

File Number:
HR11-D-H

RECEIVED FEB 08 2018

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear Ms

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Your case file has been returned to the Boston District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 1 BOS
LONDON, KY 40742-8300

Sincerely,

Electronically Signed

Amy E. Towner
Hearing Representative

UNITED STATES POSTAL SERVICE
HEADQUARTERS & HEADQUARTERS FIELD UNITS
INJURY COMPENSATION OFFICE
475 L' ENFANT PLAZA, SW, ROOM 9801
WASHINGTON, DC 20260

PAUL H FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406



If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

Washington DC, February 05, 2018

U. S. Department of Labor
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of Millie Pelletier, claimant, employed by the United States Postal Service, Portland, Maine, case number 012636867.

Merit consideration of the claim was completed in Washington D.C. Based on this review, the decision of the district office dated September 27, 2017, is set aside for the reasons set forth below.

The issue for determination is whether the basis of the September 27, 2017 denial was appropriate.

The claimant was employed as an international sales representative with the United States Postal Service in Portland, Maine, when she filed a CA2 Notice of Occupational Disease form on July 7, 2017, claiming accelerated degenerative disease of left shoulder including severe osteoarthritis of the glenohumeral joint and partial thickness tear of rotator cuff. The claimant indicated she first became aware of his condition and realized it was related to her employment on May 1, 2012. She noted to see attached statement for details on the relationship to employment; however, attachment was included. The claimant also noted the injury was reported to her management team in 2012, who advised her to submit a CA2a rather than a CA2, and she only recently became aware the injury reports were not submitted by her employer through EEO proceedings on another matter. The employing agency advised the last date the claimant was exposed to employment conditions was May 9, 2016, and that she had not returned to work.

On July 21, 2017, the Office issued a development letter to the claimant requesting a factual statement describing in detail the employment-related exposure or contact which she believed contributed to her condition; to what and how she was exposed; that tasks she performed which required the claimed exposure or contact; how often and for how long she was exposed; all exposure outside of her Federal employment; the development of the claimed condition, when she first noticed it; what symptoms she had experienced; what seemed to make it better or worse; the treatment that had been effective in controlling or curing it; the details of all previous similar conditions; and to address whether her claim was timely filed. The claimant was also advised to submit a comprehensive medical report that included dates of examination and treatment; description of her symptoms; results of examinations and tests; diagnosis; clinical course of treatment provided and the effect of such treatment; description of her medical history,



the history provided of her employment exposure and non-employment activities that may contribute to this condition; and the physician's opinion supported by a medical explanation as to whether work related exposure resulted in the specific condition that had been diagnosed. The physician was to identify the specific exposure and provide an explanation of how such work-related exposure contributed to the disease.

On July 25, 2017, the Office received a July 21, 2017 statement from the claimant in which she gave this brief chronology: January 11, 2001, first ever injury claim accepted for bilateral carpal tunnel (case number 012010912) while an Account Manager, noting she only had surgery to address right hand at that time; in 2011, submitted for left hand surgery along with aggravation/nerve impingement to left shoulder, with original claim being updated in later 2012; 2012 - submitted new claim of bursitis, severe tendinitis, and new findings of glenohumeral joint disease in left shoulder to then management team, noting in new International Sales position since 2007, same timeframe filed first EEO citing failure to accommodate – causing injury; and in 2013 while driving to a customer had to go to ER and was diagnosed with new cervical herniation found to aggravate same shoulder, instructed to file as recurrence, but it was never reported by manager.

