

Upon development of the claim, OWCP found that there was a conflict in the medical opinion evidence between Dr. Frederick Lieberman, an attending Board-certified orthopedic surgeon, who found that she sustained work-related cervical and right arm injuries, and Dr. Robert Draper, a Board-certified orthopedic surgeon and an OWCP referral physician, who found that she did not sustain such injuries.²

To resolve the conflict, OWCP referred appellant to Dr. Andrew Collier, Jr., a Board-certified orthopedic surgeon, for an impartial examination and opinion on the cause of her claimed cervical and right arm conditions. In July 1, 2009 and June 3, 2010 reports, Dr. Collier found that she did not sustain a work-related cervical or right arm condition. In July 28 and December 21, 2010 decisions, OWCP denied appellant's occupational disease claim based on Dr. Collier's opinion.

In a December 12, 2011 order,³ the Board set aside the December 21, 2010 decision and remanded the case for further development. The Board found that OWCP had not established that Dr. Collier was properly selected as the impartial medical specialist and directed OWCP, on remand, to select another impartial medical specialist under the appropriate procedures.⁴

OWCP referred appellant to Dr. Walter Dearolf, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Dearolf found that appellant had no work-related right upper extremity problems and noted that her condition was related to degenerative disease and the aging process. In a March 26, 2012 decision, OWCP denied appellant's claim based on the referee opinion, but this decision was set aside by an OWCP hearing representative on October 12, 2012. The hearing representative found that Dr. Dearolf was not properly selected as an impartial medical specialist. He directed OWCP, on remand, to refer appellant to another impartial medical specialist.

On remand, OWCP referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on her occupational disease claim. The evidence of record contains documents showing that OWCP applied the Medical Management Application (MMA) system to select a new impartial medical specialist.⁵ Dr. Simon was provided a detailed statement of accepted facts.

In a December 14, 2012 report, Dr. Simon concluded that appellant did not sustain a work-related occupational disease. He reported the findings of his physical examination and diagnosed status post excision of distal clavicle and acromioplasty on the left shoulder, limited

² OWCP had previously accepted, under a separate claim, that appellant sustained a traumatic injury at work on June 19, 1991. It accepted the claim for left shoulder strain, left rotator cuff strain, left rotator cuff tear, and left shoulder impingement. On March 4, 1992 appellant underwent authorized left shoulder surgery, including excision of her left distal clavicle, and acromioplasty.

³ Docket No. 11-1057 (issued December 12, 2011).

⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013). OWCP uses the medical management assistant to schedule referee examinations using a strict rotational scheduling feature.

⁵ *Id.*

motion in both shoulders most likely due to frozen shoulder syndrome, multilevel cervical disc disease as established by diagnostic testing, upper extremity cervical nerve root irritation, and findings of carpal tunnel syndrome on diagnostic testing, but not on physical examination. Dr. Simon found that appellant had “double-crush syndrome” at the wrist and cervical spine. He concluded that she had a condition that was progressive and degenerate, namely degenerative disc disease of the cervical spine. Dr. Simon opined that appellant’s condition was not a work-related disease. Rather, he found that it was a disease related to heredity and the weakness of tissues with normal use that develop in certain people with subsequent breakdown or degeneration. Furthermore, it was not related to any condition affecting the left shoulder since the condition was actually central in the cervical spine. Dr. Simon noted that appellant had developing degenerative disc disease of the cervical spine unrelated to her work that had caused symptoms radiating to both her right and left upper extremities. He noted that she had no work-related aggravation and indicated that her nonwork-related condition would further worsen with the passage of time.

In a January 16, 2013 decision, OWCP denied appellant’s occupational disease claim finding that the weight of the medical opinion evidence with respect to this matter rested with the opinion of Dr. Simon. It found that he was properly selected as the impartial medical specialist and that his December 12, 2012 report was well rationalized with respect to causal relationship because he was provided with a detailed statement of accepted facts regarding her job duties over the years.

