

employment duties which involved repetitive motion, walking back and forth over 100 times a day between the teller window and rear office and standing for four to six hours a day.

By letter dated October 14, 2011, 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 support of her claim, appellant submitted medical reports and diagnostic studies dated July 30, 2009 to May 12, 2011. The reports provided findings regarding appellant's right hip and leg condition.

By decision dated December 2, 2011, OWCP denied appellant's claim finding that the medical evidence of record failed to establish that her diagnosed conditions were causally related to the established factors of federal employment.

On December 27, 2011 appellant requested review of the written record before the Branch of Hearings and Review.

In support of her claim, appellant submitted a March 22, 2012 medical report from Dr. Hosea Brown, Board-certified in internal medicine. In his report, Dr. Brown reported that appellant worked for the Veterans Administration (VA) as a cashier/clerk which required prolonged standing and walking for approximately four to six hours a day, five days a week for the majority of her 10-year employment. Appellant complained of right hip, lower back and right leg pain from prolonged standing and walking due to her employment duties. Dr. Brown provided a detailed medical history and review of diagnostic reports. Upon physical examination, he diagnosed degenerative joint disease of the right hip, right hip dysplasia, degenerative joint disease of the lumbosacral spine, lumbar disc herniations and lumbar radiculopathy.

Dr. Brown opined that appellant's medical injuries arose as a result of her employment duties of prolonged standing and walking for four to six hours a day, five days a week for the past 10 years. He noted that, while she was standing at the window, she would place more weight on her right side when transferring various articles across the window because a computer was located to her left. Consequently, this employment-related activity of prolonged standing and walking for four to six hours a day and ambulation placed an increased biomechanical load preferentially on appellant's right hip as well as on her lumbosacral spine, thereby causing cumulative trauma in the form of progressive desiccation, deterioration, and destruction of the structures in both the lumbar spine and right hip. This caused the acceleration as well as aggravation of the degenerative processes in these areas thereby leading to severe degenerative joint disease of the right hip and lumbosacral spine. Dr. Brown further stated that appellant had a history of dysplasia of the right hip which was aggravated and accelerated as a direct result of appellant's federal employment duties which involved prolonged standing.

Dr. Brown stated that the employment-related induced cumulative trauma was clearly documented on all of the radiological studies. Specifically, appellant's plain x-rays of both the right hip and lumbosacral spine revealed severe degenerative changes which were documented to have increased radiologically by x-rays. Additionally, the most recent MRI scan study of the

right hip and lumbosacral spine revealed persistent severe degenerative changes. The fact that appellant's condition had worsened while she had been performing work-related duties of prolonged standing was clearly indicative of a work-related etiology of her medical conditions.

Dr. Brown stated that appellant had severe lumbosacral radiculopathy and severe degenerative and neurological damage to her right hip and low back respectively as a direct result of the performance of duties of her occupation. He concluded that she sustained a severe cumulative trauma as a direct result of performance of duties of her occupation as a cashier/clerk, which have involved both, prolonged walking and standing. These processes caused a progressive inflammation, deterioration, desiccation, and degeneration in the lumbosacral spine leading to eventual encroachment and irritation of the spinal nerves as they leave the spine in the lumbar area. This encroachment is commonly referred to as a radiculopathy with involvement of the spinal nerves, thereby causing a severe radicular-type pain and weakness in her right lower extremity which was documented on the physical examination, the nerve conduction velocity study and the MRI scan study. Therefore, Dr. Brown concluded that appellant's injuries were caused by her performance of duties as a cashier/clerk for the Department of Veterans Affairs throughout her 10-year employment history.

By decision dated May 11, 2012, the Branch of Hearings and Review set aside and remanded OWCP's December 2, 2011 decision finding that Dr. Brown's report required further development of the medical evidence. On remand, OWCP was instructed to prepare a statement of accepted facts and refer appellant and the case file for a second opinion examination with a Board-certified orthopedist for an opinion regarding whether her medical conditions were casually related to her employment activities.

On August 21, 2012 OWCP referred a statement of accepted facts, the case file and appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for an evaluation on September 19, 2012.

