

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a medical condition causally related to the accepted factors of federal employment.

FACTUAL HISTORY

On September 25, 2012 appellant, then a 52-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and right shoulder injuries due to factors of her federal employment, including the sorting and processing of problematic pieces of mail. She noted that she first became aware of her conditions on January 1, 2012 and first realized their relation to her federal employment on August 20, 2012. Appellant continued working in the limited-duty position she held prior to her claimed injury. OWCP assigned OWCP File No. xxxxxx008. In an accompanying statement, appellant indicated that she had been performing the same limited-duty position since August 6, 2006. She alleged that the position required her to bend her neck and shoulders to look down at torn mail, sort mail taken from tubs, place mail into plastic bags and tape the ends of the bags, and stamp/place labels on mail.³

In support of her occupational disease claim, appellant submitted an August 20, 2012 report from Dr. Boqing Chen and Dr. Ismail Alhamrawy, Board-certified physiatrists, who indicated that she chiefly complained of neck and bilateral shoulder pain. The physicians diagnosed severe neck pain with upper extremity radiculopathy and bilateral shoulder pain secondary to rotator cuff syndrome. Dr. Chen and Dr. Alhamrawy opined that appellant sustained work-related injuries to her neck and bilateral shoulders and maintained that the injuries occurred because she “has been sorting torn mail with [sic] sitting in a certain position, where putting pressure and burden to her neck and bilateral shoulders with repetitive accumulating trauma to bilateral shoulders, which led to significant shoulder pain and rotator cuff syndrome.”

In an October 19, 2012 development letter, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a statement dated September 22, 2012 in which she further described her repetitive job duties, noting that she performed the duties for six-to-seven hours per work shift. She submitted additional medical evidence, including a July 27, 2012 magnetic resonance imaging (MRI) scan of the right shoulder which contained an impression of rotator cuff tendinosis with a full-thickness tear of the supraspinatus tendon. In an August 4, 2012 note, Dr. Chen advised that appellant could work on a full-time basis, but placed restrictions on her lifting, pushing, and pulling activities.

³ Under separate claim files, OWCP accepted prior employment injuries: a traumatic injury in the form of a thoracic strain sustained on August 5, 2006, assigned OWCP File No. xxxxxx301; and an occupational disease claim in the form of left shoulder impingement syndrome sustained by August 26, 2009, assigned OWCP File No. xxxxxx759. Appellant also claimed that she sustained low back injuries on September 14, 2001 and July 26, 2005. OWCP assigned OWCP File Nos. xxxxxx592 and xxxxxx723, respectively, and paid medical benefits without formally adjudicating either claim. In late-2019, it administratively combined OWCP File Nos. xxxxxx592, xxxxxx723, xxxxxx301, xxxxxx759, and xxxxxx008, designating the latter as the master file.

By decision dated January 3, 2013, OWCP denied appellant's claim, finding that the "medical evidence was insufficient to establish that a medical condition was diagnosed in connection with the claimed event and/or work factors." It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 29, 2013 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On May 21, 2013 appellant, through counsel, changed this request to a request for review of the written record.

Following a review of the written evidence, by an August 6, 2013 decision, OWCP's hearing representative set aside the January 3, 2013 decision and remanded the case to OWCP for further development. The hearing representative determined that appellant established the medical component of fact of injury and directed OWCP to refer appellant for a second opinion examination.

On remand OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination and evaluation with Dr. Stanley R. Askin, a Board-certified orthopedic surgeon. It requested that he provide an opinion regarding whether appellant sustained employment-related injuries to her neck and right shoulder due to the accepted employment factors.

In a September 13, 2013 report, Dr. Askin discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that appellant offered limited neck and right shoulder motion and advised he could not be sure that she did not have a frozen right shoulder given her "lack of cooperation" in the evaluation. Dr. Askin indicated that she did not exhibit clinical evidence of cervical radiculopathy, but acknowledged that such a condition had been documented for more than a decade by electrodiagnostic studies. He concluded that appellant did not exhibit clinical evidence of cervical radiculopathy or a rotator cuff tear of the right shoulder.

By decision dated October 29, 2013, OWCP denied appellant's claim, finding that she failed to submit sufficient medical evidence to establish cervical and right shoulder injuries causally related to the accepted employment factors. It found that Dr. Askin's opinion demonstrated that appellant did not sustain a work-related cervical or right shoulder condition.

On November 1, 2013 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, but later requested that a review of the written record be conducted instead.

Appellant submitted a May 2, 2014 report from Dr. Laura Ross, a Board-certified orthopedic surgeon, who provided physical examination findings and opined that appellant's neck and right shoulder conditions, *i.e.*, right shoulder rotator cuff tendinosis with full-thickness tear of the supraspinatus tendon and multilevel disc protrusions most pronounced at C4-5, were due to her employment duties. She indicated that appellant's job of sorting mail caused repetitive stress and trauma to her neck and right shoulder.

