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

| | | |
|---|---|---|
| **M.M., Appellant** | ) | |
| **and** | ) | **Docket No. 14-258**<br>**Issued: July 17, 2014** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brockton, MA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On November 15, 2013 appellant, through her attorney, filed a timely appeal from the July 26, 2013 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 case.

### ***ISSUE***

The issue is whether appellant met her burden of proof to establish an occupational disease causally related to factors of her federal employment.

### ***FACTUAL HISTORY***

On July 19, 2012 appellant, then a 39-year-old claims assistant, filed an occupational disease claim alleging a cervical strain that she believed was caused or aggravated by sitting and

[1] 5 U.S.C. § 8101 *et seq.*

typing at her work area. She first became aware of the condition on May 21, 2012 and first realized that it was caused or contributed to by her employment on June 4, 2012. The employing establishment noted that appellant filed an ergonomics request for the wrist on March 26, 2012 and was advised to "slow down doing her work." It also noted that she advised that she hurt her back trying to lift her grandfather from the floor of her home on July 4, 2012. Appellant stopped work on July 6, 2012 and returned to work on July 19, 2012.

In a July 24, 2012 letter, the employing establishment controverted the claim. It noted that appellant's workstation was ergonomically correct, it was inspected on March 26, 2012 and that she changed her station to her preference. On July 5, 2012 appellant advised that she would not be at work as her grandfather had fallen the night before and she injured her back while helping him.[2] In correspondence received on July 30, 2012, Denise Barbuto, a supervisor, explained that the first time she heard of a back injury was on July 5, 2012, when appellant informed her that she had attempted to lift her grandfather from the floor in her home on July 4, 2012. Appellant went to the hospital as he had "put her back out." Ms. Barbuto noted that appellant went to the Good Samaritan emergency room for a nonwork injury. She received e-mail correspondence from appellant on July 5, 2012 advising that her "grandfather fell and I lifted him and pulled my back out." Ms. Barbuto noted that July 20, 2012 was the first day that she received any medical documentation relating this to appellant's work. On that date she received a call from appellant, who advised that she was going to her physician as her back was not much better.

In a July 9, 2012 report, Dr. Nicholas Tsanotelis, a Board-certified internist, noted that appellant was seen in follow up for low back pain. He stated that she "helped her grandfather, who fell, get up. [Appellant] felt the lower part of her back as well as the upper part spasm on her. She really has not had chronic back pain at all." Dr. Tsanotelis noted that appellant had a history of scoliosis. He diagnosed lumbar sprain and strain and placed her off work. In a July 13, 2012 follow-up report, Dr. Tsanotelis advised that appellant's low and upper back were quite sore, noting, "All started after lifting her grandfather up after a fall." Appellant also had some pain down her left arm but no sciatic pain. Dr. Tsanotelis noted that she did not have a history of back issues despite her scoliosis. There was no traumatic injury and no swelling. Dr. Tsanotelis diagnosed lumbar sprain and strain and neck pain.

In a report dated July 20, 2012, Dr. Tsanotelis saw appellant for lower neck and upper back discomfort with shooting pain in the right arm that she had since May. He noted that her office moved in May and her computer set up consisted of two screens and a keyboard in between. Dr. Tsanotelis explained that appellant had to repetitively turn her neck back and forth to see the monitors. Appellant went to the employee health clinic a number of times and was informed that her set up would be reviewed and adjusted. Dr. Tsanotelis noted that appellant's pain was so intense that she went to the health station. He examined her and diagnosed neck pain and brachial neuritis or radiculitis. Dr. Tsanotelis referred appellant for physical therapy and recommended a magnetic resonance imaging (MRI) scan. He provided disability certificates excusing her from work until July 20, 2012. In an attending physician's report also dated July 20, 2012, Dr. Tsanotelis noted a history of right cervical radiculopathy symptoms and

[2] The letter indicates June 4 and 5; however, this is a typographical error.

provided findings of tenderness and spasm on the right lower cervical spine. He diagnosed cervical radiculopathy due to repetitive motion. Dr. Tsanotelis checked a box "yes" regarding whether he believed that her condition was employment related. He stated that appellant needed a better work environment to prevent constant twisting of her cervical spine. In a September 25, 2012 disability certificate, Dr. Tsanotelis indicated that she was being treated for cervical radiculopathy secondary to bulging disc at C5-6 and that she remained disabled.[3]

On September 26, 2012 OWCP advised appellant of the medical evidence needed to establish her clam.

OWCP received an August 15, 2012 proposed reprimand; an August 24, 2012 order to return to duty; and documents related to appellant's leave usage. In a July 5, 2012 point of contact, appellant informed her employing establishment that her grandfather fell the day before and that she hurt her back trying to help him. In a July 9, 2012 point of contact, she advised her employing establishment that her back was not better and she would seek medical attention.

