

**United States Department of Labor
Employees' Compensation Appeals Board**

A.W., Appellant)	
)	
and)	
)	Docket No. 17-0455
)	Issued: August 21, 2017
DEPARTMENT OF HOUSING & URBAN)	
DEVELOPMENT, Wilmington, DE, Employer)	

Appearances: *Case Submitted on the Record*
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 20, 2016 appellant, through counsel, filed a timely appeal from an August 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met her burden of proof to establish a left upper extremity condition, an aggravation of a right upper extremity condition, and/or a cervical condition causally related to factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On January 3, 2007 appellant, then a 54-year-old secretary, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in her right shoulder, arm, wrist, and neck, and her left arm, wrist, and hand causally related to factors of her federal employment. She had stopped work on March 3, 2006.³

Dr. Scott M. Fried, an attending Board-certified orthopedic surgeon, in reports dated 2005 to 2007, diagnosed right ulnar and median neuropathy, right brachial plexopathy, cervical radiculopathy, right neuritis, a repetitive strain injury, possible bilateral carpal tunnel syndrome, right shoulder capsulitis, and a partial thickness tear of the right rotator cuff. He attributed the diagnosed conditions to appellant's work duties.

Dr. Zohar Stark, a Board-certified orthopedic surgeon and OWCP referral physician, determined in a September 23, 2008 report that appellant did not sustain an employment-related cervical or bilateral upper extremity condition. He found no objective evidence supporting a cervical or upper extremity condition.

In decisions dated October 16, 2008 and May 19, 2009, OWCP denied appellant's occupational disease claim.⁴ It found that Dr. Stark's opinion constituted the weight of the evidence and established that she did not sustain a bilateral upper extremity or cervical condition causally related to the identified work factors.

³ In a prior decision assigned OWCP File No. xxxxxx429, dated December 11, 2006, OWCP accepted a sprain of the right shoulder and arm at the rotator cuff, a sprain of the right shoulder and upper arm at an unspecified site, and a right rotator cuff tear. Following authorized surgery, appellant returned to part-time employment on March 14, 2005, increasing to full time until she filed a claim for recurrence of disability (Form CA-2a) beginning March 3, 2006. In a December 22, 2008 decision, the Board found that appellant had not established a recurrence of disability beginning March 13, 2006 due to her accepted work injury under File No. xxxxxx429. Docket No. 08-0974 (issued December 22, 2008).

⁴ In a decision dated April 3, 2007, OWCP denied appellant's occupational disease claim as she had not submitted sufficient supporting medical evidence; however, on October 2, 2007 an OWCP hearing representative vacated the April 3, 2007 decision and remanded the case for OWCP to refer her for a second opinion examination. It again denied the claim on March 20, 2008. In a decision dated June 17, 2008, an OWCP hearing representative vacated the March 20, 2008 decision as the opinion of the second opinion examiner was not rationalized. She instructed OWCP to obtain a new second opinion examination.

Appellant appealed to the Board. In a decision dated August 24, 2010, the Board set aside the May 19, 2009 decision.⁵ It determined that a conflict in medical opinion existed between Dr. Fried and Dr. Stark regarding whether she had an employment-related bilateral upper extremity or cervical condition. The Board remanded the case for OWCP to refer her to an impartial medical examiner for resolution of the conflict.

By decision dated February 24, 2011, OWCP denied appellant's occupational disease claim finding that the opinion of Dr. Karl Rosenfeld, a Board-certified orthopedic surgeon and impartial medical examiner, constituted the weight of the evidence and established that she had not sustained an upper extremity or cervical condition due to work factors. In a decision dated September 8, 2011, an OWCP hearing representative affirmed the February 24, 2011 decision.

Appellant again appealed to the Board. By decision dated July 3, 2012, the Board set aside the September 8, 2011 decision.⁶ The Board determined that Dr. Rosenfeld's opinion was insufficient to resolve the conflict in medical opinion as he had not sufficiently addressed whether she sustained an orthopedic condition due to work factors. The Board instructed OWCP to obtain a supplemental report from Dr. Rosenfeld regarding whether the identified work activities caused or aggravated an upper extremity or cervical condition.

After receiving a supplemental report from Dr. Rosenfeld, in a decision dated January 24, 2013, OWCP denied appellant's claim for a left upper extremity condition, an aggravation of a right upper extremity condition, and a cervical condition due to factors of her federal employment. It found that the supplemental report from him was of sufficient weight to deny her claim.

On January 29, 2013 appellant, through counsel, requested an oral hearing. By decision dated August 8, 2013, an OWCP hearing representative vacated the January 24, 2013 decision. She found that Dr. Rosenfeld's supplemental report was insufficient to resolve the conflict and instructed OWCP to refer appellant for a new impartial medical examination. OWCP forwarded appellant to Dr. Charles Hummer, a Board-certified orthopedic surgeon and impartial medical examiner.

