

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

L.S., Appellant)
and) Docket No. 12-987
DEPARTMENT OF LABOR, EMPLOYMENT) Issued: November 27, 2012
STANDARDS ADMINISTRATION,)
New York, NY, Employer)

)

Appearances:
Appellant, pro se
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 April 3, 2012 appellant filed a timely appeal from a March 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation. 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 she was injured in the performance of duty on September 23, 2010, as alleged.

On appeal, appellant contends that OWCP did not properly discuss the medical reports. She also noted that management was aware of increasing problems at computer workstations.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 24, 2010 appellant, then a 47-year-old claims examiner, claimed traumatic injury to her right shoulder on September 23, 2010, while sitting at her desk indexing mail. The employing establishment controverted her claim.

In a September 27, 2010 attending physician's report, Dr. Carol Taylor, a Board-certified family practitioner, noted that appellant described the sudden onset of right scapula pain with radiation down her arm. She diagnosed a back disorder of the thoracic spine with spasm of the right rhomboids and checked a box that the condition was causally related to the employment activity described. In a September 30, 2010 duty status report, Dr. Taylor found appellant totally disabled.

In a September 30, 2010 report, Dr. John M. Uhorchak, a Board-certified orthopedic surgeon, noted that appellant stated that she was working on computer for hours and started feeling pain while she was working and that this pain worsened on September 27, 2010. In evaluating her right shoulder, he noted that Neer impingement test was negative and that the Hawkin's impingement test was mildly positive. Dr. Uhorchak noted that an x-ray of appellant's shoulder was normal. He diagnosed her with herniated cervical disc and cervical degenerative disc disease. Dr. Uhorchak opined that her current symptoms were causally related to the injury at work as her complaints are consistent with the history of injury and his objective findings. He further opined that appellant had a 100 percent temporary impairment.

In an October 11, 2010 report, Dr. Esteban Cuartas, an orthopedic surgeon,² noted that appellant stated that she was at work when she adjusted herself at her desk and felt the sudden onset of neck pain and that after she iced her neck it felt better but that her arm started to hurt and she felt tingling and numbness down the arm. He noted that she showed radicular pain and severe weakness in the right triceps, milder at the wrists and fingers.

In a November 26, 2010 report, Dr. Taylor indicated that appellant presented to her for medical evaluation on September 27, 2010 reporting severe neck, upper back and right shoulder pain with sudden onset of symptoms while working on computer. She diagnosed appellant at that time with strain of the upper back. Dr. Taylor noted that an x-ray of the upper back showed mild scoliotic deforming. She noted that she had not seen appellant since September 30, 2010.

In a December 1, 2010 decision, OWCP denied appellant's claim because she failed to submit evidence that showed that the diagnosed medical condition was causally related to the established employment factors.

On December 6, 2010 appellant requested an oral hearing before an OWCP hearing representative.

In a January 13, 2011 report, Dr. Cuartas noted that appellant's symptoms were mild. He noted axial neck pain and radicular pain. He noted that appellant's symptoms had improved somewhat and that her strength had improved significantly. Dr. Cuartas opined that the current

² The Board cannot confirm that Dr. Cuartas is Board-certified.

symptoms were causally related to the injury at work because the complaints were consistent with the history of injury and the history of injury was consistent with objective findings.

By decision dated January 25, 2011, OWCP's hearing representative remanded the case to OWCP for further development of the medical evidence. Specifically, the hearing representative noted that, although the medical evidence submitted by appellant was insufficient to discharge her burden of proof to establish causal relationship, it was sufficient to require referral to a second opinion physician.

On February 8, 2011 OWCP referred appellant to Dr. Wayne J. Altman, a Board-certified orthopedic surgeon, for a second opinion. In a March 8, 2011 report, Dr. Altman diagnosed appellant with multiple cervical (neck) disc herniations with radicular symptomatology to the right upper extremity. He opined that the mechanism of injury as related to him by appellant, *i.e.*, simply readjusting a chair with wheels, would not have caused the multiple disc herniations in her cervical spine. Dr. Altman noted that it was a virtual impossibility that the multiple disc herniations would occur from moving a wheeled chair closer to the desk. He opined that appellant's cervical disc herniations were preexisting and had nothing to do with the work injury. Dr. Altman noted that, while she does require ongoing treatment, that treatment would not be related to her employment as a claims examiner.

By decision dated March 25, 2011, OWCP denied appellant's claim, finding the evidence did not establish that appellant's medical condition was causally related to the established work events.

Appellant requested an oral hearing before an OWCP hearing representative.

In an April 5, 2011 report, Dr. Shahid Mian, a Board-certified orthopedic surgeon, diagnosed appellant with herniations at C4-5, C5-6 and C6-7 discs, bulging of C3-4 disc, thoracic strain, tear of the rotator cuff and impingement syndrome, right shoulder. In reports dated June 7 and July 28, 2011, he indicated that these injuries were causally related to the accident of September 23, 2010.

In an April 29, 2011 report, Dr. Naheed Van De Walle, a physiatrist,³ described appellant's history of injury and listed his impressions as cervical myofascial derangement, rule out cervical radiculopathy. In a May 27, 2011 report, he gave her a trigger point injection.

In an August 25, 2011 decision, OWCP's hearing representative remanded the case for OWCP to request a clarification from Dr. Altman with regard to whether a combination of computer use and moving her chair could have caused the injury.

