United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 12-1518**
	)	**Issued: May 7, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On November 2, 2012 appellant, through her attorney, filed a timely appeal from an April 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty.

FACTUAL HISTORY

On October 30, 2009 appellant, then a 42-year-old distribution sales associate, filed an occupational disease claim alleging that she sustained a cervical spine injury as a result of heavy lifting and other work-related duties. She stated that she first became aware that her condition

[1] 5 U.S.C. § 8101 *et seq.*

was caused or aggravated by her employment on September 24, 2009, when she learned the results of a magnetic resonance imaging (MRI) scan.[2]

In an undated statement, appellant indicated that she had worked at the employing establishment since July 3, 1986. Her normal duties included the distribution of mail, taking loaded tubs of mail with flats to the carriers, taking loaded trays of lettered mail to the carriers, unloading and reloading tractor trailers, pushing hampers, u-carts, skids and cages of mail to distribution areas, casing mail, distributing box mail and parcels and window services. Appellant was placed on light-duty pursuant to her previously-accepted claim for CTS. Modified work duties included working in the key desk area (scanning accountable mail to the assigned carriers, preparing accountable logs for the carriers, maintaining accountable records, parcels, letters, etc., answering the telephone and handling the redelivery of all mail for customers including parcels). Appellant was responsible for retrieving various parcels for customers, which caused severe pain in her upper extremities. A computerized axial tomography (CAT) scan showed that she had herniated discs in her neck.

Appellant submitted an October 5, 2009 disability slip from Dr. Steven Rosen, a Board-certified physiatrist, who treated her for chronic upper extremity pain. Dr. Rosen stated that she was unable to work due to a herniated disc. The record contains a report of a September 24, 2009 CAT scan of the cervical spine.

In a letter dated November 20, 2009, OWCP informed appellant that the evidence submitted was insufficient to establish her claim and advised her to submit additional evidence, including a physician's rationalized report with a diagnosis and an opinion explaining how her diagnosed condition was causally related to identified employment activities.

By decision dated January 20, 2010, OWCP denied appellant's claim, finding that the evidence was insufficient to establish that the events had occurred as alleged and that the record did not contain any medical evidence that provided a diagnosis that could be connected to the claimed events.

On October 4, 2010 appellant requested reconsideration.

The record contains reports dated December 13, 2006 through March 22, 2007 from Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, who diagnosed RSD. Appellant submitted notes from Dr. Thomas Fagan, a chiropractor, for the period September 29, 2010 through January 11, 2012. Dr. Fagan's notes consistently reflected that appellant was experiencing neck pain and contained a diagnosis of cervical subluxation.

Appellant submitted a January 9, 2007 report from Dr. Rosen, who provided a history of injury and treatment and examination findings. Dr. Rosen noted that she had a two-year history

[2] On August 8, 2006 appellant had filed an occupational disease claim (File No. xxxxxx758) alleging that she sustained injuries to her right hand and elbow as a result of repetitive right hand movements while casing mail for 24 years. OWCP accepted her claim for right carpal tunnel syndrome (CTS); dorsal ganglion cyst of the right hand; and reflex sympathetic dystrophy (RSD) of the upper limb. Pursuant to the Board's order dated November 26, 2012 in File No. xxxxxx758, OWCP consolidated case File Nos. xxxxxx758 and xxxxxx072 under master File No. xxxxxx758.

of pain in her right shoulder, hand and elbow. He described appellant's employment activities, which included loading trucks and sorting letters. Dr. Rosen noted a prior diagnosis of CTS, for which she underwent decompression on September 19, 2006. After surgery, appellant's pain intensified and she developed constant pain in her right arm radiating toward the elbow and neck. Dr. Rosen noted that she had not had an MRI scan of the cervical spine. Physical examination revealed tenderness over the shoulder and over the cervical facet joints. There was decreased sensation in the right C6, C7 and C8 nerve distributions. Dr. Rosen diagnosed chronic regional pain syndrome and indicated that he might ask for an MRI scan of the cervical spine to rule out a herniated disc contributing to her diagnosed condition.

In a statement dated October 15, 2010, appellant contended that the constant lifting, loading and unloading of heavy equipment contributed to her cervical injury. She noted that her light-duty position did not commence until April 10, 2007.

