

stooping, twisting and reaching above the shoulder and repetitively lifting mail trays weighing 20 to 40 pounds. Appellant stopped work on November 30, 2012. The employing establishment noted that she had a history of work-related injuries and it was her first day back from a prior work injury.

In a duty status report and an attending physician's report dated December 4, 2012, Dr. Samy F. Bishai, Board-certified in emergency medicine, noted that on November 20, 2012, appellant was working and lifting over 160 trays of mail into a processing machine and felt numbness in her feet, back, neck and shoulders. He advised that she also hit her elbows on a desk and she stumbled and fell to the floor. Dr. Bishai provided findings and diagnosed a herniated nucleus pulposus, internal derangement of the left shoulder and cervical disc. He checked the box "yes" in response to whether he believed the condition was caused or aggravated by the employment activity and advised that appellant was disabled from December 4, 2012 to January 18, 2013. OWCP also received a December 3, 2012 disability certificate from a nurse and discharge instructions.

In a December 6, 2012 statement, Denise Santos, a coworker, noted that on December 1, 2012 she was walking past machine number 18 and saw appellant with a red face and neck. She indicated that appellant asked her for her help as she was going to pass out. Ms. Santos noted that she tried to keep appellant from falling but about halfway down, she fell and hit "pretty hard." She indicated that appellant's eyes rolled back and she looked dazed for a few minutes and started to cry. Ms. Santos noted calling 911 and waiting until the ambulance arrived.

In a letter dated December 13, 2012, Larry E. Osalkowski, a health and human resource management specialist, controverted the claim. He noted that this was appellant's third claim since June 11, 2011 and asserted that she did not want to work.¹ Mr. Osalkowski noted that on July 11, 2012, she underwent a functional capacity evaluation that demonstrated sub-maximum effort. He advised that on November 30, 2012 appellant returned to her date-of-injury job and that, at 4:35 p.m., she was at a supervisor desk filling out a leave form to go home, when she allegedly fainted.

On December 14, 2012 OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In a December 4, 2012 narrative report, Dr. Bishai noted that appellant suffered injuries to her neck, back and left shoulder while working for the employing establishment. He advised that she was previously off work due to accepted injuries that included left rotator cuff syndrome and lumbosacral neuritis. Dr. Bishai stated that appellant's supervisor ordered appellant to return to full duty on November 26, 2012 but she did not receive those orders until November 29, 2012. Appellant arrived at work at 10:00 p.m. on November 29, 2012 and was assigned to work on the delivery bar code sorter machine which processed the letters into carrier sequence. She started setting up the work by printing labels on the trays and moved the general purpose mail container (GPMC) which weighed about 242 pounds about 10 feet. Additionally, appellant was engaged in sweeping mail from 10:00 p.m. to 11:45 p.m., which involved grabbing handfuls of mail from

¹ Appellant's other claims are not presently before the Board.

the machine onto the rack and bending, stooping, twisting and reaching above her head. Dr. Bishai also advised that from 11:45 p.m. until 12:00 a.m., she was on a break and that afterwards, she returned to work on the same machine until 3:00 a.m., stopping for a half hour lunch. From 3:00 a.m. until 4:30 a.m., appellant started feeding the machine, which included lifting over 160 trays of mail weighing from 20 to 40 pounds each. Dr. Bishai advised that at 4:30 a.m. she informed her supervisor that she was having severe pain and burning in her neck radiating down both shoulders and into her arms and hands, as well as down her legs. Appellant indicated that her supervisor asked her to complete a leave slip and that afterwards, she fell to the floor, tripping over a chair. She was taken to the emergency room, given a shot and sent home. Dr. Bishai noted findings that included tenderness over the dorsolumbar spine in the midline and moderate paraspinal muscle spasm affecting the paraspinal muscles of the dorsolumbar region. Appellant had normal range of motion and positive sciatic nerve stretching.

Dr. Bishai diagnosed chronic lumbosacral strain; herniated disc as L5-S1; radiculopathy right and left legs, more severe on the left; bulging discs at L3-4 and L4-5; herniated lumbar disc at L5-S1; radiculopathy right and left legs, more severe on the left; bulging discs at L3-4 and L4-5; lumbar degenerative disc disease; cervical disc syndrome with radiculopathy and left shoulder internal derangement. He opined that appellant had additional injuries to her back with radiculopathy being worse than before. Dr. Bishai advised that she had new injuries to her neck, arms and left shoulder. He noted that appellant should not have returned to work and that her return was due to poor judgment by a second opinion physician, Dr. Jonathan Black, a Board-certified orthopedic surgeon.² Dr. Bishai recommended physical therapy and medication. In a January 3, 2013 report, he noted appellant's history and treatment. Dr. Bishai repeated his prior diagnoses as well as sprain and contusion of the right elbow.