In an October 1, 2012 medical report, Dr. Ha'Eri reported that he examined appellant on September 19, 2012. He noted the medical reports reviewed and provided findings on physical examination. Dr. Ha'Eri diagnosed appellant with lumbar degenerative disc disease/spondylosis, severe right hip osteoarthritis and severe bilateral knee patellofemoral compartment osteoarthritis. He opined that her diagnosed conditions were not medically connected to factors of her federal employment, noting that her conditions were of a preexisting degenerative nature and only the symptoms of the underlying conditions had been aggravated by her work duties and physical activities. Dr. Ha'Eri further noted that symptoms of the preexisting underlying condition of appellant's lower back and right knee were aggravated by her work duties/physical activities. He found these were progressive degenerative conditions which would gradually worsen over the years. Dr. Ha'Eri concluded that appellant was not capable of performing her regular employment duties as a result of her conditions, but that these conditions were not work related.

By decision dated November 29, 2012, OWCP denied appellant's claim finding that she failed to establish that her diagnosed conditions were causally related to factors of her federal employment. It noted that the weight of the medical evidence rested with the report of Dr. Ha'Eri, the second opinion physician.

On May 9, 2013 appellant requested reconsideration of OWCP's decision. In support of her request, she submitted medical evidence previously of record as well as an April 25, 2013 follow-up report from Dr. Brown.

In his April 25, 2013 report, Dr. Brown stated that he reviewed Dr. Ha'Eri's October 1, 2012 medical report and disagreed with his assertion that appellant's medical conditions were nonindustrial because they were preexisting and degenerative. He noted that Dr. Ha'Eri erroneously stated that she suffered from "symptoms" of the underlying conditions which were aggravated by her work duties and noted that a preexisting medical condition is considered work related under FECA when it has been aggravated by employment duties. Dr. Brown noted that Dr. Ha'Eri did admit that appellant was experiencing a severe aggravation of symptoms and clearly, there had been a dynamic change in her medical conditions. He further noted that not only did she have an increase in symptoms, but it was also obvious that her medical conditions of degenerative joint disease of the right hip, right hip dysplasia, degenerative joint disease of the lumbosacral spine, lumbar disc herniation and lumbosacral radiculopathy had been permanently aggravated by her work-related duties. Dr. Brown stated that Dr. Ha'Eri only listed Dr. Brown's March 22, 2012 report without indicating whether it had been properly reviewed as Dr. Ha'Eri failed to address Dr. Brown's opinion on causal relation. He went on to provide an explanation of causation regarding appellant's work-related duties and medical conditions as previously noted in his prior report.

By decision dated August 5, 2013, OWCP affirmed the November 29, 2012 decision finding that appellant failed to establish that her diagnosed medical conditions were caused by her work-related duties. It noted that the weight of the medical evidence rested with Dr. Ha'Eri, the second opinion physician.

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 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.² These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.³

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.⁴ The second

² Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

³ Michael E. Smith, 50 ECAB 313 (1999).

⁴ Elaine Pendleton, *supra* note 2.

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.⁵

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.⁶ The opinion of the physician 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. 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.⁷

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS

The Board finds this case is not in posture for decision as to 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

⁵ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁶ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁷ *James Mack*, 43 ECAB 321 (1991).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

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.¹⁰ 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.¹¹

In its August 5, 2013 decision, OWCP denied appellant's claim for failing to establish that her medical conditions were causally related to her federal employment duties, noting that the weight of the medical evidence rested with Dr. Ha'Eri, the second opinion physician. The Board finds, however, that a conflict exists in the medical evidence with respect to whether appellant's diagnosed conditions were caused or aggravated by her federal employment duties.¹²

In a March 22, 2012 medical report, Dr. Brown provided detailed review of appellant's medical history, diagnostic reports and physical examination and diagnosed degenerative joint disease of the right hip, right hip dysplasia, degenerative joint disease of the lumbosacral spine, lumbar disc herniations and lumbar radiculopathy. He opined that her medical injuries arose as a result of her employment duties of prolonged standing and walking for four to six hours a day, five days a week for the past 10 years. Dr. Brown noted that, while appellant was standing at the window, she placed more weight on her right side when transferring various articles across the window because a computer was located to her left. He stated that prolonged standing, ambulation and walking for four to six hours a day placed an increased biomechanical load preferentially on her right hip as well as on her lumbosacral spine, thereby causing cumulative trauma in the form of progressive desiccation, deterioration, and destruction of the structures in both the lumbar spine and right hip. This caused the acceleration as well as aggravation of the degenerative processes in these areas thereby leading to severe degenerative joint disease of the right hip and lumbosacral spine. Dr. Brown further stated that appellant had a history of dysplasia of the right hip which was aggravated and accelerated as a direct result of her federal employment duties which involved prolonged standing. He noted that appellant's diagnostic tests revealed severe degenerative changes and concluded that she sustained a severe cumulative trauma as a direct result of performance of duties of her occupation as a cashier/clerk, which have involved both, prolonged walking, and standing. These processes caused a progressive inflammation, deterioration, desiccation, and degeneration in the lumbosacral spine leading to eventual encroachment and irritation of the spinal nerves as they leave the spine in the lumbar area. This encroachment is commonly referred to as a radiculopathy with involvement of the spinal nerves, thereby causing a severe radicular-type pain and weakness in her right lower extremity which was documented on the physical examination, the nerve conduction velocity study and the MRI scan study.