In a September 25, 2012 report, Dr. Tsanotelis noted appellant's chronic neck pain and advised that she was unable to work since July 20, 2012. The pain across her neck and lower shoulders was too intense when she tried to work on the computer. Dr. Tsanotelis stated that appellant unsuccessfully tried to obtain a change in her workstation to alleviate her discomfort. He explained that the August 8, 2012 MRI scan showed a diffuse disc bulge with a small broad-based central disc protrusion at C5-6. Dr. Tsanotelis advised appellant that driving her car and doing simple household chores exacerbated her symptoms. He diagnosed displacement of cervical intervertebral disc without myelopathy and found that she was currently disabled and unable to return to her current employment. In an October 1, 2012 disability certificate, Dr. Robert Campbell, an orthopedic surgeon, diagnosed cervical disc degeneration and placed appellant off work for two weeks.

In a September 27, 2012 e-mail, appellant stated that she worked as a medical billing/claims assistant the employing establishment since November 3, 2003. She sat at a computer and typed 95 percent of the time. In April 2012, the claims department moved to another office. The desks in the new location were configured with the monitors in a corner. Appellant noted that her keyboard tray was removed and, as she worked at the desks, she experienced pain, that she attributed to the computer set up and the time she spent typing, running reports and doing data entry and twisting from left to right to reach the telephone. She stated that Ms. Barbuto denied her request to change the desk set up and she was informed that her computer had to stay in the corner. Appellant stated that her telephone was not in reaching distance and she had to stop what she was doing and turn her chair to answer the telephone. She stated that there was little room on her desk for her work. Appellant spent 95 percent of her shift doing things on the computer and the other 5 percent retrieving faxes, filing or in meetings. She noted that she had five appointments with OSHA that were cancelled or rescheduled, which caused her delay in reporting her claim. Appellant contended that her nonwork accident had nothing to do with her present claim.

[3] An August 8, 2012 MRI scan revealed mild degenerative changes, most pronounced at C5-6.

In an October 2, 2012 e-mail correspondence, Ms. Barbuto asserted that appellant's desk was about four years old and ergonomically correct. She noted that appellant changed her desk in April 2012. Ms. Barbuto explained that appellant's duties included typing and running reports. Appellant was encouraged to slow down due to careless errors. Ms. Barbuto stated that appellant was counseled for excessive breaks, texting during the day and using Facebook at work. She denied that appellant had to keep her computer in the corner of her desk. Ms. Barbuto noted that the telephone was flexible and cords were available if there was a problem but appellant did not bring any telephone problem to her attention. Headsets were also available as well as ergonomic keyboard trays, wrist rests and adjustable monitors. Additionally, appellant had an ergonomic chair. Ms. Barbuto explained that appellant's duties entailed hardly any telephone calls.

In October 1 and 17, 2012 letters, Craig De Mello, a program manager, confirmed the information provided by Ms. Barbuto. He described appellant's workstation and advised that she was not precluded from having her monitor or keyboard in front of her. Mr. De Mello addressed appellant's attendance and leave usage, noting that she had been on leave restriction on several occasions. He stated that prior to the nonindustrial incident at home on July 5, 2012, she was working, but subsequent to that event, she only came in to work for 6.5 hours on July 19, 2012, the date she filed her claim. Appellant had not worked since and resigned from the employing establishment. Mr. De Mello also noted that while she indicated that 95 percent of her time was spent doing shift running, reports, sorting data, typing, data entry and research, her supervisor indicated that her duties included typing 50 percent of the time and 50 percent researching and analyzing claims. He advised that appellant's job did not require many telephone calls. Mr. De Mello also indicated that she had dual screens since February 2012 but that using them was optional.

OWCP also received an undated statement from appellant on December 3, 2012. Appellant alleged that her supervisor sent her threats in the mail, she had to return to work against her physician's orders, she was falsely charged with absent without leave (AWOL) and her supervisors tried to discharge her. She related that her physicians advised that her desk area needed to be ergonomically correct and that she needed more breaks but her request was denied.

In a January 16, 2013 decision, OWCP denied appellant's claim. It found that the medical evidence did not establish that her back condition was causally related to work-related activities.

By letter dated January 23, 2013, appellant's representative requested a telephonic hearing, which was held on May 7, 2013.[4]

[4] At the hearing, appellant noted that since May 2012 she had no other injuries involving her neck and back. However, a few months before May 2012 she had low back problems. Appellant confirmed that the injury in July 2012 resulted from helping her grandfather after a fall but did not involve her neck or upper back. She reiterated that the work factor that she believed contributed to her condition included turning from her computer to her telephone, typing with the monitor in the corner of her workstation, twisting from left to right and typing on a keyboard that would not fit on a keyboard tray.