A copy of June 26, 2017 correspondence from the claimant to Charlene Richburg, USPS Injury Compensation Office headquarters, was included in which she explained that the CA2 dated back to 2012 needed to be submitted because she was in a different position and introduced new work factors precipitating the current state of her shoulder. The claimant discussed how there was confusion with the delayed treatment/surgery for the 2001 bilateral carpal tunnel affecting her left side, which was concluded in 2012. She noted it was during this surgery that the "new" injury was documented, and referenced a September 7, 2016 decision in which her left shoulder arthritis, left shoulder replacement surgery, and/or recurrent disability were denied as not causally related to the accepted 2001 claim and her former position as an Account Manager. The claimant noted this decision also pointed out new the work factors of keying and driving related to her current position. Copies of numerous emails were also received dating from June 2012 to December 2016 regarding ergonomic issues; December 3, 2012 and April 22, 2013 letters regarding Leave Buy Back; an April 15, 2013 DOL letter regarding a claim for compensation; a June 1, 2013 EEO complaint; a witness representative form; a copy of a July 8, 2014 letter agency advising her limited duty was terminated; an April 25, 2016 email regarding the claim forms in her file; a page from a September 7, 2016 merit decision; a picture of her workstation; and a December 28, 2016 Notice of Right to File letter regarding her claim for discrimination initiated on June 9, 2016.

Medical records were also received dated May 8, 2003; January 18, 2012; October 15, 2012; April 23, 2015; August 19, 2015; March 23, 2016; March 30, 2016; April 4, 2017; April 24, 2017; May 18, 2017; and June 19, 2017. The April 4, 2017 documented the claimant underwent left shoulder arthroplasty with biceps tenodesis and rotator cuff repair on that date.



On August 7, 2017, the Office received the claimant's responses to the development questionnaire dated August 2, 2017. She stated she would focus on three points, two of which involved the timeliness issue. The claimant claimed that she did timely report and submitted the injury originally on April 25, 2012 with a CA2a form to her then management team, and that it was her former manager who failed to forward the form to HQs IC office for processing, which was evidenced in recent EEO proceedings already sent to the Office. The claimant also explained that she and her current IC Specialist had discussed using the reporting dated of May 1, 2012 for the new CA2 form simply for differentiation purposes and to avoid confusion with the April 25, 2012 CA2a claim.

The claimant then addressed her failure to provide an explanation as to how she sustained a medical condition as a result of her employment. She stated there was a preponderance of evidence supporting "Failure to Accommodate" on record, witnessed. The claimant also noted there was extensive medical documentation from her current treatment physician, Dr. David Johnson, reiterating that the need for accommodations not in place and consistently attributed to permanent aggravation and acceleration of her shoulder conditions to: "Repetitive work factors, lack of management follow-through with his prescribed workplace accommodations and finally, elimination of Modified Duty Job assignment in July of 2014."

The claimant referenced a January 22, 2013 return to work note that allowed her to return to work only given specific work place modifications including voice activation software, and that emails supported this was delayed after she had been back to work since November. The claimant stated her computer was still pending a re-direct fix, which made for even more unnecessary typing to reenter the same data repeatedly. She referenced a June 1, 2013 discrimination/retaliation filing previously sent statement that noted continued delays obtaining voice activation, sent home without pay, no work available, and then one week later a Modified Duty Job Offer was given. The claimant then stated on July 14, 2014, termination of that Modified Duty Job. She referenced an August 19, 2015 email from her now current manager regarding voice activation not being addressed, and a May 8, 2003 progress report from her physician under another case suggesting the need for onsite evaluation and adjustment to work station.

By decision dated September 27, 2017, the Office denied the occupational disease claim for the reason that the medical evidence was insufficient to establish that the claimant's left shoulder condition was causally related to the accepted work events. The claimant disagreed with this decision and by letter postmarked September 27, 2017, requested an oral hearing.

Based on my preliminary review of the written evidence, the case is not in posture for hearing and the September 27, 2017 decision is set aside for the reasons set forth below.

An employee seeking benefits under the 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, 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 are causally related to the employment injury. These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹

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 the 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 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.²

In the instant case, the Office denied the May 1, 2012 occupational disease claim based on the medical evidence and the causal relationship component of the claim. However, the Office did not identify what work exposure/events were being factually accepted, only noting the claimant had alleged the agency failed to accommodate her with ergonomic keyboard/mouse/desk, and her shoulder condition worsened. When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship.³ A decision denying a claim for benefits should also contain a correct description of the basis for the denial in order that the parties of interest will have a clear understanding of the precise defect of the claim and the kind of evidence that would overcome it,⁴ to put the claimant on notice for further actions to include appeals.⁵

