

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

N.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Harrisburg, PA, Employer**

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**Docket No. 13-513
Issued: August 27, 2013**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2013 appellant, through her attorney, filed a timely appeal from a September 21, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease claim. 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 developed right rotator cuff tendinitis and impingement in the performance of duty as a clerk.

FACTUAL HISTORY

On February 17, 2012 appellant, then a 44-year-old clerk, filed an occupational disease claim (Form CA-2) alleging a torn right shoulder muscle as a result of repetitious movements of

¹5 U.S.C. § 8101 *et seq.*

lifting packages and casing letters in her federal employment duties. She first became aware of her condition and of its relationship to her employment on January 2, 2012. Appellant notified her supervisor on February 17, 2012. The claim was given File No. xxxxxx993.

In a January 24, 2012 x-ray of the right shoulder, Dr. Barry Tom, a Board-certified diagnostic radiologist, reported that there was no evidence of fracture or dislocation deformity.

In a February 6, 2012 report, Dr. A. Lee Osterman, a Board-certified orthopedic surgeon, listed a history that appellant was previously treated for bilateral de Quervain's, trigger finger, multiple areas of tenosynovitis and left lateral epicondylitis. He noted that she should be on a permanent light-duty basis. Appellant sought treatment for a new condition, which began two weeks prior when she was lifting at work and developed pain in her right shoulder when putting a tub on the floor. Dr. Osterman also noted pain in the right elbow. He diagnosed possible rotator cuff tendinitis related to appellant's lifting and recommended a magnetic resonance imaging (MRI) scan. Dr. Osterman provided work restrictions of no frequent lifting up to 10 pounds and occasionally 20 pounds. He restricted assembly line, repetitive elbow and arm work on the right side with no lifting overhead or extended arm work.

In a February 7, 2012 diagnostic report, Dr. Steven Chmielewski, a Board-certified diagnostic radiologist, reported that an MRI scan of the right shoulder revealed a high grade focal full thickness supraspinatus tendon tear without definite evidence of atrophy or retraction of the supraspinatus muscle. He further noted probable partial thickness intraspinatus tendon tear and probable superior labrum, anterior to posterior tear.

A February 14, 2012 work capacity evaluation was provided by Dr. Osterman detailing appellant's permanent work restrictions for her left wrist condition in File No. xxxxxx581.

In a February 27, 2012 report, Dr. Osterman reviewed appellant's February 7, 2012 MRI scan of the right shoulder and diagnosed rotator cuff tendinitis and impingement. Appellant was provided with a cortisone injection. Dr. Osterman noted that she could continue at modified duty and would hopefully acquire a window clerk job which was less demanding.

By letter dated February 24, 2012, OWCP informed appellant that the evidence of record was insufficient to establish her claim. Appellant was advised of the medical and factual evidence needed and asked to respond within 30 days. OWCP also requested that the employing establishment provide information regarding her employment duties.

In February 7 and March 2, 2012 narrative statements, appellant reported that she had been an employee since December 6, 1986. She provided details of the various positions held and duties performed. Appellant stated that the repetitive nature of her work caused injury to her hands, wrists and left elbow for which she was placed on limited duty. She stated that management took away the job that was created for her and returned her to her former job. Appellant's work included casing letters, oversized large envelopes and magazines, scanning bar codes, removing tubs and trays, lifting packages and throwing packages and parcels. She would place the tubs on the floor so she did not have to reach high to case the letters. Appellant's job required her to unload big containers filled with mail, magazines or oversized letters. She also had to unload hampers and containers filled with packages of first class and priority mail and she

could not pull more than 20 pounds. Appellant was initially allowed to take breaks to rest her hand and her right shoulder but recently, her supervisor had refused her breaks until the mail sorting was completed. She noted that her team was short staffed, which caused additional repetitive movements and strain.

By letter dated March 19, 2012, the employing establishment controverted the claim. It noted that appellant had a previously accepted claim for both hands, under File No. xxxxxx581. File No. xxxxxx168 for her right hand and wrist was denied by OWCP.² The employing establishment stated that, based on appellant's modified-duty assignment, she was given two 5-minute breaks and a 30-minute lunch break on her scheduled workdays. Appellant was also allowed to take as many breaks as deemed necessary and had a 20-pound lifting restriction. Her position consisted of casing mail for three to four hours and working the window service for four to five hours. Appellant's physical requirements included standing for four hours, sitting for three hours and walking for one hour. Most recently, she had bid for a full-time position consisting of eight hours of working the window services.

