

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

C.H., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Minneapolis, MN, Employer**)

**Docket No. 13-1879
Issued: February 18, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 13, 2013 appellant filed a timely appeal from a March 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for an employment-related injury and a July 3, 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 and nonmerits of this case.²

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained bilateral carpal tunnel syndrome, bilateral hand conditions and right forearm and shoulder conditions in the performance of duty causally related to factors of her federal

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the July 3, 2013 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

employment; and (2) whether OWCP properly refused to reopen her case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that her occupational disease has been historically proven through documentation from a physician she consulted for her case under OWCP File No. xxxxxx262. She further contends that in its March 25, 2013 decision OWCP stated that her occupational disease was work related and, therefore, the denial of her claim is incorrect.

FACTUAL HISTORY

On November 15, 2012 appellant, then a 42-year-old food inspector, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome, bilateral hand conditions and right forearm and shoulder conditions due to factors of her federal employment. On the claim form, she indicated that she first became aware of her condition and attributed it to her federal employment on October 30, 2012. In support of her claim, appellant submitted a position description and her job history.

In a November 23, 2012 letter, OWCP requested additional factual and medical information from appellant. It allotted her 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted a certificate of medical examination dated October 20, 2010 and a narrative statement indicating that she inspected approximately 14,000 or more birds per day using repetitive actions and experienced pain in both hands, wrists, shoulders and arms, as well as swelling in her hands and wrists. She also submitted a notice of occupational disease (Form CA-2) she filed on March 15, 2005 and a May 24, 2005 OWCP decision denying the claim on the basis that she failed to establish fact of injury. OWCP noted that the medical evidence did not establish a firm diagnosis under File No. xxxxxx262, *i.e.*, presumptive carpal tunnel.³

On March 25, 2005 Dr. George Ellard, an emergency medicine specialist, indicated that appellant complained of pain in the hands, arms and shoulders and stated that the problem was aggravated by her current position. He found a positive Tinel's sign, a positive Phalen's test and gave a presumptive diagnosis of carpal tunnel syndrome, with hand, arm and shoulder syndrome. On March 28, 2005 Dr. Ellard diagnosed shoulder pain and took appellant off work from March 28 to 29, 2005.

By decision dated December 28, 2012, OWCP denied the claim on the basis that the evidence failed to establish fact of injury.

On January 15, 2013 appellant requested a review of the written record by an OWCP hearing representative. She submitted a January 14, 2013 narrative statement indicating that her federal employment required downward repetitive motions, grabbing, twisting, pulling and pushing.

³ Appellant filed an occupational disease claim on March 15, 2005 alleging that she experienced bilateral hand, wrist and shoulder pain resulting from repetitive motion when inspecting at least 14,000 birds per day.

In an undated report, Stacie Sidebotham, a family nurse practitioner, stated that appellant was seen for bilateral wrist pains and indicated that the findings of an electromyogram (EMG) report were a moderate lesion of the right median nerve at the wrist and a mild lesion of the left wrist median nerve.

In a December 6, 2012 report, Shawana Faulk, a family nurse practitioner, diagnosed essential hypertension and wrist pain.

On December 14, 2012 Ms. Sidebotham diagnosed wrist pain and possible carpal tunnel vs. tendinitis. She indicated that appellant switched from chicken poultry to swine inspection, which was more difficult because swine were larger and had more organs to inspect and required more repetitive hand motions.

A December 19, 2012 x-ray of the left wrist showed fusion of the lunate and triquetrum which was likely congenital and was symmetric compared with the right wrist. A December 19, 2012 x-ray of the right wrist revealed congenital fusion and lack of segmentation of the lunate and triquetrum.

In a December 19, 2012 report, Ms. Sidebotham diagnosed acute wrist pain and advised that appellant wear bilateral wrist splints at work and while sleeping.

On January 2, 2013 Bruce Veeder, a physician's assistant, diagnosed acute wrist pain and indicated that appellant's EMG results were consistent with carpal tunnel syndrome. He advised that she was capable of continuing to perform light-duty work.

In a January 22, 2013 report, Dr. Mark E. Brenner, an orthopedic surgeon, indicated that appellant developed numbness, tingling and volar wrist pain as a result of her duties as an inspector. Upon examination, he found a positive Phalen's test, a positive Tinel's sign and a positive carpal compression test. Dr. Brenner diagnosed carpal tunnel syndrome and restricted appellant from repetitive pushing, pulling, gripping, pinching and fingering at work. On January 30, 2013 he reiterated his diagnosis and opined that her condition "could be work related." Dr. Brenner stated that "further evaluation in this regard would require the review of video tapes that accurately portray the vocational activity performed antecedent to the onset of her symptoms." On February 19, 2013 he reiterated his diagnosis.

By decision dated March 25, 2013, OWCP's hearing representative affirmed the December 28, 2012 decision as modified, finding that the evidence was sufficient to establish fact of injury but failed to establish a causal relationship between the diagnosed conditions and the implicated employment factors.