Appellant requested a video hearing with an OWCP hearing representative. During the May 22, 2013 hearing, counsel argued that the impartial medical specialist, Dr. Simon, was improperly selected. He also asserted that, even if Dr. Simon was properly selected, his opinion was not sufficiently well rationalized to carry the weight of the medical opinion evidence. Counsel argued that, because Dr. Simon had diagnosed various medical conditions, he should have better explained whether or not appellant’s work duties had any impact on these diagnosed conditions either by direct cause or by aggravation.

In an August 7, 2013 decision, the hearing representative affirmed the January 16, 2013 decision denying appellant’s occupational disease claim. She found that Dr. Simon was properly selected as the impartial medical specialist and that his December 12, 2012 report was well rationalized with respect to causal relationship.

In a decision dated June 24, 2014,⁶ the Board set aside OWCP’s August 7, 2013 decision and remanded the case to OWCP for further development. The Board found that the record established that OWCP properly utilized its MMA system in selecting Dr. Simon as the impartial medical specialist, but that his opinion was in need of clarification. The Board found that his conclusion on causal relationship lacked sufficient medical rationale. The Board noted that Dr. Simon did not discuss appellant’s work duties in detail or explain why they were not competent to cause aggravation of an underlying condition.

⁶ Docket No. 14-137 (issued June 24, 2014).

On remand, Dr. Simon was instructed to provide a supplemental report in accordance with the Board decision. He was provided a detailed statement of accepted facts regarding appellant's job duties over the years.

In a July 14, 2014 report, Dr. Simon opined that the work duties carried out by appellant were somewhat varied, noting that from 1985 until 1991 she worked at the employing establishment performing housekeeping, cleaning, and emptying trash cans. He discussed her 1991 work-related left shoulder injury and indicated that in 1992 she began reporting pain in her right shoulder, right arm, neck, and hand. Between 1991 and 1994 appellant was doing filing for the employing establishment and from 1994 until 1997 she was answering the telephone and using a keyboard as a telephone operator. Dr. Simon noted that from 1997 to 2012 she was a travel clerk doing filing and keyboarding. Appellant retired from work on January 29, 2011, which was approximately two years before the date of her examination of December 14, 2012. Dr. Simon noted that she reported still being symptomatic at the time of that examination despite the fact that she had two years in which she was not doing her regular work. He concluded that none of appellant's jobs were "heavy-duty" in nature.

In his July 14, 2014 report, Dr. Simon further indicated that there was no connection in the literature between the types of jobs that appellant held and the causation of degenerative disc disease of the cervical spine. There was no evidence of any specific accident in any one of these periods of time. Dr. Simon noted that appellant reported that she just gradually began to feel discomfort in her right shoulder after the treatment to her left shoulder in 1992. He noted that, considering the work that she did from 1985 to the present, there was no way of establishing any relationship between any of the jobs that she held and her condition of degenerative disc disease in the cervical spine. Dr. Simon believed that this disease was a developmental condition that increased in likelihood with the passage of time (aging) and with a genetic predisposition to this disease. He opined that it was not related to appellant's work situation whatsoever. Dr. Simon indicated that the job activities appellant performed were not competent to cause her degenerative disc disease of the cervical spine, and therefore did not cause an aggravation of this degenerative condition. Although appellant reported being symptomatic, there was no condition that could have precipitated the symptoms other than the progressive condition of degenerative disc disease in the cervical spine. Dr. Simon noted that it continued to be his opinion that there was no causal connection between her work situation and her onset of progressive degenerative disc disease in the cervical spine, and there was no evidence of an aggravation of this disease process by any one of her jobs which were of a light and mainly sedentary nature after her initial injury to her left shoulder in 1991.

