

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

D.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Washington, DC, Employer)

**Docket No. 11-93
Issued: September 6, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 14, 2010 appellant filed a timely appeal of an April 29, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision denying compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained a right shoulder condition causally related to factors of her federal employment.

On appeal, appellant argued that she did not have a preexisting condition and that her physicians supported a casual relationship between her diagnosed condition and her employment activities.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 1, 2008 appellant, then a 53-year-old sales and service associate, filed an occupational disease claim alleging that she developed pain and inflammation in the right arm and shoulder due to writing in the performance of duty. She stated that the more she wrote the more pain she experienced. Appellant also stated that the constant cold from the air conditioner increased her pain. Dr. Roscoe Adams, a Board-certified family practitioner, examined appellant on July 9, 2008 and diagnosed pain in the shoulder, impingement syndrome of the shoulder and strain of the arm or forearm due to repetitive use. In a letter dated July 18, 2008, OWCP requested additional factual and medical evidence in support of appellant's claim. It allowed 30 days for a response.

Appellant's supervisor submitted a statement dated August 1, 2008 stating that appellant was on light duty which entailed answering the telephone, writing second notices for letters and parcels, some light lifting and assisting customers in the lobby area. He noted that appellant was required to sit, stand and reach to retrieve different items intermittently throughout an eight-hour day.

Appellant underwent a right shoulder magnetic resonance imaging (MRI) scan on July 23, 2008. This test demonstrated two partial thickness bursal surface tears of the supraspinatus anteriorly and that posterior supraspinatus and infraspinatus tendon. In a note dated July 31, 2008, Dr. Adams stated that appellant's shoulder examination showed positive impingement signs and tenderness of the acromioclavicular joints with decreased range of motion in both shoulders. He reviewed the MRI scans and diagnosed rotator cuff tears secondary to repetitive work.

By decision dated August 27, 2008, OWCP denied appellant's claim finding that the medical evidence did not establish that the claimed condition resulted from appellant's accepted work activities.

Appellant requested a review of the written record on September 24, 2008. She submitted a left shoulder MRI scan dated July 23, 2008, which demonstrated a partial thickness tear of the rotator cuff at the junction of the posterior of the supraspinatus and infraspinatus as well as a tear of the anterior-anterosuperior labrum. On September 15, 2008 Dr. Adams diagnosed rotator cuff tear and impingement syndrome of the shoulder, strain of right arm repetitive use and pain in shoulder longer than three months. He noted that appellant reported bilateral shoulder pain with decreased range of motion since April 15, 2008. Appellant stated that the pain began after working on April 15, 2008 which was an especially busy day. Dr. Adams opined that appellant's injuries did not occur as a result of other medical problems, but from repetitive motion at work. By decision dated November 18, 2008, the Branch of Hearings and Review vacated OWCP's August 18, 2008 decision and remanded the case for additional development of the medical evidence.

Dr. Leonard F. Tassy, a Board-certified orthopedic surgeon, examined appellant on December 9, 2008 and diagnosed partial thickness rotator cuff tear bilaterally. He noted that appellant was more symptomatic on the right.

OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 23, 2008, Dr. Draper stated that appellant was writing when she felt a pop in her right shoulder and felt some pain in her right shoulder. He noted that appellant had a history of pushing and pulling in the performance of duty, but that she attributed her condition to writing a lot in the performance of duty. Dr. Draper reviewed appellant's MRI scans and diagnosed impingement syndrome of the right shoulder with preexisting osteoarthritis of the right acromioclavicular (AC) joint with arthropathy. He stated that appellant was sitting at her desk writing and that writing in and of itself was not of a sufficient magnitude of trauma to cause a rotator cuff tear or injury. Dr. Draper stated that appellant had osteoarthritis of the AC joint with arthropathy with hypertrophy and crowding of the supraspinatus outlet. He stated, "This crowding of the supraspinatus outlet led to impingement syndrome in the supraspinatus outlet and caused the partial tearing of the supraspinatus and infraspinatus tendons." Dr. Draper concluded, "I believe that the patient's symptoms are due to the osteoarthritis of the AC joint of the right shoulder, causing these other impingements and damages to the rotator cuff generally, I do not find that the writing in and of itself caused the rotator cuff tear. Consequently, I do not consider this an on-the-job injury but the result of her unrelated medical condition." Dr. Draper noted that appellant had similar findings in her left shoulder on MRI scan and that she was reporting some discomfort in the left shoulder. He noted that appellant's left shoulder was not injured in her employment in any way and opined that she had a similar condition in her left shoulder. Dr. Draper stated that he did not believe that appellant's right left shoulder problems were related to work activity or aggravated by work activity.

