

FACTUAL HISTORY

On January 7, 2011 appellant, then a 37-year-old clerk, filed an occupational disease claim alleging that she sustained right arm ulnar, median and radial neuropathy, brachial plexitis on the right and bilateral carpal tunnel syndrome causally related to factors of her federal employment. She began working in a limited-duty position in December 2007 with restrictions of no use of her right arm or repetitive motion. Appellant maintained that she developed carpal tunnel syndrome and experienced neck and arm spasms due to performing repetitive limited-duty employment. She stopped work on April 30, 2008 and did not return.

OWCP accepted that appellant sustained ulnar neuropathy of the right elbow under file number xxxxxx424.² It subsequently doubled the current file number into xxxxxx424.

In a report dated March 19, 2008, submitted under file number xxxxxx424, Dr. Scott M. Fried, an osteopath, discussed appellant's history of performing repetitive work duties for the employing establishment over the past nine years. In 2006, she began "doing more hands on work and went back to the regular and repetitive activity with working the machines and the sweeping as well as lifting of train, reaching and the like, she had progressive onset of pain and discomfort about the medial aspect of the right elbow and arm." Dr. Fried diagnosed a subluxing ulnar nerve of the right elbow due to repetitive work activities, right ulnar and radial neuropathy and brachial plexitis. He discussed the repetitive nature of appellant's job duties and stated:

"This job consisted of aggressive and repetitive wrist and arm motion with repeated stress and strain on the flexor tendons resulting in chronic inflammatory change and ultimately compression of the median nerve at the carpal canal [syndrome]. The neuropathophysiology of the development of this disease is that eventually the surrounding tissue of the nerve becomes scarred and once this scar tissue becomes fixed we have developed a permanent long-term nerve injury."

Dr. Fried advised that appellant could perform sedentary work with no use of the right arm, no repetitive work and no lifting over five pounds.

² In a decision dated November 18, 2010, the Board affirmed June 30 and October 1, 2009 decisions issued under file number xxxxxx424 finding that appellant did not establish intermittent disability from September 1, 2007 through April 22, 2008 or a recurrence of disability on April 30, 2008. *L.M.*, Docket No. 10-464 (issued November 18, 2010). In an order dated January 25, 2013, the Board set aside a February 28, 2012 decision denying explanation of appellant's claim and surgical authorization. The Board found that OWCP failed to show that it properly selected the impartial medical examiner in accordance with its procedures and remanded the case for a new impartial medical examination. *Order Remanding Case*, Docket No. 12-1396 (issued January 25, 2013).

In a report dated May 5, 2008, Dr. Fried discussed appellant's complaints of pain in her right ulnar elbow and "left-sided symptoms as well secondary to overuse...."³ He stated:

"[Appellant] continues to work part time, six-hour days at the [employing establishment], casing left handed. Despite our request to by something more appropriate in relation to her injuries, such as nixies, there have been no further changes made at work. [Appellant] has still not been provided an ergonomic chair either despite our last request. Again, her symptoms are aggravated by her activities at work and she actually has been out of work since Friday, May 2, [2008] because of elevated symptoms."

Dr. Fried recommended possible surgery and found that she should "remain out of work to focus on rest and healing."

On June 25, 2008 Dr. Fried related that appellant "remains symptomatic and disabled and would like to move ahead more aggressively with surgery to that right ulnar nerve." On July 23, 2008 he diagnosed an acute subluxing right elbow ulnar nerve due to repetitive work activities, right radial and ulnar neuropathy and brachial plexitis. Dr. Fried noted that appellant had a positive Tinel's at the right elbow radial and ulnar nerve and bilateral median nerves. He recommended surgical intervention.

On November 3, 2008 Dr. Fried discussed appellant's continued symptoms of right ulnar elbow pain and subluxation of the ulnar nerve.⁴ He noted that she was not working due to her injuries and that her last limited-duty position was insufficiently modified. Dr. Fried stated, "[Appellant] cannot return to her previous job (the one she apparently accepted in December 2007) as it was aggravating her symptoms further as described above and in various notes between January and May [2008]."

