

Federal Employees' Compensation Act³ (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 has established a cervical condition causally related to her April 10, 1996 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On April 22, 1996 appellant, then a 35-year-old letter sorting machine operator, filed a traumatic injury claim (Form CA-1) alleging that, on April 10, 1996, a machine door struck her left arm. OWCP accepted the claim for left upper arm contusion, left rotator cuff sprain, and a closed dislocation of the left shoulder.

Following her injury, appellant worked limited duty until the employing establishment withdrew her job in September 2010 under the National Reassessment Process. OWCP paid her wage-loss compensation beginning September 2010.

A magnetic resonance imaging (MRI) scan of the cervical spine, obtained on February 12, 1997, showed no evidence of a disc herniation. An electromyogram (EMG) and nerve conduction velocity (NCV) study dated March 22, 2002 showed no evidence of cervical radiculopathy, brachial plexopathy, or distal mononeuropathy. A July 27, 2006 cervical MRI scan revealed reversal of the cervical lordosis and disc protrusions at C4-5 and C5-6. A cervical MRI scan dated February 18, 2010 demonstrated a disc herniation on the left at C6-7 flattening the thecal sac and disc protrusions from C3 through C6.

In a report dated October 26, 2010, Dr. Alfredo Sardinas, an attending Board-certified orthopedic surgeon, described appellant's April 10, 1996 employment injury. He opined that the "force of impact injured her left shoulder and caused her neck to turn rapidly causing a flexion and extension injury to her cervical spine." Dr. Sardinas diagnosed a cervical herniated disc and internal derangement of the left shoulder due to the April 10, 1996 work injury. He noted that appellant complained of neck pain at the time of his initial evaluation on September 13, 1996.

On December 11, 2012 Dr. Sardinas again opined that appellant sustained a herniated cervical disc due to her accepted work injury as the impact of the door caused her neck to quickly turn resulting in a flexion and extension injury.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 14-1845 (issued December 29, 2014); Docket No. 16-1072 (issued July 19, 2016).

An OWCP medical adviser reviewed the evidence on March 5, 2013. He noted that a February 12, 1997 MRI scan showed no evidence of a cervical disc herniation and that there was no evidence of cervical radiculopathy on a March 22, 2002 EMG/NCV studies. The medical adviser opined that appellant's cervical condition was unrelated to her April 10, 1996 left shoulder injury, noting that there was no evidence of cervical disc herniations until a July 2005 MRI scan.

By letter dated April 17, 2013, OWCP referred appellant to Dr. James E. Butler, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he address whether her cervical condition was caused or aggravated by the April 10, 1996 employment injury.

Dr. Butler, on May 6, 2013, described appellant's complaints of pain in her left arm, left shoulder, and left hand. He diagnosed cervical degenerative disc disease without neurological deficits and a resolved left shoulder injury. Dr. Butler noted that a February 12, 1996 MRI scan did not show a cervical disc herniation and that electrodiagnostic studies performed on March 22, 2002 failed to demonstrate radiculopathy. He related that a July 25, 2005 MRI scan showed C4-5 and C5-6 disc protrusions and a February 18, 2010 MRI scan showed herniations/ protrusions at C3 through C7. Dr. Butler advised that appellant's cervical conditions were not related to the accepted employment injury, but were instead degenerative in nature.

OWCP determined that a conflict in medical evidence existed regarding whether appellant sustained a cervical condition causally related to her employment injury. It referred her to Dr. Frank Barnes, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated March 6, 2014, Dr. Barnes reviewed the history of the April 10, 1996 work injury and the medical evidence of record. He diagnosed a partial rotator cuff tear of the left shoulder with subacromial impingement and cervical degenerative disc disease based on two MRI scans showing "progression over the years, compatible with the condition's natural history." Dr. Barnes noted that appellant complained of numbness in her left hand to Dr. Sardinas on September 2, 1996, and he had obtained a cervical spine MRI scan. He opined that appellant's cervical condition was unrelated to her April 10, 1996 employment injury, noting that she did not receive treatment for a neck condition until several years after her injury. Dr. Barnes concluded that her degenerative disc disease of the cervical spine was not related to her accepted employment injury.

By decision dated June 18, 2014, OWCP denied appellant's request to expand her claim to include a cervical condition causally related to the April 10, 1996 employment injury. It found that Dr. Barnes' report constituted the weight of the evidence and established that she did not sustain cervical degenerative disc disease due to her accepted work injury.

