

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE A. OLSON and U.S. POSTAL SERVICE,
POST OFFICE, West Des Moines, IA

*Docket No. 97-69; Submitted on the Record;
Issued September 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained sciatica and a herniated disc causally related to her November 6, 1990 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On November 6, 1990 appellant, then a 33-year-old clerk, sustained a back strain in the performance of duty as a result of sorting mailbags. Following her 1990 employment injury, she performed light-duty work within her restrictions.

A November 16, 1990 radiology report of a magnetic resonance imaging (MRI) scan performed on that date to determine whether appellant had a herniated disc, noted some degenerative disc changes at L5-S1 but no evidence of focal disc protrusion or herniation.

On February 7, 1991 appellant underwent surgery consisting of a decompression at L5-S1 of the spine performed by Dr. Sinesio Misol, appellant's attending Board-certified orthopedic surgeon, based on his diagnosis of right sciatica.

In a report dated April 22, 1991, Dr. Daniel D. Zimmerman, the district medical director, reviewed the medical evidence of record and stated his opinion that appellant had sustained only a lumbosacral strain and no other back condition. Dr. Zimmerman stated that her surgery was not causally related to her injury on November 6, 1990.

In a report dated May 31, 1991, Dr. Misol stated his opinion that appellant had a disc herniation and sciatica which was causally related to her employment injury.

In a report dated December 2, 1991, Dr. Joseph M. Lichtor, a Board-certified orthopedic surgeon and impartial medical specialist,¹ provided a history of appellant's condition, a detailed discussion of the medical evidence of record, and stated:

“Dr. Misol equated degenerative disc disease, which is a normal condition of age, as abnormal and this is false. He says work caused the sciatic pain which he relieved with unnecessary surgery, totally false. He said the sciatica was caused by a herniated disc with nerve involvement at the lumbosacral level on the right which was missed by the radiologist and this is false in two ways. Physical and neurological examinations of [appellant] [were] totally and completely normal; therefore, she had no herniated disc with nerve involvement. Secondly, [he] is falsely interpreting the [MRI] scan which he then, himself, says is wrong because he found no herniation at surgery. The radiologist ‘missed’ nothing. All this emphasized creative falsehoods of the diagnosis by [him].

“There is no evidence whatsoever that [appellant] ever injured her low back. If she did have a strain or sprain, it would get well within several days to several weeks without treatment. None of the records of ... Dr. Misol reflect any physical evidence of injury nor any physical basis for complaints. After the unnecessary surgery, reflect no physical impairment whatsoever.

“It is evident from records that all care and treatment by Dr. Misol was below acceptable medical standards, do not reflect orthopedic expertise or diagnostic skill.”

* * *

“[Appellant] had nothing physically or neurologically wrong with her from [November 6 to February 7,] 1991. She required no treatment and predictably none of the treatment she received was of benefit. She required no surgery and the ‘minor’ and nothing surgery she had was totally unnecessary, but did not result in any impairment. From the records, it is obvious she has nothing wrong with her after surgery.

“From intensive review of the records, I see absolutely no need for medical care, treatment and surgery [appellant] received after [November 6,] 1990. None of this was work related. None of this resulted in any physical impairment. I see no reason why she has not been working at her regular job since [November 6,] 1990 and continued that same job up to the present without difficulties or disabilities.”

By decision dated May 12, 1992, the Office found that the weight of the medical evidence, as represented by the reports of Drs. Lichtor and Zimmerman, established that appellant's surgery on February 7, 1991, a lumbar laminectomy and partial discectomy, was not

¹ Although the Office referred to Dr. Lichtor as a second opinion physician, and Office hearing representative determined, in a February 14, 1994 decision, that Dr. Lichtor acted in the capacity of an impartial medical specialist. The Office had referred appellant to another impartial medical specialist prior to appellant's referral to Dr. Lichtor but the Office claims examiner determined that the physician's report was not sufficient to resolve the conflict in medical opinion evidence because it was based upon an inaccurate factual background.

medically necessary or causally related to her November 6, 1990 employment injury, a lumbosacral strain.

By letter dated May 29, 1992, appellant requested an oral hearing before an Office hearing representative.

On December 14, 1993 a hearing was held before an Office hearing representative at which time appellant testified.

Subsequent to the hearing appellant submitted a report dated December 14, 1993, in which Dr. Misol related that a radiologist's report concerning an MRI scan noted only degenerative disc disease at L5-S1 but that he had reviewed the films and felt that appellant had a small herniation or protrusion on the right side of her spine which was responsible for her symptoms.

By decision dated February 14, 1994, an Office hearing representative affirmed the Office's May 12, 1992 decision based upon the report of Dr. Lichtor. He found that Dr. Lichtor had acted in the capacity of an impartial medical specialist chosen to resolve the conflict in medical opinion evidence between Dr. Misol, appellant's physician and Dr. Zimmerman, the Office district medical director, as to whether appellant's conditions diagnosed by Dr. Misol, sciatica and a disc herniation, were causally related to her employment injury and that the detailed and well-rationalized report of Dr. Lichtor established that appellant's February 7, 1991 surgery performed by Dr. Misol was not causally related to her 1990 employment injury.

In a report dated February 8, 1995, Dr. Mark Karwal, a Board-certified internist, stated his disagreement with Dr. Lichtor's opinion that appellant's February 7, 1991 surgery was not medically necessary. He noted that the November 16, 1990 MRI scan showed disc degeneration at L5 and that appellant had persistent pain with right L5 radiculopathy. Dr. Karwal stated that Dr. Misol performed the February 7, 1991 surgery to decompress the nerve root and that appellant reported relief from her pain following the surgery.

