United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
	)	**Docket No. 12-258**
and	)	**Issued: July 3, 2012**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, Wilmington, DE, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 23, 2011 appellant, through her attorney, filed a timely appeal from a September 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act[1] (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 sustained a left upper extremity condition, an aggravation of a right upper extremity condition and a cervical condition causally related to factors of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated August 24, 2010, the Board set aside a May 19, 2009 OWCP decision finding that appellant had not established a bilateral upper extremity or cervical condition causally related to factors of her federal employment.[2] The Board determined that a conflict in medical opinion arose between Dr. Scott M. Fried, an attending Board-certified orthopedic surgeon, and Dr. Zohar Stark, a Board-certified orthopedic surgeon and referral physician, regarding whether she had an employment-related bilateral upper extremity or cervical condition. The Board remanded the case to refer appellant to an impartial medical examiner for resolution of the conflict. The facts and circumstances as set forth in the Board's prior decision are hereby incorporated by reference.

On October 7, 2010 OWCP referred appellant to Dr. Karl Rosenfeld, a Board-certified orthopedic surgeon, for an impartial medical examination. The record contains an appointment schedule notification designating Dr. Rosenfeld as the impartial medical specialist. It further contains screen shots showing that three physicians were bypassed prior to his selection and providing reasons for the bypasses. One physician had no telephone, one would not examine appellant for all injuries and one was of the wrong specialty.

In a report dated November 3, 2010, Dr. Rosenfeld discussed appellant's complaints of neck pain greater on the right, shooting pain to the right wrist, tingling in her fingers bilaterally with elbow extension, a burning in her hands and forearms, right shoulder pain and stiffness and occasional similar complaints in her left upper extremity. On examination, he found poor neck movement but no spasm and that she could passively lift her right arm without difficulty or stiffness. Dr. Rosenfeld found good pulses in the hands even on elevation, no atrophy of the hand and a negative Tinel's sign of the bilateral elbows, medial epidoncyle and wrists. He concluded that there were no objective findings on examination. Dr. Rosenfeld reviewed the medical evidence of record and noted that appellant had a prior history of a right shoulder repetitive strain injury and torn rotator cuff. He found that the electrodiagnostic study performed on October 8, 2004 was valid and normal. Dr. Rosenfeld opined that appellant's pain syndrome was not due to an orthopedic condition and that he found no objective evidence of a rotator cuff condition. He asserted that her ability to passively lift her shoulder showed that she used it more than "she demonstrated at the time of the exam[ination]." Dr. Rosenfeld stated that he found evidence of "symptom magnification or at least nonanatomic complaints." He noted that Dr. Fried's therapist found abnormalities on electrical tests but opined that he found "no objective validation of these numerous findings." Dr. Rosenfeld stated:

> "Therefore, in conclusion, with reasonable medical probability, I could find no orthopedic malady stemming from [appellant's] work activities to explain all of her complaints. I believe [that] she sprained her neck at one time, she obviously did hurt her shoulder at one time, but at the time of her review with me these were not in evidence except for her symptoms."

[2] Docket No. 09-2129 (issued August 24, 2010). On January 3, 2007 appellant, then a 54-year-old secretary, filed an occupational disease claim alleging that she sustained pain in her right shoulder, arm and wrist, left arm, wrist and hand and neck due to the performance of her work duties. OWCP accepted a previous claim, assigned file number xxxxxx429, for a repetitive strain injury of the right shoulder and a torn right rotator cuff.

In an accompanying work restriction evaluation, Dr. Rosenfeld found that appellant could perform her usual employment. He listed work restrictions of reaching and reaching above the shoulder for one hour and pushing, pulling and lifting up to 10 pounds.

By decision dated February 24, 2011, OWCP denied appellant's claim for a bilateral upper extremity and cervical condition. It found that Dr. Rosenfeld's opinion represented the weight of the evidence and established that she had no employment-related condition.

On March 2, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. At the hearing held on June 22, 2011, her attorney contended that Dr. Rosenfeld relied in part on an October 2004 electromyogram (EMG) interpreted as normal even though her continued working until 2006, an additional two years. Counsel noted that later EMGs were abnormal. He maintained that if Dr. Rosenfeld believed that Dr. Fried's EMG studies were unreliable he should have conducted new studies and further alleged that he did not give a diagnosis or rationale for his opinion.

On July 12, 2011 Dr. Fried diagnosed carpal tunnel syndrome based on positive EMG study, status post right shoulder decompression with continued right shoulder capsulitis and a partial thickness rotator cuff tear, cervical radiculopathy with right brachial plexopathy with thoracic neuritis and scapular wining based on positive EMG study and right radial and ulnar neuropathy due to her employment.[3] He attributed all diagnoses to the work injury and stated, "there is overwhelming objective evidence that [appellant] has ongoing work[-]related injury…. Specifically, the records of Dr. Rosenfeld do not address the fact that she has multiple objective findings consistent with ongoing problems. Appellant has positive EMG nerve conduction studies, which corroborate and document her complaints. She has treating physicians who found ongoing positive complaints."

