United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 12-1380**
	)	**Issued: December 12, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 11, 2012 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) May 10, 2012 merit decision denying her occupational disease claim. Pursuant to the Federal Employees' Compensation Act[1] (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 met her burden of proof to establish that she sustained an injury in the performance of duty.

FACTUAL HISTORY

This case was previously before the Board. In a prior appeal, appellant sought review of OWCP's January 13, 2011 decision denying her occupational disease claim. In an October 11, 2011 decision, the Board found an unresolved conflict in medical opinion due to the insufficiency of the referee physician's report. The Board set aside the January 13, 2011

[1] 5 U.S.C. § 8101 *et seq.*

decision and remanded the case for further development of the medical record.[2] The facts and the circumstances of that decision are hereby incorporated by reference. The relevant facts are delineated below.

Appellant's treating physician, Dr. William Pearce, a Board-certified surgeon, diagnosed likely thoracic outlet syndrome in the right shoulder, opined that her condition was related to lifting heavy boxes, and opening and closing doors in her office. OWCP's second opinion physician, Dr. R.M. Ubilluz, a Board-certified neurologist, found no evidence of peripheral neuropathy, neurological thoracic outlet syndrome or disc herniation. It found a conflict in medical opinion evidence as to whether appellant developed a medical condition as a result of the accepted employment activities and referred appellant, to Dr. Ricardo Kohn, a Board-certified neurologist, in order to resolve the conflict. In a report dated October 4, 2010, Dr. Kohn found no objective evidence of thoracic outlet syndrome based on appellant's physical examination or previously conducted tests. He stated, however, that he was unable to render a definitive opinion on the relevant issue without further testing. As noted, the Board found that Dr. Kohn's report was insufficient to resolve the conflict in medical opinion and remanded the case for further development.

OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Volker Bertrand, a Board-certified neurologist, for an impartial medical examination to resolve the conflict in medical opinion as to whether appellant had developed a medical condition as a result of her employment activities.

In a report dated March 16, 2012, Dr. Bertrand reviewed the statement of accepted facts and the medical record. He found that appellant did not have a medical condition due to her employment activities. On examination of the neck, appellant exhibited physiologic motion on flexion, extension, side bending and rotation. There was mild cervical tenderness on the right to deep palpation, but, when asked to move the neck by herself, appellant performed limited motion. The carotid pulse was equal bilaterally and there was no evidence of bruit. Appellant sighed during these maneuvers and exhibited pain behavior in doing neck maneuvers. Motor examination revealed good strength in the arms and legs distally and proximally, with no evidence of atrophy. There was mild flexion deformity in the fourth and fifth digit on the right hand. There was intact sensation to pinprick, vibration and precision sense, with the exception of decreased perception to pinprick in half of the fourth and fifth digit. The fingertips were slightly cold bilaterally. There was no appreciable difference in the ulnar distribution from side to side. On examination of the lumbar spine, straight leg raising was within normal limits, both sitting and supine. Appellant had good rotation side bending, flexion, extension of the lumbar spine in the standing position. However, she exhibited subjective symptoms of pain when she was prone. On examination of the right shoulder, appellant could elevate the arm above the head and behind her back with no clicks or noises. All functions appeared to be intact including elevation, abduction, adduction, extension, flexion as well as internal and external rotation. Adson's maneuver showed a slight decrease in the radial pulse on the right side. Thoracic outlet maneuvers or East sign showed appellant to be hesitant to perform, but she did. Appellant stated that she had some pain in the shoulder, but there was no reproduction of tingling, numbness, paresthesia or any discoloration; nor was there any difference in temperature. It was also noted that she had a poor shoulder posture bilaterally. Appellant had multiple small lipoma-like

[2] Docket No. 11-807 (issued October 11, 2011).

lesions on the skin which apparently is a significant sign of Dercum's disease, which can cause swelling, pain and weakness.

Dr. Bertrand diagnosed osteoarthritis, mild degenerative disease of the lumbar and cervical spine with chronic back and neck pain, mild degenerative disease of mid-thoracic spine, obesity, poor posture, increased lordosis, subjective complaint of pain in the shoulder and arm, fibromyalgia as diagnosed by rheumatologist, no evidence of thoracic outlet syndrome and Dercum's disease. He concluded that appellant did not have thoracic outlet syndrome, as there was no loss of sensation or atrophy, no temperature difference, no numbness, no tingling and no discoloration. The only positive symptom exhibited was a decrease of the radial pulse with Adson's maneuver, which is commonly seen in normal people. Dr. Bertrand stated that appellant's subjective symptoms were questionable and inconsistent, although he did find that she may have had some pain when moving her neck. He opined that all of her complaints were primarily subjective.

