

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

C.H., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, FOOD & DRUG ADMINISTRATION,)
Bethesda, MD, Employer)

**Docket No. 13-742
Issued: June 3, 2013**

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 February 11, 2013 appellant filed a timely appeal from a January 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational exposure claim and a January 29, 2013 nonmerit decision denying her request for reconsideration. 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 ulnar neuropathy as a result of factors of her federal employment; and (2) whether OWCP properly denied her request for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 27, 2012 appellant, then a 33-year-old microbiologist, filed an occupational disease claim (Form CA-2) alleging that she developed a repetitive motion injury in her right and left wrists from weeks of serotyping approximately 100 samples a day. She noted that her right wrist was worse than the left with pain and numbness radiating to her forearm. Appellant first became aware of her condition on August 20, 2012 and of its relationship to her employment on August 22, 2012. She sought medical treatment on August 30, 2012 and notified her supervisor on October 16, 2012.

In an August 30, 2012 treatment note, C.L. Dunn, a registered nurse, reported that appellant presented to the occupational health clinic with bilateral pain in her hands and wrists, which progressively worsened over the prior two weeks. Appellant reported that her pain was exacerbated when using a pipette. Nurse Dunn noted possible inflammation of the right carpometacarpal joint and possible strain of the left wrist muscles and tendons. In a September 21, 2012 treatment note, she reported that appellant returned with bilateral pain in her wrists and hands. Appellant noted that her pipefitting duties finished on August 30, 2012. She stated that her symptoms returned when she began pipetting again on September 19, 2012. Nurse Dunn noted recurrent symptoms associated with pipetting.

By letter dated November 2, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days. In another November 2, 2012 letter, OWCP requested the employing establishment provide information pertaining to appellant's occupational exposure and employment duties.

In a November 13, 2012 statement, appellant described her duties as a microbiologist involved serotyping Salmonella samples which required repetitive motion. This involved labeling and filling several hundred test tubes each day, taking the tubes in and out of bath water, screwing tube caps on and off and dispensing media. The samples had to be serotyped quickly and appellant performed such tasks for approximately two and a half months, seven hours a day. She first noticed the pain on August 20, 2012 which became worse by August 30, 2012, causing her to seek medical treatment. Appellant stopped serotyping samples on August 30, 2012. On September 19, 2012 she felt an increase in pain when she was required to take media by removing caps off of approximately 75 test tubes, dispense media *via* pipetting and place caps back onto the tubes. Appellant sought further treatment with an occupational nurse on September 21, 2012 because the earliest appointment she could get with her primary care physician was not until November 14, 2012. She stated that she had no previous injuries to her hands or wrists and did not do outside work which required repetitive motion.

By letter dated November 14, 2012, the employing establishment advised that it concurred with appellant's description of her duties due to the unusually large amount of repetitive work that had to be completed around the time of her injury. It noted that she was a microbiologist who performed serotyping of a large number of Salmonella. This involved making multiple dilutions through the use of single channel automatic pipets by holding the pipet in one hand and pushing the plunger up and down several times. The employing establishment noted that the pressure required to do this properly had to be delivered in a controlled, smooth

manner. Appellant did this daily for several weeks. The employing establishment further noted that it had ordered an electronic motorized pipet for appellant which did not require the same type of repetitive, tightly constrained pressure to work. An official microbiologist position description was provided.

In a November 14, 2012 medical report, Dr. Sharon L. Balanson, Board-certified in internal medicine, reported that appellant complained of pain and burning in her right hand, located at the thumb base with numbness in the lateral forearm. She noted that appellant worked in a laboratory, performed repetitive motions the majority of the day when pipetting and started to develop symptoms in mid-August 2012. Upon physical examination, Dr. Balanson diagnosed neuropathy and ulnar nerve distribution of the hand.

In a November 19, 2012 Attending Physician's Report (Form CA-20), Dr. Balanson noted that repetitive motion was required at appellant's workplace and beginning on April 20, 2012, appellant developed right wrist pain and numbness which radiated to the right forearm. She diagnosed ulnar neuropathy and checked the box marked "yes" when asked if she believed the condition was caused or aggravated by appellant's employment activities.

In a December 10, 2012 report, Dr. Balanson reported that appellant complained of continued right hand and forearm pain, suspecting that appellant could have tendinitis of the wrist. Additional testing was ordered.

In a December 10, 2012 diagnostic report, Dr. Rakhi Goel, a Board-certified diagnostic radiologist, reported that an x-ray of the right hand and right wrist revealed negative with no evidence of acute fracture, dislocation, significant degenerative disease or other bony abnormality. Visualized soft tissue was unremarkable.

By decision dated January 9, 2013, OWCP denied appellant's claim finding that the medical evidence of record failed to establish that her diagnosed ulnar neuropathy condition was causally related to the accepted work-related activities.

On January 14, 2013 appellant requested reconsideration of OWCP's decision. In a January 5, 2013 report, Dr. Harvey M. Cohen, a Board-certified orthopedic surgeon, stated that appellant became aware of pain in the radial side of her right wrist during late summer 2012. He noted that the pain was associated with thumb movement and appellant complained of numbness in that area. Dr. Cohen stated that appellant associated her pain with her work as a microbiologist and noted that appellant used her hands on betting machines. Upon physical examination and review of diagnostic testing, he diagnosed de Quervain's syndrome.