An April 11, 2011 offer of modified assignment for appellant's clerk position was provided, which was accepted by appellant on May 9, 2011. Her physical requirements included lifting up to 20 pounds for one hour, standing, walking and sitting for three hours, driving as needed for one hour and limited repetitive motion with breaks for two hours. In February 14, 2012 letter, appellant informed her supervisor that raising her hand to case letters, picking up parcels and placing packages into hampers caused her right shoulder to ache.

By decision dated March 27, 2012, OWCP denied appellant's claim. It found that the medical evidence of record failed to establish that her rotator cuff tendinitis or impingement was causally related to the accepted workactivities.

By letter dated April 4, 2012 appellant, through counsel, requested a hearing before the Branch of Hearings and Review.

In an April 23, 2012 report, Dr. Osterman stated that appellant had switched to a window clerk job, which she could tolerate better than her previous position. He recommended restrictions relative to lifting. On June 4, 2012 Dr. Osterman reported treating appellant since April 24, 1995 for multiple upper extremity problems. He treated her on February 6, 2012 for right shoulder rotator cuff tendinitis, noting that an MRI scan confirmed the diagnosis and impingement. On physical examination, mechanical findings relative to the right shoulder consisted of limited motion, clicking and a positive impingement test.

Dr. Osterman opined that appellant's right rotator cuff tendinitis and mechanical problems resulted from a work-related injury in 2012. This opinion was based on the written history appellant provided that described the repetitive lifting in her employment duties and her statement that, while lifting, she developed a sharp pain in her right shoulder. Dr. Osterman noted that the kind of lifting mechanism she described was that which would cause rotator cuff tendinitis, particularly in a person who had known susceptibility. Given appellant's multiple

² The Board notes that the record before the Board does not provide any other information pertaining to appellant's other OWCP claims.

previous visits and diagnoses, he noted that this was the first treatment for active rotator cuff tendinitis. Dr. Osterman further noted that the rotator cuff problem was confirmed objectively by the MRI scan. He stated that, to a reasonable degree of medical certainty, appellant's rotator cuff tendinitis in her right shoulder was related to the work-related activities of January 2012. Dr. Osterman noted that the condition could require surgical intervention in the future.

At the July 13, 2012 hearing, appellant provided testimony regarding her work history and the various positions she performed. She began working in January 2010 and her position involved opening trucks to unload mail, pulling containers, lifting parcels, casing mail, throwing parcels that weighed up to 70 pounds, lifting trays of mail that weighed up to 20 pounds and doing throwbacks. Appellant worked this position until March 2011 when she was placed on limited-duty due to tendinitis of the wrist. She was moved to half days performing strenuous and repetitive work that required reaching. Appellant's work changed again in May 2011 and her duties involved driving, casing letters and flats, throwing parcels, lifting tubs and spreading mail. In October 2011, her duties again changed and became more strenuous. Appellant was put back to eight hours of sorting tubs, casing letters and flats and throwing parcels. A coworker injured herself and was placed on limited duty, making appellant responsible for lifting the tubs. Appellant worked in this job until she bid for and received a window clerk position in February 2012.

As to her right shoulder condition, appellant testified that her pain began to gradually increase in her various positions. No specific incident occurred and she believed that her condition was caused from repetitive lifting overtime. Appellant described specific incident at work involving lifting and contended that her managers did not abide by her restrictions. In October 2011, she started having problems with her shoulder.

A March 11, 2011 offer of modified assignment was signed and accepted by appellant, which provided physical requirements of lifting up to 20 pounds for one hour, standing, walking and sitting for three hours and driving for four hours. The offer of modified assignment was effective March 26, 2011 and referenced File No. xxxxxx581. The April 11, 2011 offer of modified assignment for appellant's clerk position was resubmitted, which was signed and accepted by appellant on May 9, 2011, File No. xxxxxx581. Appellant's physical requirements as a clerk included lifting up to 20 pounds for one hour, standing, walking and sitting for three hours, driving as needed for one hour and limited repetitive motion with breaks for two hours. An October 19, 2011 offer of modified assignment was signed and accepted by appellant, effective October 22, 2011 for File No. xxxxxx581. It provided duties of a sales service and distribution associate for eight hours a day. The physical requirements provided restrictions of lifting up to 20 pounds for eight hours a day. A physician crossed out this restriction and hand wrote lifting up to 20 pounds for one hour and limited repetitive motion with breaks for two hours, his signature dated October 21, 2011.

