

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

N.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
EMPLOYEE EDUCATION SYSTEM,)
Salt Lake City, UT, Employer)

Docket No. 12-634
Issued: June 15, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 20, 2012 appellant filed a timely appeal from an October 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and a December 22, 2011 nonmerit decision. 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.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she developed left elbow ulnar neuropathy as a result of her employment; and (2) whether OWCP properly denied appellant's request for review of the written record as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 11, 2011 appellant, then a 33-year-old education program specialist, filed an occupational disease claim alleging left elbow ulnar neuropathy as a result of her employment. She first became aware of her condition and its relationship to her employment on March 9, 2011 when she left her supervisor's office after a long meeting and began to experience pain in her elbows with a burning sensation in her upper back. Appellant believed her left elbow pain was related to her work since it worsened as she performed her daily employment tasks and diminished on the weekends. When she was previously at the Veterans' Administration Medical Center, she sought medical treatment for pain and discovered that she had carpal tunnel, cubital tunnel, right radial nerve damage, tennis and golfers elbow and nerve damage in her upper back. Appellant submitted an online article about ulnar nerve neuropathy, her resume and position description.

The employing establishment controverted appellant's claim contending that the medical evidence failed to relate her left elbow ulnar neuropathy to factors of her employment. It pointed out that she previously had a carpal and cubital tunnel release and that one of her hobbies was fishing, which could be a significant factor to her ulnar neuropathy.

In a July 26, 2011 report, Dr. Pam Hansen, Board-certified in physical medicine and rehabilitation, stated that appellant had a five-year history of left elbow pain and complained of tingling and numbness in her ring and little fingers. She reviewed appellant's medical history and noted prior right-sided carpal and cubital tunnel releases. The examination revealed subjectively diminished sensation to the left over the medial half of her long finger and the entire ring and little fingers on the left. Spurling's test was negative. Dr. Hansen reported that electromagnetic (EMG) studies were abnormal and found electrodiagnostic evidence of a left ulnar neuropathy across the elbow.

In an August 1, 2011 magnetic resonance imaging (MRI) scan report, Dr. Richard Kent Sanders, a Board-certified diagnostic radiologist, observed enlarged individual fascicles within appellant's ulnar nerve sheath that extended into the superior cubital tunnel. Appellant's median and radial nerves appeared normal in signal and morphology. Dr. Sanders diagnosed focal ulnar neuropathy with enlargement at the proximal margin of the cubital tunnel.

In an August 18, 2011 memorandum, Melinda deHoll, appellant's supervisor, described appellant's job duties as daily computer work, telephone use and frequent meetings. An administrative support person would gather and organize data, type minutes and correspondence, perform electronic filing, and prepare reports, nametags, registration, and travel documents but due to being short-staffed some staff members, including appellant, performed these duties independently. Ms. deHoll provided appellant's leave requests beginning May 1, 2009 and pointed out that none of them specified "carpal tunnel/wrist problems" as a reason for leaving work.

By letter dated August 26, 2011, OWCP advised appellant that the evidence submitted was insufficient to support her claim. It requested additional medical and factual evidence to establish her claim and to respond to the provided questions within 30 days.

In a September 2, 2011 statement, appellant described her work schedule and noted that she was allowed two 10-minute breaks and a 30-minute lunch break. Her duties included repeatedly typing and responding to e-mails and preparing documents for programs, which required prolonged sitting and repetitive hand, wrist and elbow movement. Appellant was also required to attend telephone meetings, usually one-hour long. During the meeting she would type the conversation or write the information pertaining to the meeting, which also required repetitive motion. Appellant described a specific incident which led to her unbearable pain when she sat at a conference work table during a prolonged meeting and afterwards in her individual workstation. She stated that the pain was present all day long, but there were times when it hurt worse such as after she has worked all day and had to drive home. Appellant noted that previous conditions to her hand, arm, elbow or wrist included a ganglion cyst on her left wrist.

In a September 7, 2011 memorandum, Ms. deHoll, appellant's supervisor, stated that appellant worked a 9-hour day compressed workweek and was entitled to two breaks and a 30-minute lunch period. She estimated that appellant conducted two to three hours of intermittent phone conversations or conference calls and approximately five hours of intermittent computer time, which included routine, intermittent e-mail and communication with staff and clients. Appellant also developed products, such as brochures and reports and performed a minimal amount of electronic filing. Ms. deHoll reported that her work was primarily sedentary such as sitting at a desk, in conferences, briefings, meetings, and classrooms but also required standing in front of groups.

In a June 28, 2011 report, Dr. Don A. Coleman, a Board-certified orthopedic surgeon, noted appellant's complaint of left elbow pain of several months' duration after she sat through a long meeting. Appellant stated that she performed typing at work and her pain went away over the weekend. Dr. Coleman reviewed her history and conducted an examination. He observed that appellant had full range of motion in the elbow and wrists bilaterally and had old healed incisions. Dr. Coleman noted mild pain in the posterior aspect of her left elbow with resisted elbow extension and not too much discomfort with resisted wrist extension or flexion. Appellant had mild tenderness to palpation over the medial and lateral epicondyles, but increased pain over the triceps insertion, especially on the ulnar side. No ulnar nerve symptoms, specifically Tinel's, was noted. Dr. Coleman diagnosed likely left triceps tendinitis with possible medial and lateral epicondylitis.

In a July 26, 2011 clinic note, Dr. Coleman stated that appellant continued to complain of ulnar nerve symptoms and elbow discomfort. He recommended an MRI scan to assess ulnar nerve neuropathy and medial and lateral epicondylitis. In an August 9, 2011 clinic note, Dr. Coleman reported that the MRI scan was consistent with ulnar nerve compression just proximal to the cubital tunnel.

