugly. Appellant had tenderness with palpation of the lumbosacral junction mid-thoracic spine. Straight leg raising maneuvers were negative. There was no localizing reflex changes noted in the lower limbs. Appellant exhibited some mildly broad-based gait. A Trendelenburg's test was negative. There was restriction of flexion and extension in the lumbar spine.

Dr. Smulyan reported that appellant's complaints were subjective in nature. There was no anatomic correlation to appellant's complaints. There was no electrical or radiographic evidence to corroborate his complaints. Dr. Smulyan opined that appellant's current orthopedic problems were not caused, aggravated, accelerated or precipitated by his accepted work-related duties. Appellant's complaints were temporary in nature and there was no basis on which to continue medical treatment. Dr. Smulyan concluded that appellant could perform his regular work duties as a safety and occupational health specialist eight hours a day with no physical

restrictions. There was no permanent aggravation. Dr. Smulyan advised that the temporary aggravation experienced by appellant ceased as of the date of his examination.

In a March 27, 2009 decision, OWCP denied appellant's claim. It found that Dr. Smulyan's February 10, 2009 report constituted the weight of the medical opinion evidence and established that the claimed back, neck and right shoulder conditions were not caused by his accepted work-related duties.

By letter dated April 3, 2009, appellant, through his attorney, requested an oral hearing.²

In a November 18, 2009 report, Dr. Macht reiterated his prior opinion that appellant's diagnosed neck, back and right shoulders were caused by his work duties as a safety specialist.

In a February 22, 2010 decision, OWCP's hearing representative affirmed the March 27, 2009 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his 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 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 a causal relationship 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

² The record reveals that appellant subsequently requested a telephone hearing.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

identified by the claimant.⁶ Neither the fact that appellant's condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish a causal relationship.⁷

Section 8123(a) of FECA provides that, 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 who shall make an examination.⁸ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹

ANALYSIS

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

Appellant claimed that as a result of the accepted employment duties, he sustained back, neck and right shoulder conditions. He was treated by Dr. Franchetti who reported that, as appellant was visually impaired he tended to lean forward on his desk to view his computer screen, thereby placing weight on this right upper extremity. Dr. Franchetti concluded that appellant was unable to perform his usual work duties as a result of employment-related cervical strain with right cervical radiculitis, lumbosacral strain and overuse, sprain/strain with bursitis and tendinitis, partial rotator cuff tear and probable tear of the right shoulder.

Similarly, appellant was also treated by Dr. Macht, who found that his rotator cuff tear and possible labral tear of the right shoulder and musculoligamentous sprain of the neck and back were caused by the established work duties. Dr. Franchetti and Dr. Macht pointed out that appellant's impaired vision altered the mechanics of his neck by him leaning on the right to view his computer screen and thereby placing stress on this area and the right shoulder region. Additionally, Dr. Macht noted that three-fourths of appellant's eight-hour workday consisted of him sitting at his desk using his computer and that the remainder of the workday consisted of him standing, walking, bending, squatting and kneeling to perform his job duties.

Dr. Smulyan, OWCP's referral physician, opined that appellant's current neck, back and right shoulder problems were not caused, aggravated, accelerated or precipitated by the accepted work-related duties. He stated that appellant experienced temporary aggravation of his symptoms which ceased on the date of his examination. Dr. Smulyan further stated that there was no anatomic correlation to appellant's complaints. He related that there was no electrical or radiographic evidence to corroborate appellant's complaints and concluded that his complaints were subjective in nature. Dr. Smulyan advised that further medical treatment was not necessary

⁶ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁷ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁸ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

⁹ *Manuel Gill*, 52 ECAB 282 (2001).

and appellant could perform his regular work duties as a safety and occupational health specialist eight hours a day with no restrictions.

The Board finds that there is a conflict in medical opinion between Dr. Franchetti and Dr. Macht, attending physicians and Dr. Smulyan, the physician making the examination for OWCP, as to whether appellant sustained back, neck and right shoulder conditions due to the accepted factors of his federal employment.¹⁰ The case will be remanded to OWCP for referral to an impartial medical specialist. After such further development as deemed necessary, it shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: June 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹⁰ *Y.A.*, 59 ECAB 701 (2008); *Bryan O. Crane*, 56 ECAB 713 (2005).