On January 30, 2009 OWCP referred appellant for an impartial medical examination with Dr. James Tozzi, a Board-certified orthopedic surgeon. In a report dated February 17, 2009, Dr. Tozzi noted appellant's history of injuring her right shoulder while writing in the performance of duty. He noted that she underwent right shoulder surgery on February 12, 2009 and reviewed her surgical report. Dr. Tozzi stated that the changes found in surgery were primarily that of wear and tear commonly found in patients in appellant's age group. He stated, "There is ample medical information that links this to wear and tear rather than injury." Dr. Tozzi diagnosed rotator cuff degeneration, AC joint hypertrophy with degeneration, supraspinatus tendinitis. He stated, "The condition was preexisting and is degenerative. It may, in fact be considered an occupational hazard, just as carpal tunnel. However, it is such a common condition that one would have to say that the act of aging in and of itself would be, then, work related if we are to assume that wear and tear in the musculoskeletal system is work related to rather age related and common to every human being." Dr. Tozzi also noted that appellant had a similar left shoulder condition which was unrelated to any reports of injury. He concluded that appellant's condition was not work related.

By decision dated March 18, 2009, OWCP denied appellant's claim finding that the weight of the medical evidence as represented by Dr. Tozzi's report established that her right shoulder condition was preexisting and not causally related to her accepted employment activity of writing.

Appellant requested an oral hearing on April 15, 2009. Appellant attributed her rotator cuff tear to repetitive use of her right shoulder since July 1988 including lifting, pushing, pulling, reaching and throwing packages. She stated that her job assignment when her right shoulder

injury occurred was repetitive writing. Appellant submitted a report dated January 8, 2009 from Dr. Tassy. He reviewed appellant's operative report dated February 12, 2009 and diagnosed partial thickness rotator cuff tear right shoulder. Dr. Tassy found grade three to four chondromalacia on the humeral head and glenoid with some cartilage floating free. He also found mild fraying at the superior labrum and subscapularis anteriorly.

Appellant testified at the oral hearing on July 28, 2009. Counsel argued that Drs. Draper and Tozzi inappropriately evaluated appellant's claim as a traumatic injury rather than an occupational disease claim. Appellant stated that she worked as a flat sorter operator initially and then as a sales associate. She stated that on May 8, 2008 she was writing certified letters. Appellant also noted that it was very cold at the employing establishment. She stated that she was required to lift and reach in the performance of duty. Appellant stated on May 8, 2008 that she was writing and felt something pop. She noted that she continued to write for several days and her pain worsened. Appellant first sought medical attention on June 27, 2008. She noted that she had recently filed a separate claim for her left shoulder condition.

In a report dated September 28, 2009, Dr. Tassy stated that appellant had to do "a lot of lifting" in the performance of duty and that this "may be related to her problem." He diagnosed partial thickness rotator cuff tear. Dr. Tassy stated, "It is likely that some of the lifting she had to do at her work maybe led to this problem that is as specific as I can be in regard to this."

By decision dated November 17, 2009, the Branch of Hearings and Review found that Dr. Tozzi's report required clarification regarding whether appellant's employment in any manner affected the diagnosed conditions and remanded the case to OWCP for further development.

In a letter dated March 3, 2010, OWCP requested that Dr. Tozzi provide a supplemental report addressing whether the preexisting condition may have been an occupational hazard. It requested that Dr. Tozzi explain whether the accepted employment factors contributed to any extent in appellant's condition and supply medical reasoning in support of his conclusion. Dr. Tozzi responded on April 21, 2010 and stated that appellant attributed her right shoulder condition to repeated writing and being placed in a position where cold air affected her right shoulder. He stated, "It is my opinion that [appellant] has rotator cuff degenerative changes bilaterally that the reported aggravating environment and activities were inconsequential. The active writing per se and cold air do not cause rotator cuff tears." Dr. Tozzi noted that cold air could cause a temporary aggravation of her shoulder symptoms, but did not cause the condition nor lead to any permanent aggravation. He further stated, "It is therefore my opinion that [appellant] has attritional wear and tear-related rotator cuff disease that is linked to genetics, age and simple wear and tear that would be present regardless of her employment. Based upon my understanding of her employment, she has limited lifting requirements, the bulk of her work being writing and sedentary activity which does not predispose the patient to occupational hazard of rotator cuff disease." He noted that as appellant's position at the time of her complaints was not physically demanding, the duties would not be associated with the production of shoulder pain and tearing that necessitated surgical intervention.