By decision dated September 8, 2011, the hearing representative affirmed the February 24, 2011 decision. She found that the additional medical evidence was insufficient to outweigh the evidence from the impartial medical examiner.

On appeal, appellant's attorney argues that there is insufficient evidence to establish that Dr. Rosenfeld was properly selected using the Physicians Directory System (PDS) as there was no screen shot showing his selection. Counsel also contends that Dr. Rosenfeld's report was not rationalized and relied upon an EMG testing conducted two years before appellant stopped work.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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

[3] In a report dated July 15, 2011, Dr. Steven J. Valentino, an osteopath, related that he initially evaluated appellant on January 2008 for neck and right upper extremity pain. He diagnosed a right rotator cuff tear, adhesive capsulitis, brachial plexopathy, multiple peripheral neuropathies and aggravation of cervical degenerative disc disease due to a 2004 work injury.

[4] 5 U.S.C. §§ 8101-8193.

States" within the meaning of FECA, that the claim was filed within the applicable time limitation; that an injury was sustained while 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.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

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;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing 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.[9]

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.[10] The opinion of the physician must be based on a complete factual and medical background of the claimant,[11] must be one of reasonable medical certainty[12] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

Section 8123(a) 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.[14] The implementing regulations states 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 OWCP medical adviser, OWCP shall appoint

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[8] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[9] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[10] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[12] *John W. Montoya*, 54 ECAB 306 (2003).

[13] *Judy C. Rogers*, 54 ECAB 693 (2003).

[14] 5 U.S.C. § 8123(a).

a third physician to make an examination. 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.[15]

ANALYSIS

The Board remanded the case for OWCP to resolve a conflict in medical opinion regarding whether appellant sustained a bilateral upper extremity or cervical condition due to her employment. OWCP noted that she had a previously accepted claim for a right shoulder sprain and torn rotator cuff.

OWCP referred appellant to Dr. Rosenfeld for an impartial medical examination. On appeal, her attorney argues that there is insufficient evidence to support that OWCP properly selected Dr. Rosenfeld using the PDS. The record, however, reflects that, in selecting the impartial medical specialist, OWCP bypassed several physicians who were either unavailable, could not examine appellant for all injuries or were the wrong specialty. The selection process was documented through a series of screen captures. The Board finds that the evidence reflects that OWCP properly applied the medical management software in selecting Dr. Rosenfeld.[16]

The Board finds, however, that Dr. Rosenfeld's opinion is insufficient to establish that appellant has no employment-related upper extremity or cervical condition. On November 3, 2010 Dr. Rosenfeld discussed her complaints of neck pain, right shoulder pain and stiffness and shooting pain to her wrist with occasional similar symptoms in the left upper extremity. On examination he found no neck spasm, atrophy and a negative Tinel's sign bilaterally of the elbows and wrists. Dr. Rosenfeld found passive movement of the right arm without stiffness, which he determined was inconsistent with appellant's assertion that she did not move her shoulder. He found no objective evidence of either her prior rotator cuff injury or any orthopedic condition. Dr. Rosenfeld noted that electrodiagnostic studies in 2004 were reliable and showed no abnormality. He questioned the validity of subsequent electordiagnostic studies performed by Dr. Fried. Dr. Rosenfeld concluded that he found no orthopedic condition due to appellant's employment and stated, "I believe [that] she sprained her neck at one time, she obviously did hurt her shoulder at one time, but at the time of her review with me these were not in evidence except for her symptoms." He asserted that she could return to her usual employment with restrictions on regular reaching and reaching above the shoulder of not more than one hour and pushing, pulling and lifting up to 10 pounds. Dr. Rosenfeld, however, addressed only appellant current condition and its relationship to employment instead of whether she sustained a neck or upper extremity condition causally related to the identified work factors. While he found that she had no orthopedic condition at the time of his examination, he further opined that she had sprained her neck and injured her shoulder "at some point." Additionally, Dr. Rosenfeld did not explain the basis behind his work restrictions on reaching, pushing, pulling and lifting. Consequently, his report is insufficient to resolve the conflict in medical opinion.

[15] 20 C.F.R. § 10.321.

[16] *See A.D.*, Docket No. 10-2286 (issued September 27, 2011) (finding that a selection process documented for the record through a series of screen captures was sufficient to establish that the medical scheduler properly applied OWCP medical management software to make the impartial medical selection).

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[17] On remand, OWCP should obtain a supplemental report from Dr. Rosenfeld clarifying whether appellant had any employment-related condition associated with the work activities identified in her January 3, 2007 occupational disease claim. Following this and any further development deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2011 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 3, 2012
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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

[17] *See Guiseppe Aversa*, 55 ECAB 164 (2003).