In a May 27, 2014 report, Dr. Chen advised that appellant reported previously sorting torn mail while sitting in a certain position and putting pressure on her neck and shoulders with

repetitive accumulating trauma, which led to significant right shoulder pain and rotator cuff syndrome. He reported physical examination findings and diagnosed neck pain likely due to cervical radiculopathy and bilateral shoulder pain from rotator cuff syndrome. Dr. Chen opined that, even though appellant had performed modified work, the repetitive movement of sorting mail caused work-related injuries to the neck and right shoulder.

By decision dated July 7, 2014, OWCP's hearing representative set aside the October 29, 2013 decision and remanded the case to OWCP for further development. The hearing representative determined that the opinions of the attending physicians, Dr. Ross, and Dr. Chen, created a conflict in the medical evidence with the opinion of the OWCP referral physician, Dr. Askin, regarding the claimed cervical and right shoulder conditions and required that appellant be referred for an impartial medical examination and evaluation.

On July 15, 2015 Dr. Ross performed OWCP-authorized subacromial decompression with labral repair of the right shoulder.

On November 10, 2015 OWCP referred appellant, along with an SOAF and a series of questions, for an impartial medical examination and evaluation with Dr. Ian B. Fries, a Board-certified orthopedic surgeon. It requested that Dr. Fries provide an opinion regarding whether appellant had work-related cervical and right shoulder conditions.

In a February 9, 2016 report, Dr. Fries discussed appellant's factual and medical history and noted that the orthopedic examination was deferred due to communication problems. He indicated that, based on his review of the medical evidence, there was no mechanism of injury or event documented other than repetitive stress, and opined that attributing injury from work duties as separate from daily activities was "sophistic." Dr. Fries maintained that appellant improbably claimed recurrent injury while in a limited-duty position, which involved repairing torn mail. He indicated that right shoulder rotator cuff tendinosis with full-thickness supraspinatus tear, and multi-level cervical disc protrusions most pronounced at C4-5 were established by diagnostic testing. However, Dr. Fries asserted that these were very common degenerative findings and that their presence on MRI scans did not confirm they were symptomatic or the result of trauma. He found that there were insufficient clinical findings from prior examinations to establish the diagnosis of cervical radiculopathy. Dr. Fries referenced appellant's repetitive work duties and indicated that "there is no convincing scientific support for the claim repetitive motion without significant weight cause rotator cuff tears, nor that variable neck positions over time cause objective cervical pathology." He explained that rotator cuff tears and shoulder impingements were most commonly degenerative and that multilevel cervical degeneration was "poorly correlated with any claim of repeated minor trauma."

OWCP then arranged for a translator to be present for examination purposes and again referred appellant to Dr. Fries for an impartial medical examination and evaluation. In a May 6, 2016 supplemental report, he reported the findings of the physical examination he conducted on that date, noting that appellant exhibited tenderness of her neck and both shoulders.⁴ Dr. Fries

⁴ Dr. Fries noted that the translator failed to appear as scheduled, but indicated that appellant was much more comfortable in the office than she was on February 1, 2016. He found that there was adequate communication between himself and appellant to conduct a physical examination.

provided a discussion of appellant's medical conditions, which was similar to that contained in his February 1, 2016 report, and concluded that appellant did not sustain a work-related cervical or right shoulder injury.

By decision dated December 8, 2016, OWCP denied appellant's claim, finding that the opinion of Dr. Fries demonstrated that appellant did not sustain a cervical or right shoulder injury causally related to the accepted employment factors.

On December 13, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 20, 2019.

Appellant submitted an August 15, 2019 report from Dr. Ross who indicated that she disagreed with Dr. Fries' opinion that appellant did not sustain cervical and right shoulder injuries due to her work duties. Dr. Ross noted that Dr. Fries had indicated that appellant was essentially asymptomatic at the time he examined her, but she maintained that appellant was clearly symptomatic and had continued to be so since she sustained her work-related injuries. She disagreed with Dr. Fries' assessment that it was inconceivable that substantial injury could result from appellant's limited-duty work or that injuries sustained then could not be differentiated from the effects of activities of daily living outside the workplace. Dr. Ross asserted that the nature of appellant's work, including sorting mail in a sitting position while looking down most of the time with her arms constantly moving, caused repetitive stress to her cervical spine and shoulders. She opined that, in addition to the accepted left shoulder condition, appellant sustained a right shoulder injury as a direct result of cumulative trauma, including performing repetitive motions, resulting in the need for right shoulder surgery on July 15, 2015. Dr. Ross indicated that her opinion on causal relationship was supported by physical examination/diagnostic study findings and direct arthroscopic observation, and maintained that appellant's medical history fit her "pathology and complaints."