Appellant submitted a September 20, 2010 report from Dr. Michael McCoy, a Board-certified family practitioner, who stated that she had been working for the employing establishment for 24 years. Her job included pushing and pulling pallets, casing mail and loading heavy equipment off the trucks. For several months prior to September 24, 2009, appellant had been developing worsening neck and upper extremity pain and weakness into her right lower extremity. She was on limited-duty due to her CTS, RSD and neck pain. Appellant had a spinal cord stimulator implanted. She developed CTS from casing and sorting the mail as well as RSD and chronic neck pain. Appellant subsequently ruptured the herniated disc in her neck and on September 24, 2009, had a CAT scan performed, which documented a disc herniation at C5-6. She underwent cervical fusion and bone allograft. Examination revealed minimal extension of the cervical spine. There was palpable spasm and tenderness over the cervical paravertebral and trapezius muscles and significant weakness in the right upper extremity. Grip, pinch and apposition strength was decreased on the right. Dr. McCoy diagnosed cervical disc herniation at C5-6; right upper extremity radiculopathy; right lower extremity myelopathy secondary to disc herniation at C5-6; and status post cervical fusion. He opined within a reasonable degree of medical certainty that appellant's condition was a direct result of her work injuries. Dr. McCoy explained that there were no degenerative changes of the cervical spine that would cause her to have disc herniation. He further opined that appellant was misdiagnosed with RSD and CTS, which he concluded were related to the cervical disc herniation.

By decision dated January 12, 2011, OWCP denied modification of its January 20, 2010 decision. The claims examiner found that the evidence failed to establish that factors of appellant's employment caused her current herniated disc condition.

On January 30, 2011 appellant requested reconsideration. She also requested that her prior claim (File No. xxxxxx758) be expanded to include a herniated disc at C5-6.

In a January 12, 2011 report, Dr. McCoy diagnosed cervical sprain/strain with aggravation of preexisting injury, status post fusion and bilateral cervical radiculopathy. He opined that appellant was disabled due to her work injury. Dr. McCoy also stated that her current cervical condition was related to the original work injury, which was misdiagnosed.

In a March 3, 2011 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.

On September 27, 2011 appellant again requested reconsideration.

Appellant submitted follow-up reports from Dr. McCoy for the period January 31 through October 3, 2011, all of which reiterated his opinion that her cervical sprain/strain and cervical radiculopathy were causally related to her work activities. In a July 26, 2011 report, Dr. McCoy stated that she had experienced neck pain since 2004. Noting that appellant had originally worked in a heavy-duty capacity, he indicated that she had suffered a disc herniation sometime during her job activities, but that it was never diagnosed because she did not undergo an MRI scan.

In an October 3, 2011 narrative report, Dr. McCoy provided a history of injury and treatment and diagnosed a large disc herniation at C5-6 and a smaller disc herniation at C3-4, as well as cervical radiculopathy. He noted that appellant was initially diagnosed with CTS and RSD. Dr. McCoy opined, however, that these diagnoses were incidental to her herniated discs, as her pain radiated from her neck to her right shoulder, down her arm, into her elbow and crossed into her hands and fingers. CTS reportedly does not present this way, but rather would have presented with pain at the wrist, which radiated into the hand or pain at the wrist, radiating up the forearm to the elbow. RSD is a diagnosis of exclusion, meaning it is given after all other diagnoses have been exhausted and should have triggered the physicians to perform an MRI scan for cervical spine. An MRI scan of appellant's cervical spine, which is standard of care in treatment of people with pain radiating down from the upper part of the extremities to the distal part, would have immediately shown that she had a disc herniation in her cervical spine. Dr. McCoy opined that her diagnosed cervical condition was solely due to her work activities. In follow-up reports from January 31 through October 3, 2011, he reiterated his opinion that appellant's cervical condition was causally related to her work activities.

By decision dated April 11, 2012, OWCP denied modification of the January 12, 2011 decision. The claims examiner found that the factual evidence did not establish the specific employment factors alleged to have caused appellant's condition and that the medical evidence was insufficient to establish a new occupational disease. He advised her that if she felt that job factors other than those that led her to file her previous claim, caused her cervical spine condition, she must clearly describe those job factors, in detail and the medical evidence must support that those job factors resulted in her cervical spine condition.

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 timely filed within the applicable time limitation period, that an injury was sustained 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 each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for 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. The medical evidence required to establish a claim 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.[5]

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

An employee who claims benefits under FECA has the burden of establishing the essential elements of his or her claim. The claimant 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. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship. 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.[6]

On January 9, 2007 Dr. Rosen provided a history of injury and treatment, noting that appellant had been experiencing cervical, shoulder and arm pain for approximately two years. He described her employment activities, which included loading trucks and sorting letters. Examination revealed tenderness over the cervical facet joints and decreased sensation in the

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Id. 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).