On January 9, 2013 OWCP received an undated statement from appellant, who noted being assigned to a machine that required that she print labels, put the labels on trays and move 10 GPMCs weighing 242 pounds each. Appellant indicated that she had to sweep mail from the machine to mail racks, sweep stackers and lift trays of mail weighing 20 to 40 pounds each. She stated that she performed her duties repeatedly, took a lunch break from 2:00 a.m. to 2:30 a.m. and then returned to the same machine. At around 4:30 a.m., appellant was in severe pain and had burning in her neck, down her shoulders, arms, hands and back. She indicated that she later bumped her right elbow on a desk and passed out, falling to the floor. OWCP received other reports, including several diagnostic reports, a December 4, 2012 nurses note and an unsigned duty status report dated January 3, 2013.

In a January 5, 2013 statement, Mr. Osalkowski reiterated his assertions that appellant's claim should not be accepted.

By decision dated January 18, 2013, OWCP denied the claim. It found that the injury or events did not occur as alleged and that appellant did not submit sufficient medical evidence.

Appellant requested a telephonic hearing, which was held on May 16, 2013. During the hearing, counsel noted that she had a prior accepted work injury under a separate claim and was

² The employing establishment indicates that Dr. Black was a second opinion physician utilized by OWCP in a prior claim.

sent to Dr. Black. He argued that appellant was improperly returned to full-duty work based upon Dr. Black's opinion, even though her attending physician stated that she could not work. Counsel argued that there was a medical conflict in the other claim.

Following the hearing, counsel, on June 11, 2013, restated his argument that appellant was forced back to work against the wishes of her physician on November 30, 2012 and sustained additional injuries while working on that date. Mr. Osalkowski provided a June 18, 2013 statement noting his arguments regarding why the claim should be denied. Additional evidence was also received that included another statement from appellant describing her activities on the date of injury and a December 4, 2012 ultrasound of the cervical soft tissue which revealed thickening of the paravertebral muscles at C6-7.

In an August 12, 2013 decision, an OWCP hearing representative affirmed OWCP's January 18, 2013 decision. He found that the medical evidence was insufficient to establish that the diagnosed medical conditions were causally related to the claimed work activities during the six hours that appellant worked on November 30, 2012.

On October 16, 2013 appellant requested reconsideration and reiterated that she was injured at work.

Appellant also submitted additional evidence. In reports dated August 21, 2013, Dr. Bishai noted reviewing her history and provided findings on examination. He diagnosed chronic lumbosacral strain; herniated lumbar disc at L5-S1; radiculopathy right and left legs, more severe on the left; bulging discs at L3-4 and L4-5; lumbar degenerative disc disease; cervical disc syndrome with radiculopathy; internal derangement of the left shoulder; acromial impingement of the left shoulder; right elbow sprain; and right elbow contusion. Dr. Bishai opined that appellant was totally disabled due to her painful conditions. He indicated that she had severe and permanent aggravation of her preexisting conditions that she had while working for the employing establishment. Dr. Bishai stated that appellant was forced to return to work against his recommendations and had an aggravation on November 30, 2012. He repeated his previous description of her activities and opined that the injuries she suffered on that date were "simply an aggravation of preexisting conditions" that she suffered from previously. Dr. Bishai stated:

"[Appellant] also suffered additional symptoms on that day as she suffered from pain in her neck with radiation down the arms and she suffered aggravation of her shoulder injuries as well as additional injuries to the shoulders and she also suffered aggravation of the preexisting conditions in her back leading to severe back pain with radiculopathy in both legs, more severe on the left side. The causal relationship between the patient's current symptoms and the symptoms that she developed on the date of the injury of November 30, 2012 and its relationship to her work activities while she was working for the employing establishment on that date of November 30, 2012 are clear and easy to explain. The patient was using a lot of repetitive movements of bending, twisting, pushing, pulling, reaching above the shoulder and extending her body."