By decision dated September 23, 2019, OWCP's hearing representative set aside the December 8, 2019 decision and remanded the case to OWCP for further development. She directed OWCP to combine the files for all of appellant's claims and to request a supplemental report from Dr. Fries.

In a February 5, 2020 report, Dr. Fries discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on January 8, 2020. He noted that appellant reported anterior shoulder pain bilaterally and that she limited abduction motion of both shoulders to 90 degrees. Appellant had cervical flexion to 30 degrees and cervical extension to 15 degrees without complaint. Dr. Fries indicated it remained his opinion that it was inconceivable that a substantial injury resulted from appellant's limited-duty work of handling mail and equipment weighing two ounces or less. He maintained that there was no scientific method to differentiate the effects of such minor work effort, if there even were such effects, from the effects of daily activities outside the workplace. Dr. Fries noted that, as people age, rotator cuff tendinitis and tears, labral tears, and impingement are common spontaneous and progressive degenerative conditions, and their appearance is not evidence of specific trauma. He opined that there was no scientific evidence simply moving one's shoulder with essentially no physical

exertion causes significant shoulder pathology. Dr. Fries concluded that appellant did not sustain a work-related cervical or right shoulder injury as alleged.

Appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review on March 16, 2020. A hearing was held on July 1, 2020. By decision dated August 14, 2020, OWCP's hearing representative set aside the March 11, 2020 decision and remanded the case to OWCP for further development. He directed OWCP to prepare a new SOAF, which listed all of appellant's accepted medical conditions and surgeries and to request a supplemental report from Dr. Fries.

In an August 18, 2020 supplemental report, Dr Fries indicated that, upon the last physical examination on January 8, 2020, he did not find any current injury-related factors of disability, but rather found a mismatch in appellant's objective and subjective complaints. He advised that appellant's almost identical nonphysiologic findings involving both shoulders were consistent with symptom magnification and/or fabrication. Dr. Fries indicated, "[i]n summary, minor changes to the SOAF do not change opinions I previously expressed."

By decision dated September 10, 2020, OWCP denied appellant's claim, relying on the opinion of Dr. Fries that appellant did not sustain a neck or right shoulder injury causally related to the accepted employment factors.

On September 15, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a November 3, 2020 report from Dr. Ross who noted that she had reviewed Dr. Fries' August 18, 2020 report. Dr. Ross reported that she disagreed with several of Dr. Fries' assertions, noting that she disagreed that appellant did not sustain rotator cuff tears. She indicated that the medical evidence of record, including diagnostic testing at the time of the 2013 and 2015 surgeries, proved that appellant had sustained rotator cuff tears, as she observed a healed rotator cuff tear of the left shoulder supraspinatus tendon, a full-thickness rotator cuff tear of the right supraspinatus tendon, and labral tears of both shoulders. Dr. Ross maintained that appellant's work-related bilateral shoulder conditions all required surgical intervention. She noted that Dr. Fries advised in his August 18, 2020 report that he could not describe appellant's current objective findings as he had not seen her since January 8, 2020. Dr. Ross advised that she examined appellant in August 2020 and that, at that time, she appeared to have generalized shoulder girdle weakness, tenderness to palpation along both shoulders, especially along the anterolateral aspect of both shoulders, as well as limited range of motion, which was quite significant along with pain in the end ranges of motion. She noted, "I found her condition not to be resolved. I clearly find this current injury-related factor of disability, although [Dr. Fries] does not." Dr. Ross also indicated that she disagreed with Dr. Fries' opinion on disability, noting that she was not sure how Dr. Fries could posit that any change in appellant's condition/ability to work would not be due to her federal employment given that he failed to acknowledge her "occupational exposure injuries." She indicated, "As her treating orthopedic surgeon since 2012, I can assure [OWCP] that this patient is not capable of any type of work, including sedentary work, due to her occupational injuries."

A telephonic hearing was held before a representative of OWCP's Branch of Hearings and Review on January 15, 2021.

By decision dated March 31, 2021, OWCP's hearing representative affirmed the September 10, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish 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 with 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.⁶ These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (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 identified employment factors.⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹⁰ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹¹

⁵ *Supra* note 2.

⁶ *E.S.*, Docket No. 18-1580 (issued January 23, 2020); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ *E.S.*, *id.*; *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also* *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ *W.M.*, Docket No. 14-1853 (issued May 13, 2020); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹¹ *Id.*; *Victor J. Woodhams*, *supra* note 8.