¹⁰ 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).

¹¹ *Phillip L. Barnes*, 55 ECAB 426 (2004); see also *Virginia Richard, id.*; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

¹² *F.B.*, Docket No. 13-2066 (issued March 11, 2014).

OWCP referred appellant and the case file for a second opinion examination with Dr. Ha'Eri on September 19, 2012. In his October 1, 2012 report, Dr. Ha'Eri diagnosed lumbar degenerative disc disease/spondylosis, severe right hip osteoarthritis and severe bilateral knee patellofemoral compartment osteoarthritis. Contrary to the findings of Dr. Brown, Dr. Ha'Eri opined that appellant's diagnosed conditions were not medically connected to factors of her federal employment, noting that her conditions were of a preexisting degenerative nature and only the symptoms of the underlying conditions had been aggravated by her work duties and physical activities. Dr. Ha'Eri found that appellant developed progressive degenerative conditions which would gradually worsen over the years. He concluded that she was not capable of performing her regular employment duties as a result of her conditions, but that these conditions were not work related.

In an April 25, 2013 follow-up report, Dr. Brown disagreed with Dr. Ha'Eri's assertion that appellant's medical conditions were nonindustrial because they were preexisting and degenerative. He noted that Dr. Ha'Eri erroneously stated that she suffered from "symptoms" of the underlying conditions and noted that a medical condition is considered work related under FECA when it has been aggravated by employment duties. Dr. Brown noted that Dr. Ha'Eri did admit that appellant was experiencing a severe aggravation of symptoms and clearly, there had been a dynamic change in her medical conditions. He further noted that not only did appellant have an increase in symptoms, but it was also obvious that her medical conditions of degenerative joint disease of the right hip, right hip dysplasia, degenerative joint disease of the lumbosacral spine, lumbar disc herniation and lumbosacral radiculopathy had been permanently aggravated by her work-related duties. Dr. Brown stated that Dr. Ha'Eri only listed his March 22, 2012 report without indicating that it had been properly reviewed as he failed to ignore or address his opinion on causal relation. He went on to provide an explanation of causation regarding appellant's work-related duties and medical conditions as previously noted in his prior report.

The Board finds that the opinion of Dr. Brown is of equal weight to the opinion of Dr. Ha'Eri. The physicians reached an opposite conclusion regarding whether appellant's diagnosed medical conditions were caused or aggravated by her federal employment duties. Dr. Ha'Eri opined that appellant's symptoms were caused by her work-related duties but that her diagnosed conditions were preexisting. Dr. Brown opined that her diagnosed conditions were permanently aggravated by her work-related duties. When there is a conflict of opinion between the claimant's attending physician and the physician performing an examination for the government, OWCP shall appoint a third physician to resolve the disagreement.¹³ The Board notes that where a person has a preexisting condition that is not disabling, but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable.¹⁴ The impartial medical specialist should review both Dr. Brown and Dr. Ha'Eri's reports, along with the case record and statement of accepted facts, and provide a rationalized opinion as to whether appellant's medical conditions are causally related to factors of her employment, either directly or through

¹³ 5 U.S.C. § 8123(a).

¹⁴ *S.W.*, Docket No. 11-1678 (issued February 22, 2012); *Arnold Gustafson*, Docket No. 89-438 (issued October 30, 1989).

aggravation, precipitation or acceleration. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.¹⁵

CONCLUSION

The Board finds that the case is not in posture for decision as there is an unresolved conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.¹⁶

Issued: November 21, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *J.K.*, Docket No. 13-327 (issued August 7, 2013).

¹⁶ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.