United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 10-1057**
	)	**Issued: March 10, 2011**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, El Segundo, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2010 appellant filed a timely appeal from a December 21, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issues in this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained an injury causally related to factors of her federal employment.

FACTUAL HISTORY

On April 18, 2008 appellant, then a 55-year-old revenue officer, filed an occupational disease claim alleging that she sustained cervical disc disease in the performance of duty. Appellant retired from the employing establishment on August 4, 1997 but she alleged that she

first became aware of her injury on April 1, 2004 and realized it was work related on August 24, 2007.

In support of her claim, appellant provided medical reports from two physicians who examined her in connection with a different claim.[1] One report was a second opinion report dated August 3, 2006 prepared by Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, who opined that her cervical condition was not work related.

Appellant also provided a report from Dr. Nitin A. Shah, a Board-certified orthopedic surgeon and an impartial medical examiner in her earlier claim. She contends that his report and opinion can be read to find her cervical disc disease was work related. In his August 10, 2007 report, Dr. Shah noted appellant's history and diagnosed bilateral carpal tunnel syndrome (CTS) and ulnar nerve neuropathy of the left elbow. He also diagnosed degenerative disc disease of the cervical spine, C4-5, C5-6 and C6-7. Dr. Shah opined that the "diagnosed condition" was aggravated by the work injury. He generally identified overuse of the arms in typing, lifting and reaching as the cause of the arm and wrist problems appellant experienced. Dr. Shah stated appellant's work, from 1972 to 1997, had caused a permanent aggravation because the subjective and objective changes of the bilateral CTS were irreversible.

In a letter dated May 28, 2008, the Office advised appellant that additional factual and medical evidence was needed. It noted that she referred to her prior claim and included the report from Dr. Shah, the impartial medical examiner. The Office explained that Dr. Shah failed to connect the cervical spine and degenerative disc disease to appellant's work conditions. Appellant was advised to provide a comprehensive medical report from her treating physician that detailed how her claimed second injury was causally related to her employment.

The Office received a March 26, 2008 electromyography (EMG) scan and nerve conduction study (NCS), read by Dr. David S. Campion, a diagnostic radiologist, which revealed an abnormal EMG and NCS indicating severe left cubital syndrome.

The Office received a June 26, 2008 letter from counsel, who stated that appellant had experienced the ongoing symptoms of cervical degenerative discs for many years and that she associated these with her federal duties. Counsel argued that the existing medical evidence, including the report from Dr. Shah, supported the claim for a cervical degenerative condition.

By decision dated July 1, 2008, the Office denied appellant's claim. It found that the medical evidence did not demonstrate that the claimed medical condition was related to established work-related events.

On July 7, 2008 counsel requested a hearing, which was held on November 19, 2008. Appellant described her work history which included typing for many years before she became a tax examiner and revenue officer. She indicated that while performing tax reviews she was

[1] The record reflects that appellant has a prior occupational disease claim under File No. xxxxxx7249 which is not before the Board on the present appeal. The Office accepted this claim for bilateral CTS and left ulnar nerve neuropathy but never accepted any condition related to the cervical spine. Appellant has reintroduced medical evidence first gathered for that claim for cervical conditions currently on appeal.

required to carry a briefcase weighing about 15 pounds to and from audit sites. Appellant testified that she lifted the briefcase in and out of her vehicle an average of 8 to 10 times a day for approximately 15 years. She alleged that she worked on the cases with a laptop and reviewed the forms and documents related to the audit. Appellant alleged that she reported to work until August 1997.