By decision dated January 29, 2013, OWCP denied appellant's request for reconsideration finding that she did not raise any substantive legal questions or include new and relevant evidence.²

LEGAL PRECEDENT -- ISSUE 1

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

² The Board notes that appellant submitted additional evidence after OWCP rendered its January 29, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

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

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

⁵ *Elaine Pendleton*, *supra* note 3.

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

⁷ *See* 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

ANALYSIS -- ISSUE 1

OWCP accepted that appellant engaged in repetitive activities in her employment duties as microbiologist. It denied her claim, however, on the grounds that the medical evidence failed to establish a causal relationship between her work activities and her ulnar neuropathy. The Board finds that the medical evidence of record is insufficient to establish that appellant developed ulnar neuropathy causally related to factors of her federal employment as a microbiologist.

In medical reports dated November 14 to December 10, 2012, Dr. Balanson reported that appellant complained of pain and burning in her right hand located at the thumb base with numbness in the lateral forearm. She noted that appellant worked in a laboratory and performed repetitive motions the majority of the day when pipetting. Appellant started to develop symptoms in mid-August 2012 when she developed right wrist pain and numbness which radiated to the right forearm. Upon physical examination, Dr. Balanson diagnosed neuropathy and ulnar nerve distribution of the hand. In a November 19, 2012 Form CA-20, she checked the box marked "yes" when asked if she believed the condition was caused or aggravated by appellant's employment activities. In a December 10, 2012 report, Dr. Balanson reported that appellant complained of continued right hand and forearm pain and speculated that she could have tendinitis of the wrist.

The Board finds that the opinion of Dr. Balanson is not well rationalized. Dr. Balanson provided a diagnosis of ulnar neuropathy but failed to explain how appellant's work duties caused or aggravated the medical condition. Though she checked the box marked "yes" when asked if she believed appellant's condition was caused or aggravated by her employment, the Board has held that a form report that addresses causal relationship with a checkmark, without medical rationale explaining how the work conditions caused the alleged injury, is of diminished probative value and insufficient to establish causal relationship.⁹ Dr. Balanson did not provide a detailed medical history and only briefly noted that appellant worked in a laboratory performing repetitive motions the majority of the day when pipetting. She failed to adequately describe the work duties, did not specify how long she worked as a microbiologist, how many hours per day she worked and the frequency of other physical movements and tasks. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.¹⁰ The opinion of a physician supporting causal relationship must

⁸ *James Mack*, 43 ECAB 321 (1991).

⁹ *See Calvin E. King, Jr.*, 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr.*, 41 ECAB 843 (1990).

¹⁰ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.¹¹ Without medical reasoning explaining how appellant's employment factors caused her ulnar neuropathy, Dr. Balanson's reports are insufficient to meet appellant's burden of proof.¹²

The remaining medical evidence of record is also insufficient to establish causal relationship. Dr. Goel's December 10, 2012 diagnostic reports noted unremarkable findings of the right hand and wrist. While Nurse Dunn's August 30 and September 21, 2012 medical notes document appellant's treatment for her wrist and hand, they are of no probative value as a nurse is not a physician as defined under FECA.¹³ The medical evidence of record fails to support that appellant developed right ulnar neuropathy as a result of her federal employment duties.¹⁴

In the instant case, the record lacks rationalized medical evidence establishing a causal relationship between appellant's ulnar neuropathy and factors of her federal employment as a microbiologist. As such, appellant has failed to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To reopen a case for merit review under section 8128(a), the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant new evidence not previously considered by OWCP.¹⁵ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

¹¹ See *Lee R. Haywood*, 48 ECAB 145 (1996).

¹² *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹³ Nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists and clinical psychologists.

¹⁴ *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

¹⁵ *D.K.*, 59 ECAB 141 (2007).

¹⁶ *K.H.*, 59 ECAB 495 (2008).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her January 14, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant's argument was that her injury was employment related but the underlying issue in this case was whether her injury was causally related to the accepted factors of federal employment. That is a medical issue which must be addressed by relevant medical evidence.¹⁷ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

While appellant submitted a new medical report from Dr. Cohen dated January 5, 2013, this report is not relevant in establishing causal relationship between appellant's diagnosed condition and factors of her federal employment as a microbiologist. Dr. Cohen's report merely related appellant's own complaints that she became aware of pain in the radial side of her right wrist during late summer 2012, associated her pain with her work as a microbiologist and used her hands on betting machines. While he provided a new diagnosis of de Quervain's syndrome, he did not provide his own medical opinion as to the cause of appellant's de Quervain's syndrome. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸ While appellant submitted new evidence, it was not relevant in addressing causal relationship. She may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

Evidence submitted by appellant after the final decision cannot be considered by the Board. As previously noted, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.¹⁹ Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁰

¹⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁸ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁹ 20 C.F.R. § 501.2(c)(1).

²⁰ *Sherry A. Hunt*, 49 ECAB 467 (1998).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that her right ulnar neuropathy is causally related to factors of her federal employment as a microbiologist. OWCP properly denied her request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated January 29 and 9, 2013 are affirmed.

Issued: June 3, 2013
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