

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

T.N., Appellant)

and)

DEPARTMENT OF JUSTICE,)
IMMIGRATION & NATURALIZATION)
SERVICE, Calipatria, CA, Employer)

**Docket No. 12-1056
Issued: December 18, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2012 appellant filed a timely appeal from a March 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 her cervical condition is causally related to her accepted employment injuries.

FACTUAL HISTORY

On August 20, 1998 appellant, a 39-year-old deportation assistant, filed an occupational disease claim (Form CA-2) for right upper extremity numbness, tingling and pain that she related

¹ 5 U.S.C. § 8101 *et seq.*

to employment factors. In November 1998, OWCP accepted the claim for a bilateral wrist, elbow and shoulder strain, but specifically refused to accept the claim for a cervical condition. In July 2000, it expanded the claim to include bilateral carpal tunnel syndrome.

The record contains a February 26, 1999 report from Dr. Travis H. Calvin, a Board-certified neurological surgeon, who opined that appellant's cervical condition was caused by overuse and poor positioning while at work.

By decision dated July 22, 2003, OWCP denied appellant's claim for compensation for a cervical condition that she attributed to her 1998 employment injury. Appellant requested an oral hearing. Based upon a review of the written record, an OWCP hearing representative issued a decision on February 23, 2004 setting aside the July 22, 2003 decision and finding that her claim should be expanded to include the condition, cervical radiculopathy, resolved.² By decision dated September 1, 2005, the Board set aside the February 23, 2004 decision on the grounds that appellant had been denied the right to an oral hearing on OWCP's decision to limit the period of acceptance of her cervical condition. The case was remanded for reconsideration based upon the ruling of the hearing representative following an oral hearing.

In a decision dated May 19, 2006, an OWCP hearing representative found the case was not in posture for a decision as to whether appellant had a cervical condition that was causally related to her accepted injury and remanded the case for an examination by a second opinion physician.³ On remand, appellant was referred to Dr. Irwin Shapiro, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether there was a causal relationship between her claimed cervical condition and factors of employment and whether she was disabled from August 19, 1998 through January 1999. In a report dated June 2, 2009, Dr. Shapiro opined, based solely on a review of the medical record, that objective findings did not support a diagnosis of a cervical condition.

In an August 24, 2009 decision, OWCP denied appellant's request to expand her claim to include a cervical condition and denied compensation for disability from August 19, 1998 through January 1999, finding that the weight of the medical evidence was contained in Dr. Shapiro's second opinion report. In a May 28, 2010 decision, it denied her claim for a cervical condition, again relying on Dr. Shapiro's opinion.

In an order dated May 25, 2011, the Board set aside the May 28, 2010 decision and remanded the case for further development of the medical evidence. The Board found that, as OWCP had begun to develop the medical evidence, it had an obligation to secure a report adequately addressing the issue at hand, namely, whether appellant had a cervical condition

² The hearing representative determined that no compensation should be paid for a cervical condition relating to an April 1999 nonwork-related accident from which appellant had recovered as of June 1999 and that she should file a new occupational disease claim for a cervical condition commencing October 1999. OWCP issued a decision on March 12, 2004 in accordance with the directions of the hearing representative and issued a decision as to entitlement to compensation on June 8, 2004.

³ Appellant filed an appeal with the Board on June 22, 2006. By order dated July 12, 2007, the Board dismissed the appeal on the grounds that the case was in an interlocutory status. Docket No. 06-1552 (issued July 12, 2007).

causally related to her accepted injury and that, on its face, Dr. Shapiro's report was insufficient to satisfy that burden.⁴

On remand, OWCP referred appellant, together with a statement of accepted facts,⁵ to Dr. Ronald Lampert, a Board-certified orthopedic physician for an examination and an opinion as to whether appellant's claimed cervical condition was causally related to her accepted 1998 injury. In a July 13, 2011 report, Dr. Lampert reported the history of injury and treatment, reviewed the medical records and provided examination findings. He noted that September 1998 x-rays and a magnetic resonance imaging (MRI) scan revealed a disc bulge at C4-5 and C5-6 and that she had continued numbness and pinching in her neck and shoulder. Appellant had a disc replacement in 2007. Examination of the neck revealed full flexion, extension and left and right rotation. There was no evidence of paracervical muscle spasm, splinting or tenderness. Dr. Lampert diagnosed postoperative carpal tunnel syndrome; postoperative disc replacement at C5-6; and painful right upper extremity, by history. He opined that appellant had not sustained an injury to her neck as it related to the injury of record and that the disc bulges were consistent with her age. Dr. Lampert added that there was insufficient evidence to show that ongoing repetitive work or a traumatic event had caused or aggravated a neck condition.

OWCP found a conflict of medical opinion between Dr. Calvin, who opined that appellant's cervical condition was causally related to keyboarding and turning her neck at work and Dr. Lampert, who opined that there was no cervical condition causally related to the 1998 injury. On August 12, 2011 it referred her to Dr. R. Richard Maxwell, a Board-certified orthopedic surgeon, for a referee examination and an opinion as to whether she had a cervical condition related to the mechanism of injury in order to resolve the conflict. Dr. Maxwell was advised that his report should clarify the issues identified in the enclosed conflict statement and that he should use the attached statement of accepted facts as the only factual framework for his opinion. He was further advised that his opinion must address the specific causality of the cervical condition and whether the mechanism of injury as noted on the SOAF caused the cervical condition or contributed to its development. There was no statement of accepted facts attached to the August 12, 2011 conflict statement.