By decision dated April 29, 2010, OWCP denied appellant's claim finding that the weight of the medical opinion evidence rested with Dr. Tozzi who reviewed the statement of

accepted facts and provided medical reasoning in support of his opinion that appellant's condition was not related to her accepted employment factors.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and 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 or specific condition for which compensation is claimed is causally related to the employment injury.³

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."⁴ 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 evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁵

ANALYSIS

Appellant alleged that she developed a right shoulder condition due to her employment duties of writing and working in an over air conditioned area. Her attending physician, Dr. Adams attributed her right shoulder impingement syndrome to her employment duties. OWCP referred appellant for a second opinion evaluation with Dr. Draper who opined that appellant's shoulder condition was not related to her implicated employment duties, but instead was due to normal wear and tear through the process of aging.

The Board finds that OWCP properly determined that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Adams, and Dr. Draper, an OWCP referral physician, regarding the causal relationship between appellant's diagnosed

² *Id.* at §§ 8101-8193.

³ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁴ 20 C.F.R. § 10.5(q).

⁵ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

condition and her employment duties. When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

OWCP properly referred appellant, a statement of accepted facts and a list of specific questions to Dr. Tozzi, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence. In his initial report dated February 17, 2009, Dr. Tozzi accurately reported appellant's history of injuring her right shoulder while writing in the performance of duty and working in a cold environment. He reviewed the February 12, 2009 surgical report and opined that the changes found in surgery were primarily that of wear and tear commonly found in patients in appellant's age group. Dr. Tozzi diagnosed rotator cuff degeneration, AC joint hypertrophy with degeneration, supraspinatus tendinitis. He opined that appellant's shoulder condition was preexisting and degenerative noting that it could be considered an occupational hazard, but was so common that it was really age related. Dr. Tozzi bolstered his opinion by noting that appellant's left shoulder condition was similar and not attributed to her employment.

Dr. Tozzi submitted a supplemental report dated April 21, 2010 and again reviewed the statement of accepted facts noting that appellant attributed her right shoulder condition to repeated writing and being placed in a position where cold air affected her right shoulder. Dr. Tozzi opined that appellant's accepted employment activities could not cause her right shoulder rotator cuff tears. He opined that cold air could cause a temporary aggravation of her shoulder symptoms, but did not cause a rotator cuff tear or lead to any permanent aggravation of that condition. Dr. Tozzi concluded, "It is therefore my opinion that [appellant] has attritional wear and tear related rotator cuff disease that is linked to genetics, age and simple wear and tear that would be present regardless of her employment. Based upon my understanding of her employment, she has limited lifting requirements, the bulk of her work being writing and sedentary activity which does not predispose the patient to occupational hazard of rotator cuff disease."

The Board finds that the weight of the medical evidence rests with the well-reasoned reports of Dr. Tozzi. In situations where there are opposing medical reports of virtually equal weight and rationale and 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.⁸ Dr. Tozzi based his report on a proper history of injury and provided a clear opinion that appellant's right shoulder condition was not due to the accepted employment factors of writing and working in a cold environment. He attributed appellant's rotator cuff tear to the aging process, noting that appellant had similar

⁶ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁷ *R.C.*, 58 ECAB 238 (2006).

⁸ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

findings in her left shoulder. Dr. Tozzi explained that appellant's basically sedentary work duties were not sufficiently strenuous to result in the diagnosed rotator cuff tear. He explained why he believed that appellant's shoulder condition was not the result of her implicated employment duties and suggested an alternative explanation for her condition that the condition arose as a result of the normal aging process. This reasoning is sufficient to resolve the existing conflict of medical opinion evidence and does not support appellant's claim for an occupational disease.

Dr. Tassy examined appellant following her right shoulder surgery and listed appellant's work requirements as "a lot of lifting" and suggested that the lifting may be related to appellant's shoulder condition. He stated, "It is likely that some of the lifting she had to do at her work maybe led to this problem that is as specific as I can be in regard to this." While Dr. Tassy offered an opinion that appellant's employment contributed to her right shoulder condition, this report is not based on a proper history of injury as appellant's position was sedentary with limited lifting. He also failed to provide a definitive opinion, stating that it was likely that lifting may be led to appellant's shoulder condition. This speculative statement is not sufficient to meet appellant's burden of proof.

The Board finds that the weight of the medical evidence fails to support appellant's claim that her employment duties of writing and working in a cold environment caused or contributed to her diagnosed condition of right rotator cuff tear. The Board further finds that Dr. Tozzi's reports are entitled to the weight of the medical evidence and disagrees with appellant's interpretation of the medical evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she developed a right shoulder condition due to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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