Dr. Bishai opined that it was a “a well-known fact that patients who suffer from disc disease or injuries as this patient had suffered from due to previous work injuries that she suffered are prone to develop aggravation of these conditions because of these repetitive movements of bending, twisting, pulling, pushing, reaching above the shoulder and extending her body.” He explained that appellant worked for six hours doing many movements including reaching above the shoulder, twisting her body and lifting a stacker paddle above her shoulder. Dr. Bishai noted that she had to get up on her toes to place the mail and then place the mail on trays, while twisting, turning and using both hands to get mail. He stated that the trays weighed approximately 20 pounds and appellant pushed a cart that weighed 1,000 pounds. Dr. Bishai opined that all of these movements that she did while using her arms above her shoulder level “have contributed and caused an aggravation of the preexisting problems with her shoulders including the torn rotator cuff muscles that were diagnosed as well as an aggravation of the shoulder impingement syndrome conditions that have been diagnosed in this case.” He noted that appellant’s back and neck conditions were explained because lifting caused her to expend a lot of energy and caused injury to the discs that usually suffered an aggravation of “these preexisting problems with the discs in terms of the rupture of the annulus fibrosis part of the discs and the bulging or herniation of the discs due to the nucleus pulposus bulging through the tears in the annulus fibrosis.” Dr. Bishai stated that this was a pathophysiological process that led to her severe symptoms in her neck and back as the disc herniation and bulges in both the cervical and lumbosacral spine led to radiculopathy in the arms and legs. He advised that causal relationship existed between appellant’s symptoms following the November 30, 2012 injury and her activities at work that night. Dr. Bishai opined that he had provided a rationalized opinion explaining that, after working six hours, she had an aggravation of her preexisting neck, back and shoulder conditions. He asserted that his opinion showed the activities that appellant did at work were related to her pain symptoms. Dr. Bishai opined that it was well known that when a patient had serious problems such as herniated discs and radiculopathy, in the arms and legs, as well as shoulder injuries due to rotator cuff syndrome and shoulder impingement, they could easily be aggravated by the type of work activities that she performed on November 30, 2012. He stated that within a reasonable degree of medical certainty, the diagnosed conditions were directly related to appellant’s work activities on November 20, 2012 and these activities aggravated her preexisting conditions that she suffered previously at work. Dr. Bishai indicated that her problems were all work related.

OWCP received additional records that include treatment notes dated November 22, 2013 from Dr. Gregory F. Saric, Board-certified in family medicine and a January 8, 2014 report from Dr. Robert H. Reppy, an osteopath specializing in preventative medicine. Dr. Reppy examined appellant and repeated the diagnoses provided by Dr. Bishai.

By decision dated January 10, 2014, OWCP denied modification of its prior decision.

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 FECA³ and that an injury was sustained in the performance of duty.⁴ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁶ The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷ The medical evidence required to establish causal relationship is usually rationalized medical 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 relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

ANALYSIS

Appellant alleged that on November 30, 2012, she was feeding and sweeping a machine, bending, stooping, twisting and reaching above the shoulder; and repetitively lifting mail trays weighing 20 to 40 pounds in the performance of duty. The Board finds that the evidence supports that she performed such job duties on November 30, 2012. Although OWCP found that the medical evidence was insufficient to establish the claim, the Board finds that the case requires further development regarding whether appellant sustained a new traumatic injury in the performance of duty.

Appellant submitted medical reports from Dr. Bishai which support that her work activities on November 30, 2012 aggravated her preexisting conditions and caused total disability. In his August 21, 2013 report, Dr. Bishai reviewed her history, noted findings and diagnoses and concluded that she had severe and permanent aggravation of her preexisting conditions due to her work at the employing establishment. He described appellant's work activities and opined that her injuries were "simply an aggravation of preexisting conditions" that

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *James E. Chadden Sr.*, 40 ECAB 312 (1988).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁷ *Id.* For a definition of the term "traumatic injury," see 20 C.F.R. § 10.5(ee).

⁸ *D.E.*, 58 ECAB 448 (2007).

she had previously in addition to new symptoms she sustained. Dr. Bishai supported causal relationship noting that she used a lot of repetitive movements and asserted that it was “well known” that patients with disc disease or injuries such as those sustained by her were prone to aggravate those conditions because of these repetitive movements of bending, twisting, pulling, pushing, reaching above the shoulder and extending her body. He opined that all of these movements as well as lifting above the shoulder aggravated appellant’s diagnosed conditions. The Board finds that this report, while not completely rationalized, is consistent in indicating that appellant sustained an employment-related cervical condition.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility in the development of the evidence to see that justice is done.⁹ While Dr. Bishai’s reports are not sufficiently rationalized to discharge appellant’s burden of proving that her claimed conditions were caused or aggravated by factors of her employment on November 30, 2012, these reports are uncontroverted and raise an inference of causal relationship sufficient to require further development of the case record by OWCP.¹⁰

On remand, OWCP should refer appellant, the case record and a statement of accepted facts to the appropriate specialist for an evaluation and a rationalized medical opinion regarding the cause of her condition.¹¹ After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

On appeal, counsel made several arguments in support of appellant’s claim. In light of the Board’s disposition to remand her claim, it is premature to address these arguments.

CONCLUSION

The Board finds that this case is not in posture for decision. .

⁹ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁰ *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

¹¹ In view of assertions in the record by appellant and the employing establishment, that her symptoms have a connection with prior injury claims, OWCP may wish to consider whether these claims should be doubled.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision.

Issued: October 3, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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