Appellant appealed to the Board. By decision dated December 29, 2014, the Board affirmed the June 18, 2014 decision.⁵ It found that Dr. Barnes' opinion, as the impartial medical examiner (IME), represented the special weight of the evidence and was sufficient to resolve the conflict in medical opinion regarding whether appellant sustained an employment-related cervical condition. The Board discussed counsel's argument that the statement of accepted facts (SOAF) did not disclose that she had complained of neck pain after the April 10, 1996 injury, that

⁵ Docket No. 14-1845 (issued December 29, 2014).

Dr. Barnes was not properly selected, and that he did not resolve the conflict in medical opinion. The Board found that Dr. Barnes was provided a complete and accurate background, was properly selected as a referee physician, and provided a rationalized medical opinion that resolved the conflict.

On December 17, 2015 appellant, through counsel, requested reconsideration. She again argued that she complained of cervical pain at the time of her September 13, 1996 evaluation with Dr. Sardinas. Counsel maintained that the SOAF was incomplete as it failed to indicate that appellant alleged a neck condition in addition to a left shoulder condition due to her work injury and that consequently the opinions of Dr. Butler and Dr. Barnes were not based on a complete background. She further asserted that Dr. Barnes' opinion was not rationalized or based on a complete review of the record as he did not review medical evidence regarding her cervical injury until years after her April 10, 1996 injury.

In support of her reconsideration request, appellant submitted photographs of the work area where she alleged that the April 10, 1996 employment injury occurred. She resubmitted medical evidence of record, including cervical MRI scans dated February 12, 1997 and July 27, 2005, an October 26, 2010 report from Dr. Sardinas, and the March 6, 2014 report from Dr. Barnes. Appellant also submitted a February 3, 2015 cervical x-ray report from Dr. Lorenzo Farolan, a radiologist, diagnosing straightening of the cervical lordotic curve consistent with muscle spasms and osteophytes at C3-7.

By decision dated February 4, 2016, OWCP denied modification of its prior decision.⁶ It determined that appellant had not submitted sufficient evidence to show that she sustained a cervical condition due to her April 10, 1996 work injury.

Appellant appealed to the Board. By decision dated July 19, 2016, the Board affirmed the February 4, 2016 decision, finding that she had not established a cervical condition as a result of her April 10, 1996 work injury.⁷ It noted that it had previously found that Dr. Barnes based his opinion on a complete factual background and declined to review the evidence and arguments addressed in its prior decision. The Board found that the newly submitted evidence was insufficient to establish that appellant sustained a cervical condition due to her April 10, 1996 employment injury.

On December 12, 2016 appellant, through counsel, requested reconsideration. Counsel asserted that she complained of cervical pain at the time of her initial evaluation with Dr. Sardinas on September 13, 1996 and discussed the findings on the 2005 cervical MRI scan study. She further argued that Dr. Butler provided no rationale for his opinion and that Dr. Barnes relied upon an incomplete SOAF as it did not indicate that appellant complained of neck pain contemporaneous with her injury. Counsel additionally asserted that Dr. Barnes did not have a

⁶ The Board notes that OWCP denied modification of the Board's December 29, 2014 decision. OWCP, however, is not authorized to review Board decisions, which are final after 30 days and are not subject to review except by the Board. Although the December 29, 2014 decision was the last merit decision of record, OWCP's June 18, 2014 decision is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d),

⁷ Docket No. 16-1072 (issued July 19, 2016).

complete record to review. She maintained that Dr. Barnes relied upon an inaccurate history of appellant not complaining of neck symptoms until several years after her injury. Counsel summarized new evidence submitted with the reconsideration request.

Appellant submitted treatment notes dated February 6 through July 8, 1997, a bone density scan dated October 20, 2016, and the February 12, 1997 and July 27, 2005 cervical MRI scan studies. She also submitted a November 11, 2010 report from Dr. Sardinas.

In a report dated December 13, 2016, Dr. Sardinas opined that appellant's April 10, 1996 work injury resulted in a neck injury as the force caused quick flexion and extension of her neck.⁸ He related, "It is in all medical probability that both the left shoulder and the cervical spine were injured as a result of this injury...." Dr. Sardinas requested that OWCP expand acceptance of the claim to include a herniated cervical disc and also noted that appellant sustained left shoulder internal derangement.