In an August 17, 2011 attending physician's report, Dr. Coleman noted appellant's complaint of left elbow pain and diagnosed ulnar nerve compression consistent with an MRI scan. He checked a box marked "yes" advising that appellant's condition was caused or aggravated by repetitive motion.

In a decision dated October 26, 2011, OWCP denied appellant's occupational disease claim finding insufficient medical evidence to establish that her left elbow condition were

causally related to her employment. It accepted that appellant performed her duties as an education program specialist but determined that the medical evidence failed to establish that her diagnosed condition resulted from her accepted duties.

On November 29, 2011 appellant requested a review of the written record and provided a September 29, 2011 clinic note by Dr. Coleman.

By decision dated December 22, 2011, the Branch of Hearings and Review denied appellant's request for a review of the written record finding that her request was not made within 30 days of the October 26, 2011 OWCP decision. Appellant's case was considered in relation to the issues involved and it was determined that the issue could equally be addressed by requesting reconsideration and submitting evidence not previously considered which establishes that she sustained an injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative, and substantial evidence² including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.³ In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁴

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁵ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.⁶ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

³ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *D.U.*, Docket No. 10-144 (issued July 27, 2010); *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁵ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009); *D.I.*, 59 ECAB 158 (2007).

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

between the diagnosed condition and the specific employment factors identified by the employee.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant's duties as an education specialist required repetitive hand, wrist, and elbow movement but denied her claim finding insufficient evidence to establish that her employment caused an injury. The Board finds that she failed to submit sufficient medical evidence to establish that she sustained left elbow ulnar neuropathy causally related to factors of her employment.

Dr. Coleman addressed appellant's complaints of left elbow pain and related a history of a specific incident several months prior when she experienced debilitating left elbow pain after she sat through a long meeting. He conducted an examination and observed mild pain in the posterior aspect of her elbow and mild tenderness to palpation over the medial and lateral epicondyles. Dr. Coleman diagnosed ulnar nerve compression consistent with an MRI scan. In an August 17, 2011 report, he checked a box marked "yes" indicating that appellant's condition was caused or aggravated by repetitive motion. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, it is of diminished probative value and insufficient to establish a claim.⁸ The Board notes that Dr. Coleman did not obtain a history of injury of appellant's employment duties or address how her repetitive work activities caused or aggravated her left elbow condition.⁹ Because Dr. Coleman does not relate appellant's specific employment factors to her left elbow condition, his reports fails to support causal relationship and are insufficient to establish appellant's claim.

In a July 26, 2011 report, Dr. Hansen noted appellant's history of left elbow pain for the past five years and conducted an examination. She noted that appellant's EMG studies were abnormal and found evidence of left ulnar neuropathy across the elbow. Although Dr. Hansen provided a diagnosis, she did not provide any opinion on the cause of appellant's condition or explain how her employment duties caused or contributed to the left elbow condition. In an August 1, 2011 report, Dr. Kent also diagnosed ulnar neuropathy in appellant's left elbow but provided no rational explanation regarding causal relationship. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁰ The reports of Drs. Hansen and Kent are insufficient to establish appellant's claim.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that work activities may produce symptoms revelatory of an underlying

⁷ *Solomon Polen*, 51 ECAB 341 (2000); *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

⁸ *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁹ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, Docket No. 06-1183 (issued November 14, 2006).

¹⁰ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

condition nor the belief that her condition was caused, precipitated, or aggravated by her employment is sufficient to establish causal relationship.¹¹ Such a relationship must be shown by rationalized medical opinion evidence.¹² On appeal, appellant submitted new evidence and contends that this evidence is sufficient to support her claim. The Board, however, cannot consider this new evidence on appeal because its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision.¹³

Appellant further alleged that her employing establishment did not provide an assessment of her workstation in a timely manner, did not mention that she had the heaviest workload, and did not inform OWCP that she was training two new employees. These contentions are not relevant to the issue of causal relationship. Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion by a physician.¹⁴ Appellant did not submit such rationalized medical opinion evidence, and thus, she failed to meet her burden of proof to establish her claim.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary.¹⁵ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁶ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹⁷ Although that is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁸ OWCP procedures require that it

¹¹ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹² *Patricia J. Bolleter*, 40 ECAB 373 (1988).

¹³ See 5 U.S.C. § 501.2(c). Similarly, the Board may not consider Dr. Coleman's September 29, 2011 clinic note, submitted to OWCP after issuance of its October 26, 2011 decision, as OWCP did not consider this report in reaching its decision.

¹⁴ *Supra* note 5.

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. §§ 10.616, 10.617.

¹⁷ *Id.* at § 10.616(a).

¹⁸ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁹

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in an undated appeal form that was postmarked November 29, 2011. OWCP determined that her request was made more than 30 days after the date of issuance of OWCP's October 26, 2011 decision. Accordingly, it properly found that appellant's request was untimely filed and she was not entitled to a review of the written record as a matter of right.

The Board notes that appellant did not submit a written request for review of the written record by November 25, 2011, 30 calendar days from OWCP's October 26, 2011 decision. Because her request was postmarked November 29, 2011, her request was untimely. Therefore, OWCP properly found in its December 22, 2011 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its December 22, 2011 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.²⁰ In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for review of the written record.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her left elbow condition was causally related to her employment. The Board further finds that OWCP properly denied her request for a review of the written record pursuant to 5 U.S.C. § 8124(a)(1).

¹⁹ See *R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

²⁰ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 22 and October 26, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 15, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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