OWCP, by decision dated March 21, 2014, denied appellant's occupational disease claim. It found that the opinion of Dr. Hummer established that she did not have an employment-related shoulder condition.

Appellant, through counsel, requested an oral hearing, which was held on June 10, 2014. By decision dated July 29, 2014, an OWCP hearing representative determined that OWCP had not clearly set forth the questions to be addressed by Dr. Hummer and further found that his report and addenda did not adequately address whether work duties caused her upper extremity conditions. She determined that OWCP should clearly differentiate between the prior right arm accepted claim under File No. xxxxxx429 and the current claim for an occupational disease due to work activities from the date appellant resumed work after her prior right arm injury in

⁵ Docket No. 09-2129 (issued August 24, 2010).

⁶ Docket No. 12-0258 (issued July 3, 2012).

March 2005 until the date she stopped work in March 2006. The hearing representative instructed OWCP to obtain an opinion from a new impartial medical adviser.

OWCP, by letter dated November 19, 2014, referred appellant to Dr. David Pashman, a Board-certified orthopedic surgeon, for an impartial medical examination. It asked him to determine whether she had sustained a left upper extremity condition due to the work factors identified in the statement of accepted facts.

In a December 18, 2014 report, Dr. Pashman discussed appellant's history of a right rotator cuff repair in February 2005 following which she returned to work with lifting restrictions until March 2006. He discussed her complaints of neck pain, right arm pain, and low back pain. Dr. Pashman reviewed the medical evidence of record, including the results of electrodiagnostic studies, and provided detailed findings on examination. He diagnosed a repetitive right shoulder strain and rotator cuff tear, status post right shoulder surgery, degenerative disc disease of the cervical spine with a concomitant C6-7 syrinx, multiple subjective upper extremity complaints with symptom magnification, and possible bilateral median neuropathy, more so on the right side. Dr. Pashman noted that appellant had no "objective evidence of any muscle wasting or atrophy. Appellant does have some grip strength weakness in her right upper extremity compared to her contralateral left, but is reasonably strong at this point in time." Dr. Pashman advised that, to determine whether she had a strain or rotator cuff tear on the right side, he would need to review diagnostic studies and records from the other claim. He found "no objective evidence of any traumatically-induced pathology in her left shoulder" or cervical spine.

By decision dated January 22, 2015, OWCP denied the claim as the medical evidence did not support that appellant sustained an employment-related left arm condition.

On January 29, 2015 appellant, through counsel, requested an oral hearing. Following an August 28, 2015 hearing, in a decision dated December 7, 2015 an OWCP hearing representative vacated the January 22, 2015 decision. She noted that Dr. Pashman found that appellant had no traumatic injury to the cervical spine and left shoulder, but did not address whether she sustained a left upper extremity condition, an aggravation of a right upper extremity condition, or a cervical condition due to employment factors from March 2005 to 2006. The hearing representative also noted that it was unclear whether Dr. Pashman had the complete case record. On remand, she instructed OWCP to amend the statement of accepted facts to specifically include a right shoulder condition and right shoulder surgery in 2005 under File No. xxxxxx429. The hearing representative determined that it should obtain an opinion from Dr. Pashman regarding whether appellant experienced a cervical spine or upper extremity condition due to her employment from the date she resumed work in March 2005 until her work stoppage in March 2006. She indicated that OWCP should provide the physician with the complete case record to include the accepted right shoulder claim in File No. xxxxxx429. The hearing representative further found that Dr. Pashman should address whether any other conditions were causally related to employment factors.

OWCP, on December 28, 2015, requested a supplemental opinion from Dr. Pashman. It provided him with the case record from File No. xxxxxx429 and an amended statement of accepted facts.

Dr. Pashman, in a January 4, 2016 supplemental report, reviewed the medical records from File No. xxxxxx429. He opined that appellant had not sustained a cervical or upper extremity condition as a result of her work duties from March 2005 to March 2006. Dr. Pashman related, “There is no objective documentation that [appellant] had any specific work-related injury or aggravation causally related to her return to work,” noting that after shoulder surgery individuals could have “some somatic discomfort with abduction and overhead activities.” He further opined that appellant’s degenerative cervical spine condition and other conditions were unrelated to employment, but were instead “developmental and degenerative processes and not traumatically-induced or work-related in any way.” Dr. Pashman provided work restrictions due to her subjective complaints of discomfort with abduction and flexion. He related, “I do not feel that these work restrictions are specifically related to any federal employment activities or injuries.” Dr. Pashman found that appellant could perform sedentary or light employment with no difficulty.

By decision dated March 15, 2016, OWCP denied appellant’s occupational disease claim. It determined that Dr. Pashman’s opinion represented the weight of the medical evidence and established that she had no cervical or upper extremity condition due to work activities from March 2005 to March 2006.