In a May 30, 2013 letter, Mr. De Mello reiterated his previous contentions and provided a photograph of appellant's workstation. He noted that she would not have to reach or twist answer to her telephone.

In a June 11, 2013 statement, appellant noted that on May 21, 2012 she had contacted the employee health unit due to burning feeling and severe low back pain. She noted that her appointments with employee health were cancelled and rescheduled at least four times until July 19, 2012 when she was examined and advised to file a claim. Appellant reiterated her contentions about her duties and workstation. She asserted that her telephone rang several times a day. Appellant argued that the photographs provided by the employing establishment were misleading as her telephone was not in the spot shown. She explained that, if the telephone were plugged in, it would not reach the monitor.

By decision dated July 26, 2013, the hearing representative affirmed the January 16, 2013 decision. He found that Dr. Tsanotelis' medical history was not consistent with appellant's contentions which rendered his opinion of diminished probative value.

## ***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 of FECA, that an injury was sustained 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.[5] 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.[6]

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 causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which 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

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

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

relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

It is well established that, where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable. However, the normal progression of untreated disease cannot be said to constitute aggravation of a condition merely because the performance of normal work duties reveal the underlying condition. For the conditions of employment to bring about an aggravation of preexisting disease, the employment must be such as to cause acceleration of the disease or to precipitate disability.[8]

## ***ANALYSIS***

Appellant claimed a cervical strain due to work factors. She was diagnosed with conditions that included cervical strain, cervical radiculopathy and cervical disc degeneration. Appellant attributed her condition to her job duties that included sitting at a computer, typing, talking on the telephone, reaching and twisting. The evidence supports that she performed these duties. The Board finds that appellant has not provided sufficient medical evidence to establish that her diagnosed cervical condition is causally related to these employment factors. The Board notes that she had an intervening injury on July 4, 2012 to her low and upper back while assisting her grandfather who had fallen.

Appellant submitted several reports from Dr. Tsanotelis. On July 9, 2012 Dr. Tsanotelis listed a history that she "helped her grandfather" get up after he fell and "[appellant] felt the lower part of her back as well as the upper part spasm." He diagnosed lumbar sprain and strain and placed her off work. In a July 13, 2012 report, Dr. Tsanotelis opined that appellant's "lower back and now her upper back is still quite sore. All started after lifting her grandfather up after a fall. [Appellant] is starting to have some pain down her left arm no sciatic pain." He diagnosed lumbar sprain and strain and neck pain. The Board notes that these reports do not support a work-related condition as Dr. Tsanotelis attributed appellant's injury to July 4, 2012 when she assisted her grandfather from the floor.

In a July 20, 2012 report, Dr. Tsanotelis noted that appellant was seen for her lower neck and upper back discomfort that she had since May. He stated that her office had changed in May and her computer set up consisted of two screens with a keyboard in between. Dr. Tsanotelis stated that appellant had to repetitively turn her neck to look at the monitors. He diagnosed neck pain and brachial neuritis or radiculitis. While Dr. Tsanotelis mentioned repetitive neck movement at work, he did not adequately address how appellant's work factors contributed to her cervical condition. His report does not address the prior July 4, 2012 incident involving her grandfather. In a July 20, 2012 attending physician's form report, Dr. Tsanotelis checked a box "yes" that her condition was work related. The Board has held that checking a box "yes" in a

[7] *Id.*

[8] *A.C.*, Docket No. 08-1453, (issued November 18, 2008).

form report, without additional explanation or rationale, is not sufficient to establish causal relationship.[9] Dr. Tsanotelis did not adequately explain why appellant's work activities caused or aggravated her neck condition. The need for rationale regarding causal relationship is important as the record indicates that she has a degenerative condition and because of Dr. Tsanotelis' initial reports attributed her upper back and neck problems to assisting her grandfather. Dr. Tsanotelis' September 25, 2012 report noted appellant's status but did not specifically address causal relationship.[10]

The other medical reports of record are also insufficient to establish the claim. They do not provide a physician's opinion addressing whether work factors caused or contributed to a diagnosed medical condition.

The record also contains nurse's notes. However, reports by a nurse are not considered medical evidence as a nurse is not considered a physician as defined under FECA.[11] Thus, a nurse's report is not probative medical evidence.

There is insufficient medical evidence based on full or accurate medical history, explaining how appellant's employment duties caused or aggravated a cervical condition. Appellant has not met her burden of proof to establish a medical condition in the performance of duty causally related to factors of her employment.

On appeal, appellant reiterated her contentions about the employing establishment, her workstation and her duties. The issue is medical in nature. As noted, the medical evidence of record is insufficiently rationalized to meet her burden of proof.

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty, causally related to factors of her federal employment.

[9] *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[10] *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[11] *See Sean O'Connell*, 56 ECAB 195 (2004); 5 U.S.C. § 8101(2). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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