By decision dated March 10, 2017, OWCP denied modification of its prior decision.⁹ It found that appellant had not submitted a reasoned report bolstered by objective findings demonstrating that she sustained a cervical condition due to her April 10, 1996 employment injury.

On appeal counsel asserts that appellant's attending physician submitted a reasoned report sufficient to establish causal relationship between her cervical condition and her April 10, 1996 employment injury. She notes that she complained of neck pain on September 13, 1996 and Dr. Sardinas obtained a cervical MRI scan study and related that she probably injured her neck at the time of her work injury.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁰ To establish 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.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

⁸ Dr. Sardinas, in a progress report dated December 8, 2016, treated appellant for left arm tenderness. On December 13, 2016 he indicated that she could not return to work without limitations.

⁹ The Board notes that OWCP denied modification of the Board's July 19, 2016 decision. OWCP, however, is not authorized to review Board decisions, which are final after 30 days and are not subject to review except by the Board. Although the July 19, 2016 decision was the last merit decision of record, OWCP's February 4, 2016 decision is the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d),

¹⁰ *See V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹¹ *See M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

the claimant.¹² 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.¹³

When 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.¹⁴

ANALYSIS

As noted, this case has previously been before the Board. In its prior decisions, the Board found that the opinion of Dr. Barnes, an IME, represented the special weight of the evidence and established that appellant did not sustain an employment-related cervical condition. It considered counsel's arguments that the SOAF was incomplete as it failed to set forth that she had complained of neck pain soon after the April 10, 1996 injury, that Dr. Barnes was not properly selected as IME, and that his opinion was not rationalized and thus, insufficient to resolve the conflict in medical opinion. On reconsideration counsel again asserted that she complained of neck pain at the time of her initial evaluation with Dr. Sardinias, that the SOAF provided to Dr. Butler and Dr. Barnes was incomplete, and that Dr. Barnes' report was insufficient to resolve the conflict in medical opinion. The Board, however, previously considered these arguments. The Board will not review evidence and argument previously addressed, as those matters are *res judicata* absent any further review by OWCP.¹⁵

On reconsideration appellant submitted treatment notes and the results of diagnostic studies which were previously considered. She also submitted an October 20, 2016 bone density scan. However, diagnostic reports which offer no opinion regarding causal relationship are of limited probative value.¹⁶

In a report dated December 13, 2016, Dr. Sardinias asserted that appellant sustained a cervical condition due to her April 1996 employment injury and explained the mechanism by which the force of impact caused injury due to rapid flexion and extension of the cervical spine. He opined that she probably sustained a neck injury in addition to her shoulder injury on April 10, 1996 and requested expansion of the claim to include a herniated cervical disc. Dr. Sardinias, however, was on one side of the conflict resolved by Dr. Barnes. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the special weight accorded the report of an IME or to create a new

¹² See *John W. Montoya*, 54 ECAB 306 (2003).

¹³ See *H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

¹⁴ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁵ See *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ See *E.B.*, Docket No. 17-0305 (issued July 10, 2017).

conflict.¹⁷ Dr. Sardinias' report is thus insufficient to overcome the special weight accorded to Dr. Barnes' opinion or to create a new conflict in medical opinion.¹⁸

On appeal counsel contends that the opinion of Dr. Sardinias is well reasoned and thus, sufficient to demonstrate that she sustained a cervical condition due to her April 10, 1996 employment injury. As discussed, however, Dr. Sardinias was on one side of the conflict resolved by the IME, and thus, his additional report is insufficient to meet her burden of proof.¹⁹

Counsel notes that appellant complained of neck pain on September 13, 1996 and Dr. Sardinias obtained a cervical MRI scan study and related that she probably injured her neck at the time of her work injury. As noted, however, the Board specifically addressed this argument in its December 29, 2014 decision and found that the SOAF provided a proper factual background.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established a cervical condition causally related to her April 10, 1996 employment injury.

¹⁷ See *Jaja K. Asaramo*, *supra* note 10; *Michael Hughes*, 52 ECAB 387 (2001).

¹⁸ See *K.R.*, Docket No. 16-0542 (issued December 21, 2016).

¹⁹ See *M.O.*, Docket No. 17-0096 (issued December 15, 2017).

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2018
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