Counsel, on March 21, 2016, requested an oral hearing. He subsequently requested a review of the written record in lieu of an oral hearing. Counsel argued that Dr. Pashman’s opinion was not rationalized. He indicated that the physician did not appear aware that appellant’s work duties required moving heavy boxes and focused on whether she sustained a traumatic work injury rather than an occupational disease. Counsel also asserted that Dr. Pashman did not address whether the work activities aggravated a cervical condition or the diagnosed syrinx. He noted that the physician found work restrictions.⁷

In a decision dated August 29, 2016, an OWCP hearing representative affirmed the March 15, 2016 decision. He found that Dr. Pashman’s opinion constituted the weight of the medical evidence as the impartial medical examiner.

On appeal counsel contends that Dr. Pashman addressed whether appellant sustained a traumatic injury rather than a condition related to her work duties. He asserts that the physician did not discuss her job duties of lifting and moving boxes weight up to 52 pounds and repetitive upper extremity work. Counsel maintains that Dr. Pashman did not determine whether appellant sustained a condition due to her repetitive work duties and provided restrictions that would disable her from employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ 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

⁷ Counsel further maintained that OWCP could only request clarification from an impartial medical examiner one time before referring appellant for a new impartial medical examination; however, he subsequently noted that Board case law provided that more than one addendum could be requested if the physician was compliant responding.

⁸ *Supra* note 2.

the United States” within the meaning of FECA, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹⁰

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;¹¹ (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;¹² and (3) medical evidence establishing 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.¹³

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.¹⁴

ANALYSIS

On prior appeal, the Board determined that a conflict in medical opinion existed between Dr. Fried, appellant’s attending physician, and Dr. Stark, an OWCP referral physician, regarding whether appellant sustained a left upper extremity condition, an aggravation of a right upper extremity condition, or a cervical condition due to work factors occurring from March 2005, when she resumed work following right shoulder surgery under File No. xxxxxx429 until March 2006, when she stopped work. OWCP initially referred her to Dr. Rosenfeld and Dr. Hummer for impartial medical examinations. However, the reports from these physicians were insufficient to adequately resolve the relevant issues in the case.¹⁵ On November 19, 2014 OWCP referred appellant to Dr. Pashman for an impartial medical examination.

⁹ *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *See Ellen L. Noble*, 55 ECAB 530 (2004).

¹¹ *Michael R. Shaffer*, 55 ECAB 386 (2004).

¹² *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

¹³ *Beverly A. Spencer*, 55 ECAB 501 (2004).

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

¹⁵ *See J.M.*, Docket No. 10-0177 (issued October 1, 2010) (where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion; if the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist).

The Board finds that Dr. Pashman's opinion is thorough and well rationalized and thus is entitled to special weight. As noted, when a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.¹⁶

Dr. Pashman, in his December 18, 2014 report, discussed appellant's history of a February 2005 right rotator cuff repair and noted that following her surgery she resumed work with lifting restrictions until her March 2006 work stoppage. He reviewed the medical evidence of record and, on physical examination, found no evidence of atrophy and reasonably strong grip strength. Dr. Pashman diagnosed a repetitive right shoulder strain and rotator cuff tear, status post right shoulder surgery, degenerative disc disease of the cervical spine with a C6-7 syrinx, multiple subjective upper extremity complaints, and possible bilateral median neuropathy. He concluded that appellant did not have a traumatic injury to her left shoulder or cervical spine due to employment factors.

In a January 4, 2016 supplemental report, Dr. Pashman reviewed the medical evidence from File No. xxxxxx429. He found that appellant did not have any cervical or upper extremity condition resulting from work duties performed March 2005 to March 2006. Dr. Pashman provided rationale for his opinion by noting that there was no objective evidence supporting an injury or aggravation during this period. He further advised that appellant's syrinx and degenerative cervical condition were unrelated to employment. Dr. Pashman provided work restrictions unrelated to federal work duties or injuries and opined that she could perform sedentary or light employment. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁷

On appeal counsel argues that Dr. Pashman only addressed the issue of whether appellant sustained a traumatic injury rather than occupational disease. In his January 4, 2016 supplemental report, however, the physician found that she did not sustain a cervical or upper extremity condition due to factors of her federal employment from March 2005 to March 2006.

Counsel further asserts that Dr. Pashman was not aware that appellant's job duties involved lifting and moving boxes weighing up to 52 pounds and repetitive upper extremity work. He contends that the physician's restrictions would disable her from her position. At a November 28, 2005 hearing held under File No. xxxxxx429, however, appellant related that when she returned to work in March 2005 after her right rotator cuff surgery she performed sedentary work without lifting.

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.

¹⁶ See 5 U.S.C. § 8123(a); *M.M.*, Docket No. 15-0979 (issued August 27, 2015).

¹⁷ See *R.S.*, Docket No. 15-1686 (issued November 25, 2015); *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a left upper extremity condition, an aggravation of a right upper extremity condition, and/or a cervical condition causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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