In treatment notes dated January 9 and February 20, 2012, Dr. Ron Burinsky, an osteopath, reported that appellant had two tears in her right rotator cuff tendons. Appellant could return to full duties of her bid assignment within the allotted six-month period.

Treatment and progress notes dated January 24 to July 16, 2012 documenting appellant's right shoulder condition were also submitted from Dr. Patrick M. Borja, a treating chiropractor.

By letter dated September 17, 2012, Dr. Osterman reported that appellant had multiple areas of tendinitis due to her repetitive work activities. The lifting of the tub incident was merely “the straw that broke the camel’s back.” Dr. Osterman stated that appellant’s multiple problems were related to her repetitive work activities.

By decision dated September 21, 2012, an OWCP hearing representative affirmed the March 27, 2012 decision, as modified to find that the evidence of record failed to establish that the occupational exposure occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 filed within the applicable time limitation; that an injury was sustained while 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 These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁵ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.⁶

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁷ The opinion of the physician must be one of reasonable medical certainty

³Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁴Michael E. Smith, 50 ECAB 313 (1999).

⁵Pendleton *supra*note 3 at 1143.

⁶See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

⁷See 20 C.F.R. § 10.110(a); John M. Tornello, 35 ECAB 234 (1983).

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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

An employee who claims benefits under FECA has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. The claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁹ However, it is well established that, proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁰

ANALYSIS

The issue is whether appellant developed right rotator cuff tendinitis and impingement in the performance of duty. The Board finds that this case is not in posture for decision as to whether she sustained an injury in the performance of duty.

In its September 21, 2012 decision, OWCP found that appellant did not establish that the occupational exposure alleged. The Board finds, however, that the evidence of record is sufficient to establish that the occupational exposure occurred, as alleged.

Through her narrative statements and testimony, appellant detailed her employment duties as casing letters, oversized large envelopes and magazines, scanning bar codes, removing tubs and trays, lifting packages and throwing packages and parcels. She stated that she would place tubs on the floor so she would not have to reach high to case the letters. Appellant claimed repetitive lifting packages and casing letters in her federal employment duties caused her right shoulder injury. Her job required her to unload big containers filled with mail, magazines and oversized letters, as well as unload hampers and containers filled with packages of first class and priority mail because she could not pull more than 20 pounds. The medical evidence shows that appellant first sought treatment on January 9, 2012 for her right shoulder condition with Dr. Burinsky. Dr. Osterman's February 6, 2012 medical report notes that she sought treatment for right shoulder pain which had developed in January 2012, when she was lifting at work and placed a tub on the floor. Appellant's CA-2 form, narrative statements, testimony and description to her physicians have all been consistent as to the occupational exposure alleged.

⁸*James Mack*, 43 ECAB 321 (1991).

⁹*See Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

¹⁰*Phillip L. Barnes*, 55 ECAB 426 (2004); *Virginia Richard, id.*; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

The employing establishment controverted the claim alleging that appellant's work involved a sedentary to light workday, which did not include a great deal of reaching over shoulder, lifting parcels weighing 70 pounds or strenuous repetitive work. It noted that her statements did not reflect the most recent signed job offer dated May 9, 2011. Appellant's supervisors were interviewed and stated that appellant never asked for assistance or complained of any pain or problems relating to her work or limitations. They also stated that the work would be rotated among the clerks working in that office. The employing establishment noted that appellant was given two 5-minute breaks and a 30-minute lunch break on scheduled workdays. Appellant was also allowed to take as many breaks as she deemed necessary and had a 20-pound lifting weight restriction.

The Board finds that appellant has established the occupational exposure as alleged. The employing establishment's contentions do not negate the fact that her duties involved repetitive motions of casing letters, oversized large envelopes, magazines, scanning bar codes, removing tubs and trays and lifting and throwing packages. The Board notes that appellant never testified that she was required to throw parcels weighing up to 70 pounds after her first offer of modified duty on March 11, 2011, or prior to the work restrictions she was provided at that time.

