

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE M. MILLER and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Leneya, KS

*Docket No. 98-2016; Submitted on the Record;
Issued May 10, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

On August 14, 1997 appellant, then a 51-year-old tax examining assistant, filed an occupational disease claim alleging that he sustained "trapped nerves due to repetitious use of computer and 10-key calculator" and that his "condition has developed into arthritis in the neck."

By decision dated October 27, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence did not establish that he sustained an injury in the performance of duty. By letter dated December 12, 1997, appellant requested reconsideration of his claim. In a decision dated February 24, 1998, the Office denied modification of its prior decision.

The Board has duly reviewed the case record in the present appeal and finds that this case is not in posture for decision due to a conflict in medical opinion.

The Board has held that where employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the period of disability related to the aggravation.¹ Where the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. This is true even though the employee is found medically disqualified to continue in such employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, the disqualification for continued employment is due to the underlying condition, without any contribution by the employment.²

¹ *Thomas N. Martinez*, 41 ECAB 1006 (1990).

² *Ronald M. Meyer*, 35 ECAB 358 (1980).

Section 8123(a) of the Federal Employees' Compensation Act³ provides that where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make the examination.⁴

In the present case, there is a conflict in medical opinion between appellant's physicians, Dr. Lirio Mahmoud and Dr. F. Dan Koch, a Board-certified orthopedic surgeon, and the Office medical adviser.

In a report dated December 1, 1997, Dr. Mahmoud related:

"[Appellant] has been seen here since July 1994, initially for pain in his right arm and shoulder that has progressed into neck pain with numbness and tingling of the right arm. It initially occurred after sleep, but was found to be exacerbated by rapid up and down movement while working."

Dr. Mahmoud noted degenerative changes of appellant's cervical spine with disc space narrowing and indicated that a magnetic resonance imaging (MRI) study showed a "small herniated disc at C4 and 5."

In a form report of the same date, Dr. Mahmoud stated:

"[Appellant] initially had symptoms after sleep [and] thought it was a sore neck. He went to [physical therapy and] symptoms dissipated. Symptoms reappeared while working on 10 key [and] keyboard. When first seen symptoms were similar but after further exam[ination] [it] was determined his job aggravated [his] condition."

Dr. Mahmoud diagnosed C-5 radiculopathy and degenerative disease of the cervical spine. He checked "yes" that the condition was caused or aggravated by employment and opined that appellant's condition was "aggravated by repetitive up [and] down motion of the neck while using 10[-]key and computer keyboard and computer screen." Dr. Mahmoud found that appellant was totally disabled from September 17, 1996 to October 10, 1997 and could resume employment on October 13, 1997.

In a form report dated December 17, 1997, Dr. Koch diagnosed C-5 radiculopathy and degenerative disease of the cervical spine. He checked "yes" that the condition was aggravated by appellant's employment and attributed the aggravation to repetitive motion.

The Office medical adviser, on the other hand, in a report dated February 23, 1998, noted that appellant had experienced neck pain and radiculopathy since an occasion in 1994 when he fell asleep on the floor. He opined that appellant's work might aggravate his symptoms but did not aggravate his underlying condition of degenerative arthritis.

³ 5 U.S.C. § 8123(a)

⁴ *Debra S. Judkins*, 41 ECAB 616 (1990).

To resolve the conflict in medical opinion regarding whether appellant sustained an aggravation of an underlying condition due to factors of his federal employment, the Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate impartial medical specialist. After further development, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated February 24, 1998 and October 27, 1997 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.

May 10, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member