In a report dated May 29, 2009, Dr. Fried related that appellant had an employment-related injury to her ulnar nerve that was not a new injury but a progressive worsening of an existing condition. He stated, "Her present problem is a progression of the initial work injury and though her work activities are contraindicated and do worsen the problem, this is not [a] new injury *per se*, rather [a] progression of the already well documented ulnar nerve pathology."

In a letter dated January 14, 2011, OWCP requested additional factual and medical information from appellant, including clarification of the conditions claimed. It noted that appellant had denied her claim for a nerve condition under file number xxxxxx424 and enclosed a copy of an impartial medical report by Dr. John F. Perry, a Board-certified orthopedic surgeon, obtained under file number xxxxxx424.

³ On May 12, 2008 Dr. Fried indicated that appellant continued to have "significant right ulnar nerve symptoms despite coming out of work" and performed a steroid injection. On May 21, 2008 he evaluated her for a reaction to the injection.

⁴ In progress reports dated September 9, 2008 and March 30 and April 29, 2009, Dr. Fried described appellant's continued symptoms and noted that he was waiting for authorization for surgery of the right ulnar elbow. The record further contains progress reports from Dr. Fried dated December 1, 2008 through July 15, 2009.

On September 30, 2010 Dr. Perry evaluated appellant under file number xxxxxx424. He discussed her right elbow problems beginning September 2007 and her current complaints of pain in the left elbow, tingling in the little and ring fingers and loss of range of motion of the right elbow. Dr. Perry diagnosed right elbow ulnar neuropathy of questionable severity that was probably due to employment. He stated that “[o]ther nerve problems such as compression of the median nerve and radial tunnel syndrome, are not present, based on the clinical exam[ination] today.” Dr. Perry recommended new diagnostic studies.

By letter dated March 10, 2011, appellant’s attorney noted that she was recovering from surgery on her right elbow authorized under file number xxxxxx424. He stated, “This new occupational disease claim has been filed as a result of the overall worsening of [appellant’s] right arm condition following her return to limited[-]duty work.”

In a decision dated April 7, 2011, OWCP denied appellant’s occupational disease claim. It found that she had not responded to its January 14, 2011 requesting clarification of the conditions claimed.

On April 14, 2011 appellant, through her attorney, requested an oral hearing. On August 4, 2011 counsel requested a review of the written record in lieu of the oral hearing. He submitted evidence relevant to file number xxxxxx424.

In a supplemental report dated July 25, 2011, Dr. Perry related that an electromyogram (EMG) was “basically negative for thoracic outlet syndrome, carpal tunnel syndrome or radial tunnel syndrome. There was [stated] to be ‘mild’ ulnar motor slowing across the elbow.” Dr. Perry reviewed Dr. Fried’s operative report and related that “the radial neuropathy, brachial plexitis and median neuropathy were not verified on the basis of this independent EMG.” He reviewed a work capacity evaluation and stated, “I do [not] know that there is any diagnosis on the left related to the work injury.” Dr. Perry stated:

“In summary then, it is my opinion that the transposition of the ulnar nerve was performed for an electrodiagnostically mild delay in conduction across the cubital tunnel.

“There is no confirmation of radial tunnel syndrome, carpal tunnel syndrome or brachial plexitis on the new EMG and no procedures are necessary for any of those conditions.”

In a decision dated October 19, 2011, an OWCP hearing representative set aside the April 7, 2011 decision. She noted that the evidence submitted by appellant’s attorney included a description of the limited-duty employment performed from December 2007 to the time she stopped work in March 2008. The hearing representative found that appellant alleged that her job duties caused or aggravated her brachial plexitis, left carpal tunnel syndrome and right ulnar, median and radial neuropathies. She determined that the evidence from Dr. Fried raised an uncontroverted inference of causal relationship sufficient to warrant further development. The hearing representative instructed OWCP to double the current file into file number xxxxxx424 and requested that Dr. Fried provide a rationalized opinion regarding whether appellant’s

bilateral upper extremity conditions were caused or aggravated by her work duties from December 2007 to March 2008.