Dr. Bertrand noted appellant's allegation that her back and right arm pain started at home but was aggravated by repetitive bending and lifting at work, particularly the right arm by opening the window because of some pulley system that does not work appropriately. He stated,

> "It is possible that she may have intermittent pain at work which is not unusual with degenerative disc disease. It is not apparent that this is a result of her work. These are normal aging changes which are not unusual at her age and can be painful whether at home or at work. In addition, Dercum's disease (adiposis dolorsa) can lead to weakness, numbness, nerve pain, depression and insomnia. Fibromyalgia may complicate this. Regarding her arm and shoulder pain, this may have started about the same time her back pain started and she said it was repetitive activity. This can be seen in people who constantly do this such as painters or plasterers. This was only done intermittently and was not related to her job. This activity did not cause her drooped shoulder. All of her complaints are subjective. There is no clinical evidence that her symptoms were caused by her job although they may be aggravated. In summary, none of the diagnoses or complaints of pain are caused by her postal employment."

In an accompanying attending physician's report, Dr. Bertrand indicated that appellant could work a six-hour day with restrictions, due to fibromyalgia, shoulder pain, back pain.

In a letter dated March 23, 2012, OWCP asked Dr. Bertrand to clarify his opinion by explaining whether his proposed work restrictions were warranted by employment conditions. It also asked him to explain his opinion that appellant's symptoms may have been aggravated by her employment.

In a supplemental report dated May 10, 2012, Dr. Bertrand stated that none of appellant's symptomatology was related to her work. Rather, appellant's pain was secondary to degenerative disc disease in the cervical and lumbar spines, which were normal signs of aging and had nothing to do with her employment recommended work. Therefore, the restrictions were not attributed to her employment. Dr. Bertrand stated that appellant's pain may temporarily be aggravated when she is at work. He noted, however, that the aggravation would not lead to progression of her underlying arthritic conditions, which can continue to progress whether she works or does not work. Dr. Bertrand recommended a chest film and ultrasound testing to

determine whether there were other possible causes that may produce similar symptomatology in appellant's neck and shoulder. While his clinical examination did not suggest a thoracic outlet syndrome, other pathologies in that area, *i.e.*, a stenosis of the clavicular artery, may lead to symptomatology or possibly Pancoast tumor. Dr. Bertrand opined, however, that, even if another pathology were identified, it would not be related to her federal employment.

In a decision dated May 10, 2012, OWCP denied appellant's claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of 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, that an injury was sustained in the performance of duty as alleged, and that any disability and specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship, generally, is rationalized medical opinion 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.[5]

Section 8123 of FECA 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.[6] 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

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Id*.

[6] 5 U.S.C. § 8123.

sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[8] However, when the impartial specialist is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[9] Unless this procedure is carried out by OWCP, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[10]

ANALYSIS

The Board finds that Dr. Bertrand's reports are insufficient to resolve the conflict.

In a March 16, 2012 report, Dr. Bertrand provided examination findings and multiple diagnoses, including osteoarthritis, mild degenerative disease of the lumbar and cervical spine, mild degenerative disease of mid-thoracic spine and Dercum's disease. He concluded that appellant did not have thoracic outlet syndrome. Dr. Bertrand opined that all of appellant's complaints were subjective and that none of her diagnoses were related to her federal employment. He stated, however, that her symptoms may have been aggravated by her job activities. Therefore, Dr. Bertrand's initial opinion on causal relationship was not well explained. Although he stated that appellant's complaints were all subjective, he provided specific diagnoses and concluded that her symptoms may have been aggravated by her employment. Dr. Bertrand did not address appellant's specific job duties or explain how her work activities had aggravated her cervical, lumbar and thoracic conditions. The only activity mentioned was the opening of a window at work, which he incorrectly indicated was not work related. Based on his initial report, OWCP sought clarification from Dr. Bertrand.

In a May 10, 2012 supplemental report, Dr. Bertrand stated that none of appellant's symptomatology was related to her work. He opined that her pain was secondary to degenerative disc disease in the cervical and lumbar spines, which were normal signs of aging. Dr. Bertrand also stated that appellant's pain may temporarily be aggravated while at work. He did not adequately explain, however, the nature of any temporary aggravation between her work

[7] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell*, Jr., 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[8] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[9] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[10] *Roger W. Griffith*, *supra* note 9; *Harold Travis*, 30 ECAB 1071 (1979).

activities and her diagnosed condition. Medical conclusions unsupported by rationale are of diminished probative value.[11] While his clinical examination did not suggest a thoracic outlet syndrome, Dr. Bertrand recommended further testing to determine whether there were other possible causes that may produce similar symptomatology in appellant's neck and shoulder. The Board finds that Dr. Bertrand did not provide a definitive opinion on the relevant issue. Therefore, his opinion must be regarded as speculative and is insufficient to resolve the conflict in medical opinion.

The case will be remanded to OWCP for further development of the medical evidence. After such further development as OWCP deems necessary, an appropriate decision should be issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 10, 2012 decision be set aside and remanded for action consistent with this decision of the Board.

Issued: December 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[11] *Willa M. Frazier*, 55 ECAB 379 (2004).