The Office received copies of reports dated June 11 and December 16, 2004 and December 8, 2005 from Dr. Robert J. Giombetti, a Board-certified neurologist, who treated appellant for right CTS, probable left elbow ulnar neuropathy. Dr. Giombetti identified cervical spondylosis with a probable component of right upper extremity radiculopathy as conditions also affecting appellant. He noted in a very brief report dated June 11, 2004 that appellant suffered from ulnar nerve entrapment at the elbow, neck pain, cervical disc disease and probable right CTS. In a longer report dated December 16, 2004, Dr. Giombetti stated that he first saw her on August 5, 2003. Appellant's initial complaints were numbness in her left ring and small fingers which had begun about two months before the visit. She also complained of neck stiffness. With regard to the neck, diagnostic imaging performed August 7, 2003 disclosed cervical disc bulging and osteophyte formation and some compression of the vertebral spaces of the neck. The December 16, 2004 report concluded with a diagnosis of right CTS, probable left ulnar neuropathy at the elbow and cervical spondylosis with possible right upper extremity radiculopathy. Dr. Giombetti attributed the majority of appellant's upper extremity complaints to peripheral conditions and acknowledged that a portion might be due to cervical radiculopathy. In a report dated December 8, 2005, he did not mention cervical conditions but referenced appellant's diagnosis of right CTS and left ulnar neuropathy.

In an April 5, 2004 report, Dr. George J. Sahakian, a Board-certified internist, noted that appellant was under his care since 1982. He advised that she had recurrent major depression with periods of depression, anxiety, insomnia and irritability. Dr. Sahakian also stated that appellant had asthmatic bronchitis and emphysematous changes in her right upper lung. He referenced Dr. Giombetti's diagnosis of numbness of the left hand, cervical discopathy and left ulnar neuropathy without further comment.

By decision dated February 17, 2009, an Office hearing representative affirmed the Office's July 7, 2008 decision.

The Office received several treatment notes from Dr. John Beck, a Board-certified psychiatrist, noted that appellant was given total disability retirement in 1997 and discussed psychiatric and emotional issues without reference to her cervical condition.

A January 28, 2009 report from Dr. Todd Spector, Board-certified in family medicine, diagnosed hypertension, depression, and anxiety and briefly opined that he did not believe that appellant's degenerative joint disease of the spine was secondary to work-related issues. He did not explain the basis for his comment on causal connection of her cervical degenerative joint disease.

In a June 23, 2009 letter, counsel requested reconsideration and submitted additional evidence, which included a June 22, 2009 report from Dr. Shah. She also included a copy of its May 21, 2009 letter addressed to Dr. Shah, requesting his opinion with regards to whether

appellant's cervical condition was work related. Counsel noted providing Dr. Shah with a list of questions, a March 6, 2007 statement of accepted facts from the Office and a seven-page medical summary that she prepared. The statement of accepted facts and the seven-page medical summary are not in the record before the Board.

In his June 22, 2009 report, Dr. Shah diagnosed bilateral CTS, ulnar nerve compression neuropathy, cubital tunnel syndrome on the left elbow, degenerative disc disease at multiple levels, cervical spine C3-4, C4-5, C5-6, C6-7 and C7-Tl with bilateral cervical radiculopathy. He noted that appellant's conditions had not changed although he did not specifically mention in his report that he had seen her about two years earlier. Dr. Shah noted signs suggestive of de Quervain's tendinitis of the right wrist, to repeated use of the right arm. He opined that the diagnosis of the cervical spine disease was an aggravation of coexisting conditions. Dr. Shah indicated that repeated use of the upper extremities accelerated and precipitated the underlying disease of the cervical spine, which was work related. He advised that it also made appellant's other conditions including her bilateral CTS and ulnar nerve neuropathy worse. In response to questions posed in a letter from appellant's attorney, Dr. Shah stated:

> "1. In my judgment, diagnosed conditions of bilateral [CTS] and ulnar neuropathy on the left side and degenerative disc disease of the cervical spine of multiple levels remain the same. In addition, [appellant] has signs suggestive of de Quervain's tendinitis of the right wrist which is also secondary to the repeated use of the right upper extremity.
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> 2. As far as the reference to the diagnosis of the cervical spine disease is concerned, in my judgment, it is also an aggravation of coexisting conditions, and my examination remains that repeated use of the upper extremities has accelerated and precipitated the underlying disease of the cervical spine, and it is a work-related condition. We do not have any benefit of new [magnetic resonance imaging] MRI scan studies, so it will be impossible for this examiner to compare or see if there is any significant difference in the cervical degenerative disc disease.
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> 3. Having cervical spine conditions has made the conditions of bilateral [CTS] and ulnar nerve neuropathy worse. In medical terminology, this is used as double crush syndrome. Having coexisting compression neuropathy and cervical spine disease together, do make the conditions worse, and the symptomatology of the neck and upper extremity conditions worse and require treatment for both conditions, cervical spine as well as compression neuropathy of both upper extremities (*i.e.*, bilateral [CTS] and ulnar nerve neuropathy)."