ANALYSIS

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

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹² For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.¹³ In situations where the case is properly 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

The Board finds that there is a new conflict in the medical opinion evidence that requires referral of appellant for an examination and evaluation with a new impartial medical specialist. In a February 5, 2020 report, Dr. Fries, the impartial medical specialist, discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on January 8, 2020.¹⁵ He indicated it remained his opinion that it was inconceivable that a substantial injury resulted from appellant's limited-duty work of handling mail and equipment weighing two ounces or less.¹⁶ Dr. Fries maintained that there was no scientific method to differentiate the effects of such minor work effort, if there even were such effects, from the effects of daily activities outside the workplace. He noted that, as people age, rotator cuff tendinitis and tears, labral tears, and impingement are common spontaneous and progressive degenerative conditions, and their appearance is not evidence of specific trauma. Dr. Fries opined that there was no scientific evidence simply moving one's shoulder with essentially no physical exertion causes significant shoulder pathology. He concluded that appellant did not sustain a work-related cervical or right shoulder injury as alleged. In an August 18, 2020 supplemental report, Dr. Fries indicated that, upon his last physical examination on January 8, 2020, he did not find any current injury-related factors of disability, but rather found a mismatch in appellant's objective and subjective

¹² 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹³ *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

¹⁴ *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁵ OWCP initially referred appellant to Dr. Fries in late-2015 after finding that the opinions of the attending physicians, Dr. Ross and Dr. Chen, created a conflict in the medical opinion evidence with the opinion of the OWCP referral physician, Dr. Askin, regarding the claimed cervical and right shoulder conditions. Dr. Fries first provided opinions on February 1 and April 28, 2016, but first examined appellant on April 28, 2016. OWCP requested that he provide supplemental reports on multiple occasions.

¹⁶ OWCP accepted employment factors in the form of appellant bending her neck and shoulders to look down at torn mail, sorting mail taken from tubs, placing mail into plastic bags and taping the ends of the bags, and stamping/placing labels on mail, as alleged.

complaints.¹⁷ He asserted that appellant's almost identical nonphysiologic findings involving both shoulders were consistent with symptom magnification and/or fabrication. Dr. Fries indicated, "[i]n summary, minor changes to the SOAF do not change opinions I previously expressed."

In contrast, Dr. Ross concluded that appellant sustained cervical and right shoulder conditions due to the accepted employment factors. In an August 15, 2019 report, she indicated that Dr. Fries had asserted that appellant was essentially asymptomatic at the time he examined her, but she noted that appellant was clearly symptomatic and had continued to be so since she sustained her work-related injuries. Dr. Ross disagreed with Dr. Fries' assessment that it was inconceivable that substantial injury could result from appellant's limited-duty work or that injuries sustained then could not be differentiated from the effects of activities of daily living outside the workplace. She asserted that the nature of appellant's work, including sorting mail in a sitting position while looking down most of the time with her arms constantly moving, caused repetitive stress to her cervical spine and shoulders. Dr. Ross found that, in addition to the accepted left shoulder condition, appellant sustained a right shoulder injury as a direct result of cumulative trauma, including performing repetitive motions, resulting in the need for right shoulder surgery on July 15, 2015. In a November 3, 2020 report, she reported that she disagreed with several of Dr. Fries' assertions, noting that she disagreed that appellant did not sustain rotator cuff tears. Dr. Ross indicated that the medical evidence of record, including diagnostic testing at the time of the 2013 and 2015 surgeries, proved that appellant had sustained rotator cuff tears, as she observed a healed rotator cuff tear of the left shoulder supraspinatus tendon, a full-thickness rotator cuff tear of the right supraspinatus tendon, and labral tears of both shoulders. She maintained that appellant's work-related shoulder conditions all required surgical intervention. Dr. Ross noted that Dr. Fries advised in his August 18, 2020 report that he could not describe appellant's current objective findings as he had not seen her since January 8, 2020. She advised that she examined appellant in August 2020 and that, at that time, she appeared to have generalized shoulder girdle weakness, tenderness to palpation along both shoulders, especially along the anterolateral aspect of both shoulders, as well as limited range of motion, which was quite significant along with pain in the end ranges of motion. Dr. Ross noted, "I found her condition not to be resolved. I clearly find this current injury-related factor of disability, although [Dr. Fries] does not."

Because there remains an unresolved conflict in medical opinion evidence regarding whether appellant sustained work-related cervical and right shoulder conditions, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the case record and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination and report to resolve the conflict.¹⁸ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹⁷ OWCP requested that Dr. Fries provide a supplemental report after correcting deficiencies in the SOAF. In February 1 and April 28, 2016 reports, Dr. Fries had provided similar opinions expressing his belief that appellant did not sustain work-related cervical and right shoulder conditions.

¹⁸ See *supra* note 14.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 21, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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