Based on my review, I find that the factual component of Fact of Injury cannot be substantiated based on the current evidence of record. The claimant filed a CA2 occupational disease form claiming left shoulder conditions. On this form she did not identify the employment-related activities or exposure which she believed contributed to her condition, or the timeframe of such work exposure. The Office issued a development letter on July 21, 2017, requesting factual statement describing in detail the employment-related exposure or contact which she believed contributed to her condition; to what and how she was exposed; that tasks she performed which required the claimed exposure or contact; how often and for how long she was exposed; all exposure outside of her Federal employment; the development of the claimed condition, when she first noticed it; what symptoms she had experienced; what seemed to make it better or worse; the

¹ *James B. Bowers, III*, 44 ECAB (Docket No. 92-542, issued October 8, 1992).

² *Charles E. Evans*, 48 ECAB (1997).

³ *Barbara Bush*, 38 ECAB 710 (1982).

⁴ *Patrick Michael Duffy*, 43 ECAB 280 (1991).

⁵ FECA Procedure Manual, Part 2-Claims, Disallowances, Chapter 2-1400-5



treatment that had been effective in controlling or curing it; the details of all previous similar conditions; and to address whether her claim was timely filed.

Although additional factual statements/information was later received, the claimant did not provide specific responses to the actual nine questions posed in the July 21, 2017 development letter. The claimant never actually described the specific employment-related exposure or work activities she actually performed, whether it was regular duty or modified duty, or the timeframes during which she performed these activities. There was also no position description or copy of a modified job offer on record to document any actual job duties performed. The statements the claimant did submit did not sufficiently identify her actual employment duties as an international sales representative, or the period of employment exposure the claimant was alleging caused or contributed to her left shoulder condition. It was not clear whether she was claiming work exposure prior to 2012 only, or to ongoing work exposure up to May 2016, when the agency noted she had stopped work. While the claimant provided copies of various emails/administrative correspondence to document non-accommodation and ergonomic issues, these alone would be insufficient to establish the factual basis of the claim. The specific issues/timeframes regarding the alleged ergonomic/non-accommodation issues were also vague and lacked sufficient detail.

It is the claimant's initial burden to identify the specific employment activities and period of exposure she is claiming, and in a claim alleging an occupational disease based on repetitive trauma, the frequency and duration of the various activities is vital information.⁶ For the reasons above, the factual basis of this occupational disease claim remains unclear and unsubstantiated. It was further noted that the employing agency was not requested or given the opportunity to comment on the allegations made by the claimant.

It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature, and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁷ The Office has an obligation to see that justice is done.⁸ Office procedures provide that in administering the FECA, the OWCP must obtain any evidence which is necessary for the adjudication of the case which is not received when the notice or claim is submitted.⁹

On remand, the Office should give the claimant an additional fifteen days to submit the specific factual details requested in the July 21, 2017 development questionnaire. The claimant should be specific as to the duties she actually performed as an international sales representative, and the specific timeframes/periods of exposure she is claiming as having contributed to her left shoulder condition. She should also be specific as to the dates of non-accommodation/ergonomic issues. The employing agency should then be given the opportunity to review the claimant's allegations for comment and corroboration.

⁶ T.R., Docket No. 11-0144, issued September 13, 2011.

⁷ *Udella Billups*, 41 ECAB 260 (1989).

⁸ *John J. Carlone*, 41 ECAB 354 (1989).

⁹ FECA Procedure Manual, 2-0800-10.a.



Copies of the claimant's position description and any modified job offers should also be requested for the record. The Office should then make findings of fact regarding the factual basis of the claim, and careful review of the remaining elements should be done for an appropriate *de novo* decision to be issued.

Accordingly, the decision dated September 27, 2017, is hereby set aside and the case is returned to the district office for further development as described above.

ISSUED:

WASHINGTON, D.C.

Electronically Signed

AMY E. TOWNER
Hearing Representative
For
Director, Office of Workers'
Compensation Programs



Washington DC, February 05, 2018

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