On April 17, 2013 appellant requested reconsideration and submitted an April 9, 2013 report from Dr. Brenner, who reiterated his diagnosis and stated that after having reviewed the information she provided to him it did appear that her current clinical situation was historically and causally related to her vocational activity. She also submitted an April 29, 2013 report from him reiterating his work restrictions.

By decision dated July 3, 2013, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show

that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ 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 and that an injury⁵ was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (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.⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish a claim that federal employment factors caused or aggravated her bilateral carpal tunnel syndrome, bilateral hand conditions and right forearm and shoulder conditions. While appellant submitted a statement in which she identified the factors of employment that she believed caused the condition, in order to establish a claim that she sustained an employment-related injury, she must

⁴ 5 U.S.C. §§ 8101-8193.

⁵ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

⁶ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁷ See *D.R.*, Docket No. 09-1723 (issued May 20, 2010). See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ See *O.W.*, *supra* note 6.

also submit rationalized medical evidence which explains how her medical conditions were caused or aggravated by the implicated employment factors.⁹

In his reports, Dr. Brenner diagnosed carpal tunnel syndrome and indicated that appellant developed numbness, tingling and volar wrist pain as a result of her duties as an inspector. He restricted her from repetitive pushing, pulling, gripping, pinching and fingering at work. On January 30, 2013 Dr. Brenner reiterated his diagnosis and opined that appellant's condition "could be" work related. The Board finds that he failed to provide a rationalized opinion explaining how factors of appellant's federal employment, such as repetitive pushing, pulling, gripping, pinching and fingering, caused or aggravated her carpal tunnel syndrome. Such generalized statements do not establish causal relationship because they merely repeat appellant's allegations and are unsupported by adequate medical rationale explaining how her physical activity at work actually caused or aggravated the diagnosed conditions.¹⁰ The Board has held that the mere fact that her symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between her condition and her employment factors.¹¹ Lacking thorough medical rationale on the issue of causal relationship, Dr. Brenner's reports are insufficient to establish that appellant sustained an employment-related injury.

In his reports, Dr. Ellard diagnosed shoulder pain and gave a presumptive diagnosis of carpal tunnel syndrome, with hand, arm and shoulder syndrome. The Board finds that he failed to provide a firm diagnosis and did not address causal relationship -- only a description of appellant's complaints. Dr. Ellard's reports are of no probative value on the issue of causal relationship.

The reports from Mr. Veeder, a physician's assistant, and Ms. Sidebotham and Ms. Faulk, family nurse practitioners, are of no probative value as they are not physicians under FECA.¹² As such, the Board finds that appellant did not meet her burden of proof with these submissions.

The December 19, 2012 x-rays are diagnostic in nature and therefore do not address causal relationship. As such, the Board finds that they are insufficient to establish appellant's claim.

As appellant has not submitted any rationalized medical evidence to support her allegation that she sustained an injury causally related to the indicated employment factors, she failed to meet her burden of proof to establish a claim.

⁹ A.C., Docket No. 08-1453 (issued November 18, 2008); *Donald W. Wenzel*, 56 ECAB 390 (2005); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁰ See *K.W.*, Docket No. 10-98 (issued September 10, 2010).

¹¹ See *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹² 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

On appeal, appellant contends that her occupational disease has been historically proven through documentation from a physician she consulted for her case under OWCP File No. xxxxxx262. She further contends that in OWCP's March 25, 2013 decision it stated that her occupational disease was work related and, therefore, the denial of her claim is incorrect. The Board has reviewed the evidence of record and finds that it is insufficient to establish causal relationship. OWCP denied appellant's claim in File No. xxxxxx262 for failure to establish that she sustained an employment-related injury, specifically no firm diagnosis of carpal tunnel syndrome. Moreover, the Board finds that its decision dated March 25, 2013 found that appellant established fact of injury relative to the implicated employment factors, but not causal relationship. Based on the Board's findings for the reasons stated above, appellant's arguments are not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹³ OWCP regulations provide that 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 and pertinent new evidence not previously considered by OWCP.¹⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.¹⁵

ANALYSIS -- ISSUE 2

In support of her April 17, 2013 reconsideration request, appellant submitted medical reports dated April 9 and 29, 2013 from Dr. Brenner. The Board finds that this new evidence is relevant to the medical causation issue in the present case. As appellant provided relevant and pertinent new evidence not previously considered, OWCP improperly denied her reconsideration request. Thus, it was obligated to conduct a merit review of the claim.¹⁶

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his burden of proof.¹⁷ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision,

¹³ *Id.* at §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2). *See Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁵ *Id.* at § 10.608(b). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements OWCP will deny the application for review without reviewing the merits of the claim).

¹⁶ *See M.V.*, Docket No. 13-1502 (issued November 18, 2013).

¹⁷ *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

but only after the case has been reviewed on the merits.¹⁸ On remand, OWCP shall conduct a merit review of the case and, following any necessary further development, issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained bilateral carpal tunnel syndrome, bilateral hand conditions and right forearm and shoulder conditions in the performance of duty causally related to factors of her federal employment. The Board further finds that OWCP improperly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed. The July 3, 2013 decision is set aside and remanded for further proceedings consistent with this decision of the Board.

Issued: February 18, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).