By decision dated August 4, 2014, OWCP found that appellant did meet her burden of proof to establish her claim for a work-related occupational disease. It found that the weight of the medical evidence regarding whether she sustained a work-related occupational disease rested with the well-rationalized opinion of Dr. Simon, the impartial medical specialist.

Appellant, through counsel, requested a video hearing with an OWCP hearing representative. During the December 22, 2014 hearing, counsel argued that Dr. Simon failed to

provide an accurate description of her work duties and therefore his opinion was not based on an accurate factual history.⁷

By decision dated March 11, 2015, the hearing representative affirmed OWCP's August 4, 2014 decision denying appellant's claim for work-related occupational disease.

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 is causally related to the employment injury. These are the essential elements of each and every compensation claim, regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁸

OWCP regulations define the term occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift.⁹ 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.¹⁰

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹¹ 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 employee.¹² Neither the mere fact that a disease or condition manifests itself during a period

⁷ After the hearing, appellant submitted a statement providing an additional description of her work duties.

⁸ *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁹ 20 C.F.R. § 10.5(ee).

¹⁰ *Supra* note 8.

¹¹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹³

Section 8123(a) of FECA provides in pertinent part: “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.”¹⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶

ANALYSIS

After development of the medical evidence in this occupational disease claim, OWCP determined that there was a continuing conflict in the medical opinion evidence and referred her to Dr. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding her claim for a work-related occupational disease. It denied appellant’s claim based on his December 14, 2012 report. In a decision dated June 24, 2014,¹⁷ the Board found that Dr. Simon was properly selected as the impartial medical specialist, but that his opinion was in need of clarification. The Board noted that he did not discuss appellant’s work duties in detail or explain why they were not competent to cause any aggravation. On remand, Dr. Simon produced a supplemental report dated July 14, 2014. In decisions dated August 4, 2014 and March 11, 2015, OWCP denied appellant’s claim for a work-related occupational disease, finding that the weight of the medical evidence with respect to this matter was represented by the opinion of Dr. Simon.

The Board finds that appellant has not established a work-related occupational disease. The weight of the medical evidence with respect to this matter is represented by the thorough, well-rationalized opinion of Dr. Simon, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹⁸ His December 14, 2012 and July 14, 2014 reports establish that appellant did not sustain a work-related occupational disease.

In his reports, Dr. Simon provided an extensive description of appellant’s factual and medical history, including a recitation of her job duties and treatment for medical problems over the years. He noted that, considering the work that she did from 1985 to the present, there is no

¹³ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁷ Docket No. 14-137 (issued June 24, 2014).

¹⁸ *See supra* note 16.

way of establishing a relationship between any of the jobs that she held and her condition of degenerative disc disease in the cervical spine. This disease was a developmental condition that increased in likelihood with the passage of time and with a genetic predisposition to this disease. It was not related to appellant's work situation whatsoever. Dr. Simon indicated that the job activities she performed were not competent to cause her degenerative disc disease of the cervical spine, and therefore did not cause an aggravation of this degenerative condition.

The Board has carefully reviewed the opinion of Dr. Simon and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Simon provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁹

On appeal counsel argues that Dr. Simon's opinion was of limited probative value because he did not present an accurate presentation of appellant's work duties. However, the Board notes that, particularly in his July 14, 2014 report, Dr. Simon provided a detailed and accurate picture of her various work duties over the years. He was provided a detailed statement of accepted facts regarding appellant's job duties over the years, and his account of her duties is fully in accordance with this statement.²⁰ Dr. Simon provided medical rationale for his opinion by explaining that the types of job duties she performed would not have been competent to cause degenerative disease or aggravate a preexisting degenerative condition.

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.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish her claim for a work-related occupational disease.

¹⁹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

²⁰ Counsel argues that Dr. Simon erred that when he indicated that appellant did not perform jobs that were "heavy-duty" in nature. As noted, Dr. Simon provided a detailed and accurate account of her work duties over the years and the Board does not find that he mischaracterized those duties.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board