[6] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard, id.*; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

right C6, C7 and C8 nerve distributions. Dr. Rosen diagnosed chronic regional pain syndrome and indicated that he might ask for an MRI scan of the cervical spine to rule out a herniated disc contributing to her diagnosed condition. On October 5, 2009 he stated that appellant was unable to work due to a herniated disc. As Dr. Rosen did not provide an opinion on the cause of her cervical condition, it is of limited probative value on that issue. The report, however, supports appellant's claim that her cervical condition existed as early as 2005 and that she was engaged in heavy employment duties.

Dr. McCoy opined that appellant's cervical disc condition resulted from work activities over a 24-year period. He gave a history of her condition and indicated that he had reviewed appellant's medical records and test results. On September 20, 2010 Dr. McCoy stated that appellant had been working for the employing establishment for 24 years. He reflected an understanding of her job requirements and the nature of her job duties, which included pushing and pulling pallets, casing mail, and loading heavy equipment off the trucks. Dr. McCoy noted that appellant was placed on limited duty following the acceptance of her prior claim due to her CTS and RSD, which she developed from repetitive duties of casing and sorting the mail. He diagnosed a disc herniation at C5-6 pursuant to a September 24, 2009 MRI scan, which he attributed directly to her heavy work activities. Dr. McCoy explained that there were no degenerative changes of the cervical spine that would cause her to have disc herniation.

On October 3, 2011 Dr. McCoy diagnosed a large disc herniation at C5-6 and a smaller disc herniation at C3-4, as well as cervical radiculopathy. He opined that appellant's diagnosed CTS and RSD were incidental to her herniated discs, as her pain radiated from her neck to her right shoulder, down her arm, into her elbow and crossed into her hands and fingers. CTS reportedly does not present this way, but rather would have presented with pain at the wrist, which radiated into the hand or pain at the wrist, radiating up the forearm to the elbow. RSD is a diagnosis of exclusion, meaning it is given after all other diagnoses have been exhausted and should have triggered the physicians to perform an MRI scan for cervical spine. An MRI scan of appellant's cervical spine, which is the standard of care in treatment of people with pain radiating down from the upper part of the extremities to the distal part, would have immediately shown that she had a disc herniation in her cervical spine. Dr. McCoy opined that her diagnosed cervical condition was solely due to her work activities.

Dr. McCoy's reports did not provide a full explanation as to how appellant's employment activities caused or aggravated her cervical condition. In all of his reports, however, he did consistently opine that her heavy duties, which included pushing and pulling pallets, casing mail and loading heavy equipment off the trucks, caused her herniated disc and radicular conditions.

The Board notes that, while none of the reports of appellant's attending physicians are completely rationalized, they are consistent in indicating that she sustained an employment-related cervical condition and are not contradicted by any substantial medical or factual evidence of record. OWCP found that her physicians did not seem to have a clear understanding of her work duties or her physical restrictions. The Board notes, however, that OWCP failed to provide her physicians with a statement of accepted facts, which delineated her job functions and restrictions over the course of her employment. While the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference

between her claimed conditions and the identified employment factors and are sufficient to require OWCP to further develop the medical evidence and the case record.[7]

OWCP found that appellant had alleged that her cervical condition arose from the same job functions that led to her prior claim, which was accepted for CTS and RSD. The Board notes that in her August 8, 2008 occupational disease claim, she alleged that she sustained injuries to her right hand and elbow as a result of repetitive right hand movements while casing mail for 24 years. In her October 30, 2009 claim, however, appellant alleged that she sustained a cervical condition due to heavy lifting and other work-related duties. She described in detail the job activities that she believed contributed to her cervical injury, which included loading and unloading trucks and pushing and pulling heavy hampers. The Board finds that appellant has claimed a new injury due to employment activities other than those that led her to file her previous claim.

On remand, OWCP should prepare a statement of accepted facts that includes a detailed employment history, job descriptions for each position held, specific functions performed by appellant in each position and the restrictions imposed by her treating physicians. It should submit the statement of accepted facts to her treating physician or to a second opinion examiner, in order to obtain a rationalized opinion as to whether her current cervical condition is causally related to factors of her employment, either directly or through aggravation, precipitation or acceleration.

CONCLUSION

The Board finds that this case is not in posture for decision as to whether or not appellant sustained a cervical injury in the performance of duty.

[7] *See Virginia Richard, claiming as executrix of the estate of Lionel F. Richard, supra* note 5; *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 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: May 7, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board