By decision dated March 20, 1995, the Office denied modification of the Office's February 14, 1994 Office decision.

A December 20, 1995 MRI scan report noted an essentially stable examination of the lumbosacral spine with postoperative changes in the right at L5-S1 following a 1991 laminectomy, some disc bulging and a small subligamentous herniation "of uncertain presence or clinical significance" but no right-sided nerve root impingement.

On December 20, 1995 appellant filed an occupational disease claim alleging that she sustained an injury to her low back and right leg which she attributed to repeated lifting in her job. She indicated that she first became aware of this condition on December 16, 1995.²

On March 12, 1996 appellant requested reconsideration of the Office's March 20, 1995 decision which denied modification of the February 14, 1994 decision of the Office hearing representative in which the hearing representative found that the report of the impartial medical

² The Board notes that in January 1996 the case records for the December 16, 1995 claim and the November 6, 1990 claim were consolidated.

specialist, Dr. Lichtor, established that appellant's February 7, 1991 surgery was not employment related.

In clinical notes dated January 5, 1996, Dr. Misol attributed appellant's need for surgery to her November 6, 1990 employment injury. He stated:

“[Appellant], just before Christmas, despite the 15 [pound] restriction, had to do a lot of work and probably because of this, on [December 20, 1995] found herself unable to move. She was taken to the [emergency room] ... with acute back pain....

“MRI films reviewed by me show the only significant abnormality here is the L5-S1 disc interspace, which is the one where she had the hernia and the surgery. Other than that, the other discs appear to be very normal and this goes along with the fact that she has all along been diagnosed by me as an L5-S1 disc herniation secondary to work injury and not the result of a developmental, chronically degenerative disc disease. This was proven by this MRI obtained five years after the surgery that shows that all the other discs are still normal.”

By decision dated March 14, 1996, the Office denied appellant's claim for sciatica and a herniated disc on the grounds that the evidence of record failed to establish that these conditions were causally related to factors of her employment.

By decision dated June 6, 1996, the Office denied appellant's request for reconsideration of its March 20, 1995 decision on the grounds that the evidence submitted in support of the request for reconsideration was found to be of a repetitious nature and insufficient to warrant further merit review of the prior decision.

The Board finds that appellant did not meet her burden of proof to establish that she sustained sciatica or a herniated disc causally related to her November 6, 1990 employment injury or to other factors of her employment.

In the present case, the Office properly determined that there was a conflict in the medical opinion between appellant's attending physician Dr. Misol, a Board-certified internist and the government physician, Dr. Zimmerman, on the issue of whether appellant's conditions of sciatica and a disc herniation and her February 7, 1991 surgery were causally related to her November 6, 1990 employment-related back strain. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lichtor, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.³

In situations 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

³ Section 8123(a) of the Act provides in pertinent part: “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.” 5 U.S.C. § 8123(a).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

The Board finds that the weight of the medical evidence in this case is represented by the thorough, well-rationalized opinion of Dr. Lichtor, the impartial medical specialist selected to resolve the conflict in medical opinion. His December 2, 1991 report establishes that the conditions of sciatica and a disc herniation were not causally related to appellant's employment.

The February 8, 1995 report of Dr. Mark Karwal, a Board-certified internist, is not sufficient to overcome the opinion of the impartial medical specialist, Dr. Lichtor. In his report, Dr. Karwal stated his disagreement with Dr. Lichtor's opinion that appellant's February 7, 1991 surgery was not medically necessary. He noted that the November 16, 1990 MRI showed disc degeneration at L5 and that appellant had persistent pain with right L5 radiculopathy. Dr. Karwal stated that Dr. Misol performed the February 7, 1991 surgery to decompress the nerve root and that appellant reported immediate relief from her pain. However, Dr. Misol diagnosed a disc herniation and sciatica and Dr. Karwal does not explain how these conditions or the disc degeneration were causally related to appellant's November 6, 1990 employment-related back strain. The fact that appellant reported relief from her pain following surgery does not establish that the conditions diagnosed by Dr. Misol, sciatica and a disc herniation, were causally related to her employment injury.

The Board further finds that the Office, in its June 6, 1996 decision, did not abuse its discretion in denying appellant's request for reconsideration regarding its March 20, 1995 decision that appellant's February 7, 1991 surgery was not causally related to her November 6, 1990 employment injury.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁵ As appellant filed her appeal with the Board on September 4, 1996, the only decision which is properly before the Board regarding her February 7, 1991 surgery is the Office's June 6, 1996 decision denying her request for reconsideration. The Board has no jurisdiction to consider the Office's March 20, 1995, February 14, 1994 and May 12, 1992 decisions in which the Office found that appellant's surgery on February 7, 1991 was not causally related to her November 6, 1990 employment injury.⁶

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of her claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁷ Section 10.138(b)(2) provides that when an application for review of the merits of a

⁴ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁵ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

⁷ 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸

In support of her request for reconsideration, appellant submitted notes from Dr. Misol dated January 5, 1996 in which he stated his opinion that appellant's disc herniation and February 7, 1991 surgery were causally related to her November 6, 1990 back strain. However, the Office has not accepted the condition of a disc herniation as employment related and therefore this evidence does not constitute relevant and pertinent evidence not previously considered by the Office. As appellant did not submit relevant and pertinent evidence not previously considered by the Office, has not shown that the Office erroneously applied or interpreted a point of law and has not advanced a point of law or a fact not previously considered by the Office, the Office did not abuse its discretion in denying his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated June 6 and March 14, 1996 are affirmed.

Dated, Washington, D.C.
September 8, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁸ 20 C.F.R. § 10.138(b)(2).