By decision dated December 21, 2009, the Office denied modification of its prior decision. It noted that Dr. Shah's report was of limited value as it contained a medical history that was prepared by counsel and was not provided to the Office. The Office also noted that the first evidence of a cervical condition appeared seven years after she last worked.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 or specific condition for which compensation is claimed is causally related to the employment injury.[3] 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.[4]

Office regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who has had no prior connection with the case.[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]

ANALYSIS

The evidence establishes that appellant has a cervical condition. While she retired in 1997, appellant filed this claim in 2008 of the medical reports which specifically pertain to her

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Elaine Sneed*, 56 ECAB 677 (2005).

[6] *Id.*

neck, none are earlier than 2004. Appellant has testified that, while working, she did typing for many years, carried a brief case and got in and out of her vehicle multiple times a day while carrying the brief case. The Office and employing establishment have a substantially diminished chance to develop her work activities, job duties or medical condition because she delayed filing her claim for 10 years. The burden on the medical experts includes explaining how the passage of time has affected the process of examining, diagnosing and offering an opinion on the causal relationship between the employment which ceased in 1997 and the cervical condition identified years later.

Appellant provided reports from Dr. Shah, who was an impartial medical examiner in another claim involving different parts of appellant's body. Dr. Shah's opinion in this claim does not enjoy the special weight accorded to the opinions of a referee examiner. There was no conflict of medical evidence, he was not selected by the Office in accordance with procedural safeguards and Dr. Shah's prior involvement with appellant in an earlier claim would disqualify him from selection as an independent medical examiner in this claim.[7] Dr. Shah was an Office physician with respect to her other claim and is not an impartial specialist in the present claim.[8] The reports and opinions expressed by him must be evaluated by the standards generally applied to medical experts.

In his August 10, 2007 report, Dr. Shah noted appellant's history and diagnosed bilateral CTS, ulnar nerve neuropathy, of the left elbow, and degenerative disc disease of the cervical spine, C4-5, C5-6 and C6-7. Without distinguishing which conditions had been accepted by the Office and which had not, he merely stated that the "diagnosed condition" was permanently aggravated by the work injury because the subjective and objective changes of the bilateral CTS were irreversible.

Dr. Shah opined in general terms that the diagnosed conditions were medically connected to the factors of employment. From 1972 to 1997, appellant had used her upper extremities on a repeated basis. Although this opinion suggests that her cervical condition might be included among those found employment related, Dr. Shah does not make an explicit statement and the context of his statement is against that inference. His report was intended as part of a claim for the upper extremities, not the neck, and the opinion on causal connection certainly addresses appellant's CTS. The Board will not read into this report a finding of causal connection for a cervical condition where that finding was not explicitly stated and where the cervical condition was not part of the claim.

Even if Dr. Shah had meant to find the cervical condition causally connected to appellant's occupational disease in the earlier claim, he did not provide detailed rationale to explain the reason for his conclusion. He did not discuss how the passage of a decade between his examination and her retirement might have affected his analysis of her complaints. The

[7] *Ronald Santos*, 53 ECAB 742 (2002).

[8] Regarding conflicts in the medical evidence, see 5 U.S.C. § 8123(a).

Board has long held that medical opinions not containing rationale on causal relation are entitled to little probative value are generally insufficient to meet appellant's burden of proof.[9]

Following the initial denial of this claim by the Office, counsel contacted Dr. Shah and provided him with a list of questions and her own medical summary of the case. She also noted providing him with a statement of facts from the Office. However, the medical summary and March 6, 2007 statement of accepted facts are not in the record before the Board.[10]

In a June 22, 2009 report, Dr. Shah stated that the diagnosed cervical spine disease was an aggravation of coexisting conditions. He indicated that repeated use of the upper extremities accelerated and precipitated the underlying disease of the cervical spine. Dr. Shah opined that all the conditions he named were work related. He used the term "double crush syndrome" and stated that it had produced worsening symptoms of both the neck and the upper extremity conditions.