Appellant has adequately and consistently described the circumstances giving rise to her claimed condition, the duties she performed, limited-duty restrictions and various jobs she held at USPS. The Board finds that the evidence, of record supports that the occupational exposure occurred as alleged.¹¹

This raises the question of whether her federal employment duties caused her right rotator cuff tendinitis and impingement. The Board finds that the medical evidence is sufficient to require further development of the case record.

The reports of Dr. Osterman provided a history of his medical treatment of appellant. On February 6, 2012 she sought treatment after lifting a tub at work in January 2012 and developed pain in her right shoulder. A February 7, 2012 MRI scan of the right shoulder revealed rotator cuff tendinitis and impingement. Physical examination showed mechanical findings relative to the right shoulder with limited motion, clicking and a positive impingement test.

Dr. Osterman attributed appellant's right rotator cuff tendinitis to the lifting she performed in January 2012 and to her history of repetitive work activities. He noted that the kind of lifting mechanism she described was that which would cause rotator cuff tendinitis, particularly in a person with a known susceptibility. Dr. Osterman noted that he first treated appellant for this condition following the incident of January 2012. He further noted that the rotator cuff problem was confirmed objectively by the MRI scan. Dr. Osterman opined, within a reasonable degree of medical certainty, that appellant's rotator cuff tendinitis in her right shoulder was related to the work activities. He stated that the diagnosis of rotator cuff tendinitis had been objectively substantiated and was an ongoing problem. In a September 17, 2012 supplement, Dr. Osterman reiterated that appellant's right shoulder rotator cuff tendinitis related to her repetitive work activities with a specific aggravation superimposed on the chronic process.

¹¹See *Willie J. Clements*, 43 ECAB 244 (1991).

The Board notes that, while Dr. Osterman's opinion is not completely rationalized, it is consistent in supporting that appellant sustained a right shoulder condition and is not contradicted by any substantial medical evidence of record.¹² Dr. Osterman provided a clear opinion based on examination findings and an accurate factual and medical background. He stated that appellant's right rotator cuff tendinitis was caused or aggravated as a result of her repetitive federal employment duties as a clerk. Dr. Osterman demonstrated a clear understanding of appellant's work duties and discussed how they caused her injuries. He provided a detailed review of her medical history, documenting treatment since April 1995 for various upper extremity conditions. Following the incident of January 2012, appellant was seen for treatment for rotator cuff tendinitis. Dr. Osterman properly based his findings on diagnostic testing and physical examination and noted that the rotator cuff problem was confirmed objectively by the February 6, 2012 MRI scan.

The medical reports submitted from Dr. Barry, Dr. Chmielewski, Dr. Burinsky and Dr. Borja document diagnostic testing and treatment for right rotator cuff tendinitis beginning in January 2012.¹³ The evidence is sufficient to require OWCP to further develop the medical evidence.¹⁴

On remand, OWCP should prepare a statement of accepted facts which described appellant's employment history, duties for each position held and the restrictions imposed by her treating physicians. It should submit the statement of accepted facts to Dr. Osterman for additional opinion on causal relations or refer appellant to a second opinion examiner. After such development as deemed necessary, OWCP should issue a merit decision in her claim for compensation.

CONCLUSION

The Board finds that appellant has established the occupational exposure as alleged. The case is not in posture for decision as to whether she developed right rotator cuff tendinitis and impingement causally related to the accepted factors of her federal employment as a clerk.

¹²*Frank B. Gilbreth*, Docket No. 02-1310 (issued May 14, 2003).

¹³ The Board notes that while Dr. Borja's reports dated January 24 to July 16, 2012 document appellant's treatment for the right shoulder, he is not considered a physician under FECA as he did not diagnose a spinal subluxation as demonstrated by x-ray to exist. Thus, Dr. Borja's reports are of limited probative value. A chiropractor is not considered a physician under FECA unless their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. 5 U.S.C. § 8102(2); see *Sean O'Connell*, 56 ECAB 195 (2004); *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁴See *Virginia Richard*, *supra* note 9; see also *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: August 27, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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