On October 17, 2011 Dr. Maxwell was informed that an appointment had been scheduled for appellant on November 18, 2011. He was asked to review the enclosed SOAF medical records and questions prepared by the claims examiner before conducting his examination. The record does not contain a copy of the SOAF.

In a three-page report dated November 18, 2011, Dr. Maxwell stated that he had reviewed cervical spine x-rays dated May 6, 1999; a cervical MRI scan dated March 3, 2000; and numerous medical records, including operative reports. He noted that appellant had been involved in motor vehicle accidents in 1996, where she suffered a cervical strain and in 1999, where she struck her head on the side of the vehicle. On examination of the neck, Dr. Maxwell found that range of motion was quite satisfactory, noting that she was able to bring her chin

⁴ Docket No. 10-1810 (issued May 25, 2011).

⁵ A June 15, 2011 statement of accepted facts indicated that appellant was involved in a nonwork-related automobile accident on April 28, 1999, resulting in a head laceration and cervical discomfort.

almost all the way down to her cervical spine. Extension was “good at 30 degrees. Side-to-side bends and rotary movements [were] satisfactory.” Dr. Maxwell opined that appellant’s cervical radiculopathy and subsequent surgery were not related to the mechanism of injury as described in the SOAF. Noting that, the neck is designed for many rotary and side to side bending movements, he indicated that even in an overuse syndrome, often diagnosed as cervical strain, this repetitive motion is unlikely to cause a disc bulge or rupture to the point of requiring surgery. Dr. Maxwell stated it was more likely that the flexion extension injury she suffered in the 1999 automobile accident would be the more reasonable cause of the pathology in her cervical spine which ultimately led to her surgery.

By decision dated March 5, 2012, OWCP denied appellant’s request to expand her claim to include an additional cervical condition. The claims examiner found that Dr. Maxwell’s referee report was well reasoned and represented the weight of medical opinion.

LEGAL PRECEDENT

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause.⁶ Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.⁷

When there exists opposing medical opinions 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 upon a proper factual and medical background, will be given special weight.⁸

ANALYSIS

The Board finds that this case is not in posture for decision on the issue of whether appellant has a cervical condition causally related to her accepted injury, as there remains an unresolved conflict in medical opinion.

Appellant’s treating physician opined that appellant’s cervical condition was caused by overuse and poor positioning while at work. OWCP’s second opinion physician, Dr. Lampert, opined that she had not sustained an injury to her neck as a result of the established employment injury. It properly referred appellant to Dr. Maxwell for an impartial medical examination in order to resolve the conflict between Dr. Calvin and Dr. Lampert. The Board finds that

⁶ *K.R.*, Docket No. 11-391 (issued December 21, 2011).

⁷ *See Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marerro*, 50 ECAB 170 (1998).

⁸ *M.C.*, Docket No. 10-2242 (issued July 7, 2011); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

Dr. Maxwell's opinion is insufficiently rationalized to resolve the conflict in medical opinion. Therefore, the case will be remanded for further development.

OWCP's procedures provide that the referee physician should provide a report which contains a clinical history, results of the examination, results of any testing performed and a reasoned opinion in response to the questions posed sufficient to resolve the conflict. The procedures further require the referee physician to use the SOAF as the framework for his or her opinion.⁹

OWCP's procedures provide that the referee physician should provide a report which contains a clinical history, results of the examination, results of any testing performed and a reasoned opinion in response to the questions posed sufficient to resolve the conflict. The procedures further require the referee physician to use the SOAF as the framework for his or her opinion.¹⁰ Dr. Maxwell's November 18, 2011 report was deficient on several counts. The report did not include a detailed clinical history, detailed examination findings or a definitive diagnosis. There is no evidence that he performed any specific tests to support his conclusions.

Although Dr. Maxwell opined that appellant's cervical radiculopathy and subsequent surgery were not related to the mechanism of injury as described in the SOAF, he did not identify the mechanism of injury contained in the SOAF; nor did he indicate that he had used OWCP's SOAF as a basis for his opinion, as required. As the record does not contain a copy of the SOAF and Dr. Maxwell did not describe its contents, the Board is unable to determine whether he considered the fact that OWCP accepted appellant's claim for cervical radiculopathy, resolved. In short, Dr. Maxwell failed to adequately explain how he arrived at his conclusion.¹¹ Dr. Maxwell's statement that repetitive motion is unlikely to cause a disc bulge or rupture to the point of requiring surgery and that it was more likely that the flexion extension injury she suffered in the 1999 automobile accident would be the more reasonable cause of the pathology in her cervical spine, is speculative in nature. For these reasons, the Board finds Dr. Maxwell's opinion to be of limited probative value and insufficient to resolve the conflict between Dr. Calvin and Dr. Lampert.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹² While appellant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹³ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁴ As it undertook development of the medical

⁹ *Id.* at Chapter 3.500.4(g).

¹⁰ *Id.* at Chapter 3.500.4(g).

¹¹ Medical conclusions unsupported by rationale are of little probative value. *Willa M. Frazier*, 55 ECAB 379 (2004).

¹² *Vanessa Young*, 55 ECAB 575 (2004).

¹³ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁴ *Melvin James*, 55 ECAB 406 (2004).

evidence by referring appellant to Dr. Maxwell, it had an obligation to secure an opinion adequately addressing the relevant issues.¹⁵ Therefore, the case will be remanded to OWCP for a supplemental report from him. If Dr. Maxwell is unwilling or unable to clarify or elaborate on his opinion, the case should be referred to another appropriate specialist. After such further development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant has a cervical condition that is causally related to her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for action consistent with this decision.

Issued: December 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Peter C. Belkind*, 56 ECAB 580 (2005).