Dr. Shah's June 22, 2009 report was also brief and lacked the essential detail and development to frame his final conclusions. He did not explain the physiological process of cervical degenerative disc disease in terms of mechanics or duration. Dr. Shah did not explain how CTS and ulnar nerve neuropathy operate to affect cervical disc disease. He did not discuss the components of appellant's cervical condition: bulging discs, narrowed disc space and osteophyte formation. The Board cannot make assumptions as to medical rationale.

Dr. Shah's report contains nothing about appellant's actual work activities over the years 1972 to 1997. To the extent that he finds a progressive condition aggravated by appellant's overuse of her arms, he must explain how the process develops and progresses in patients and apply this information to the specifics of her situation. Certainly there were some nonwork stresses placed on appellant's arms and neck. Dr. Shah fails to comment on nonwork activity and fails to discuss whether it might have affected her condition over a period of years.

It is possible that all of the doctor's conclusions regarding causal connection between appellant's job and her neck problems are correct but his report does not establish them to a reasonable degree of medical probability. Further, Dr. Shah's June 22, 2009 report is possibly of diminished probative value because it is unclear whether his opinion is based on an accurate or complete factual background. The medical summary provided to him by counsel is not of record in its entirety.[11]

Also submitted were reports of June 11 and December 16, 2004 and December 8, 2005 from Dr. Giombetti, who opined that some of appellant's symptoms may be due to cervical radiculopathy. However, Dr. Giombetti did not offer an opinion as to the cause of appellant's

[9] *Carolyn F. Allen*, 47 ECAB 240 (1995).

[10] Any March 6, 2007 statement of accepted facts created by the Office could not pertain to the claim on appeal. This claim was not filed by appellant until April 18, 2008. The Office's statement of facts in a different claim is not relevant to claim for different injuries to different parts of the body.

[11] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

cervical condition. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[12] The diagnostic reports of March 26, 2008 EMG scan and NCS from Dr. Campion did not provide an opinion regarding the cause of any diagnosed condition. These reports, while medically useful, are irrelevant to the causal connection issue before the Board.

The record also contains an August 3, 2006 report from Dr. Ha'Eri who opined that appellant's cervical condition was not work related. In a January 28, 2009 report, Dr. Spector also stated that he did not believe that her degenerative spine condition was secondary to work-related issues. Such as they are, these reports tend to weigh against a finding of a work-related cervical condition.

Other reports submitted by appellant did not specifically address causal relationship whether work factors from 1997 and before caused or aggravated her cervical condition. They concerned other medical conditions not related to the claim before the Board.

On appeal, counsel submitted arguments that the Office should have requested that Dr. Shah clarify his opinion, presumably in the earlier claim.[13] She asserted that the Office advised appellant to file a new occupational disease claim. Counsel noted that appellant followed what she believed was the Office's advice and filed a new occupational disease claim, then sought clarification from Dr. Shah and that the Office unfairly discounted his opinion. She asks that the Board grant a motion to complete the record by looking at everything attached to appellant's summary of the case presented to Dr. Shah. For reasons enumerated earlier, the Board declines.

The Board notes that matters regarding appellant's other claim are not part of the present appeal. Appellant has failed to present rationalized medical evidence in this appeal to establish that her neck condition is causally related to her employment duties.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty causally related to factors of her federal employment.

[12] *Michael E. Smith*, 50 ECAB 313 (1999).

[13] The Board declines to consider this request because it concerns a claim which is not part of this appeal. The role of Dr. Shah in this appeal is that of a treating physician. The fact that he was an Office referee physician in another claim involving this appellant does not affect his status in this appeal. It is reasonable for appellant to attempt to generate evidence tending to be favorable to her claim. That evidence is not an "Addendum" to Dr. Shah's earlier independent medical examination in a different claim. It is simply evidence in this claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2009 is affirmed.

Issued: March 10, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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