In a September 19, 2011 supplemental report, Dr. Altman stated that one hour of computer use on September 23, 2010 prior to moving her chair forward did not cause or contribute to the accepted medical condition and that he saw no injury-related disability.

³ The Board cannot confirm that Dr. Van De Walle is Board-certified.

By decision dated October 4, 2011, OWCP again denied appellant's claim for compensation as the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events.

On October 24, 2011 appellant requested an oral hearing before an OWCP hearing representative. In reports dated November 2 and December 22, 2011, Dr. Mian again noted that her injuries were causally related to the accident of September 23, 2010.

In a November 11, 2011 report, Dr. Cuartas noted that on September 23, 2010 appellant was using the computer four hours and started feeling pain as she was working. He noted that the pain worsened on September 27, 2010. Dr. Cuartas opined that appellant's current symptoms were causally related to the injury at work as the complaints were consistent with the history of injury and his objective findings.

At the hearing held on February 13, 2012 appellant argued that her doctors clearly stated that the employment incident caused her injury. She also mentioned a December 29, 2010 report by Dr. Cuartas. When OWCP's hearing representative informed appellant that this report was not in the record, she submitted this report at the hearing.

In the December 29, 2010 report, Dr. Cuartas noted that he first saw appellant on September 30, 2010 based on a referral from Dr. Taylor and that at that time appellant continued to have severe pain in her right extremity inclusive of neck, upper back and right arm/shoulder radiating pain. He reviewed his treatment of appellant. Dr. Cuartas opined that the complaint of severe radiating pain down the arm/shoulder into the fingers was causally related to the incident of September 23, 2010 and was work related according to the mechanism of the injury. He explained that the fact that appellant was working at her desk on September 23, 2010 when she used her body to move her chair closer to the computer screen created a sudden increase in pressure and stress of the cervical spine which herniated the discs at levels C5-6 and/or C6-7, within a reasonable degree of medical certainty. Dr. Cuartas noted that she denied having pain prior to this episode. He continued that appellant's work duties included sitting at a desk and it was in the course of these duties that she developed her symptoms. Dr. Cuartas noted that it was not unusual for disc herniations to occur with what otherwise appear to be low-energy mechanisms. Consequently, he concluded that the diagnosed conditions of herniated disc, cervical C5-6, C6-7 are causally related to the incident of September 23, 2010 within a reasonable degree of medical certainty.

By decision dated March 28, 2012, OWCP's hearing representative affirmed the denial of benefits. The hearing representative found that the weight of the medical evidence was represented by Dr. Altman's report.

LEGAL PRECEDENT

OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to

time and place of occurrence and member or function of the body affected.⁴ An employee seeking benefits under FECA⁵ 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 FECA, 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 and/or specific condition for which compensation is claimed are causally related to the employment injury. 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.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. The medical evidence required to establish causal relationship is usually rationalized medical 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.⁷

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.⁸ 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 case.⁹

ANALYSIS

Appellant's claim was denied because OWCP found that she did not establish an injury causally related to the accepted employment event of September 23, 2010. Although she submitted reports from her treating physicians, most of these reports do not constitute rationalized medical opinions that linked her injury to her employment. Dr. Taylor saw appellant on September 27, 2010 and described sunset onset of right scapula pain with radiation down her

⁴ 20 C.F.R. § 10.5(ee).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

⁷ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

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

⁹ *R.C.*, 58 ECAB 238 (2006).

arm. She diagnosed back disorder thoracic spine and checked a box indicating that she believed that this condition was causally related to appellant's federal employment. However, neither in this report or her report of November 26, 2010 does Dr. Taylor give a rationalized explanation as to how she reached the conclusion that the strain of the upper back was related to her employment incident. Dr. Uhorchak noted that appellant stated that she was working on computer for hours and started feeling pain and opined that her current symptoms were related to the history and his objective findings. However, this general statement is not sufficient to establish causal relationship. Neither is the earlier opinion of Dr. Cuartes, who basically notes in his October 1, 2010 report that appellant had sudden onset of pain when she adjusted herself at her desk. None of these medical reports were sufficiently rationalized to meet appellant's burden of proof to establish causal relationship. However, as these reports were sufficient to require further development of the medical evidence, OWCP referred appellant to Dr. Altman for a second opinion. Dr. Altman diagnosed multiple cervical disc herniations with radicular symptomatology to the right upper extremity. However, he did not believe that this was related to the employment incident.

In a December 29, 2010 report, Dr. Cuartas discussed his treatment of appellant. He noted that on September 23, 2010 she was using her body to move her chair closer to her computer screen when she created a sudden increase in pressure and stress on the cervical spine which herniated the discs at levels C5-6 and/or C6-7. Dr. Cuartas further noted that it was not unusual for disc herniations to occur with what otherwise appear to be low-energy mechanisms. Consequently, he concluded that the diagnosed conditions of herniated disc-cervical C5-6 and C6-7 were causally related to the incident of September 23, 2010 within a reasonable degree of medical certainty.

The Board finds a conflict in medical opinion between Dr. Cuartas and Dr. Altman, with regards to whether appellant sustained injury causally related to the accepted employment factor. Therefore, the case will be remanded to refer appellant to an impartial medical examiner to resolve the conflict. Following this and any further development of the medical evidence, OWCP shall issue an appropriate *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 28, 2012 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: November 27, 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