By decision dated April 18, 2012, OWCP denied appellant's occupational disease claim. It found that the report of Dr. Perry, who provided an impartial medical examination under file number xxxxxx424, constituted the weight of the evidence and established that appellant did not have carpal tunnel syndrome, radial nerve syndrome, thoracic outlet syndrome or brachial plexis.

On April 23, 2012 appellant, through her attorney, requested an oral hearing. He subsequently requested a review of the written record.

In a decision dated September 26, 2012, an OWCP hearing representative affirmed the April 18, 2012 decision. She found that Dr. Perry acted as a second opinion examiner under the current file number and that his opinion established that appellant did not sustain any upper extremity condition other than the ulnar neuropathy accepted under file number xxxxxx424.

On appeal, appellant's attorney contends that OWCP erred by relying on Dr. Perry's report as he did not address the relevant issue of whether her limited duty caused or aggravated an upper extremity condition. He contends that Dr. Fried's opinion was sufficient to warrant further development.

LEGAL PRECEDENT

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 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.⁶ 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.⁷

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;⁸ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;⁹ and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for

⁵ *Supra* note 1.

⁶ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *Michael R. Shaffer*, 55 ECAB 386 (2004).

⁹ *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

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.¹⁰

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. 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 certainty¹² explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

ANALYSIS

Appellant alleged that she sustained ulnar, median and radial neuropathy of the right arm, right brachial plexitis and bilateral carpal tunnel syndrome causally related to performing her limited-duty employment from December 2007 to April 2008. OWCP accepted the occurrence of the claimed employment factors. It also accepted that appellant sustained ulnar neuropathy of the right elbow under file number xxxxxx424. OWCP combined the current case record with file number xxxxxx424 and reviewed the evidence from both records. It found that the opinion of Dr. Perry, who provided an impartial medical examination under file number xxxxxx424, constituted the weight of the evidence and established that appellant did not have any employment-related condition of the upper extremities other than the accepted ulnar neuropathy.

The Board finds that the case is not in posture for decision due to a conflict in medical evidence. The case will be remanded for resolution pursuant to 5 U.S.C. § 8123(a). In a report dated March 19, 2008, Dr. Fried, appellant's attending physician, diagnosed right ulnar and radial neuropathy, brachial plexitis and a subluxing right ulnar nerve. He attributed the conditions to appellant's repetitive work duties. On May 5, 2008 Dr. Fried related that her work duties aggravated her right ulnar elbow symptoms and found that she should remain off work. On July 23, 2008 he diagnosed a subluxing right ulnar nerve, right radial and ulnar neuropathy and brachial plexitis. On November 3, 2008 Dr. Fried found that appellant could not return to the position she began in December 2007 "as it was aggravating her symptoms further...." In a report dated May 29, 2009, he advised that she sustained a worsening of her preexisting ulnar nerve condition due to her work duties.

On September 30, 2010 Dr. Perry, whose report is that of a second opinion physician under the current file number, diagnosed right elbow ulnar neuropathy probably due to work factors. In a supplemental report dated July 25, 2011, he found no objective evidence of thoracic outlet syndrome, brachial plexitis, carpal tunnel syndrome or radial tunnel syndrome.

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

¹⁰ *Beverly A. Spencer*, 55 ECAB 501 (2004).

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).

shall appoint a third physician who shall make an examination.¹⁴ On remand, OWCP should refer appellant to an impartial medical examiner to determine whether she sustained any upper extremity condition caused or aggravated by work factors from December 2007 to April 2008. Following this and any further development deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion evidence necessitating referral to an impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2012 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 24, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ 5 U.S.C. § 8123(a).