

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIM LAW-JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 03-2075; Submitted on the Record;
Issued November 26, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant established that her accepted condition of right carpal tunnel syndrome should be expanded to include left carpal tunnel syndrome as a result of her December 26, 1991 accepted employment injury.

On December 28, 1991 appellant, then a 33-year old machine clerk, filed a notice of traumatic injury claiming that on December 26, 1991 her right hand swelled and she developed pain in her right arm up to the neck, shoulder and breast, due to lifting tubs of mail. The Office of Workers' Compensation Programs accepted appellant's claim for right carpal tunnel syndrome, right shoulder tendinitis and right medial epicondylitis. The Office also authorized right carpal tunnel surgery and right ulnar surgery. Appellant stopped work on December 28, 1991 and worked intermittently until approximately April 1995.

This is the second appeal in this case.

By decision dated March 1, 2002,¹ the Board found that the August 20, 1999 report of Dr. Stanley Askin, the independent medical examiner and Board-certified orthopedic surgeon, chosen to resolve a conflict in medical opinion, was insufficiently well rationalized and required clarification.² He indicated in his report that, as far as he was aware, there was no actual medical

¹ Docket No. 00-2635 (issued March 1, 2002).

² Appellant also claimed that she sustained a left carpal tunnel syndrome condition due to employment factors. The Board noted that the Office properly determined that there was a conflict in medical evidence regarding the issue between Dr. Stuart G. Dubowitch, an attending physician of undetermined specialty, and Dr. Marc L. Kahn, a Board-certified orthopedic surgeon, who served as an impartial medical examiner. Section 8123(a) of the Federal Employees' Compensation 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." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a).

or scientific link between special activities, including repetitive stress and the thickening of the tissues of carpal tunnel syndrome. The Board found that Dr. Askin did not explain how or why the thickening of the tissues of carpal tunnel syndrome was not related to repetitive stress activities. He only indicated in his report that, "as far as he was aware," there was no medical or scientific link. The Board also noted that Dr. Askin did not explain his statement regarding the difference between carpal tunnel syndrome and "tissue intolerance to work activity" and how appellant was simply intolerant to this type of work.

The Board set aside the decisions of the Office dated April 24, 2000 and September 13, 1999 and remanded the case to the Office for further proceedings consistent with the Board's opinion. The facts of the case as summarized in the prior decision are hereby incorporated by reference.

Following the Board's remand on May 15, 2002 the Office referred appellant to Board-certified orthopedic surgeon, Dr. Howard Zeidman, for an impartial medical evaluation to determine her diagnosis and whether a causal relationship exists between her condition and the accepted work injuries. The Office did not request that Dr. Askin clarify his opinion before referring appellant to Dr. Zeidman. The record contains evidence from a claims examiner stating:

"The March 1, 2002 decision of the Board found that the impartial medical examiner report from [Dr.] Askin was insufficiently well rationalized and required clarification, but the remand did not direct that the Office return to Dr. Askin. Because the examination was done almost three years ago and because Dr. Askin did give his reasons for his opinions (although these were not found sufficient by [the Board]), this Office will arrange for a new impartial medical examination to be done."

The Office forwarded Dr. Zeidman a statement of accepted facts, the medical evidence of record and specific questions regarding appellant's condition. He examined appellant on May 23, 2002 and submitted his report dated the same day. Dr. Zeidman provided a long history of appellant's condition and briefly answered the Office's questions. He stated in pertinent part:

"The third question talks about the relation to the injury at work on December 26, 1991 and the fourth describe the question of left carpal tunnel syndrome. I believe both can be considered together. I do believe that [appellant] has symptoms and electromyogram (EMG) and nerve conductive (NC) study findings consistent with the diagnosis. I do not believe it was related by direct cause, aggravation, acceleration or precipitation to the lifting of tubs on December 26, 1991. Indeed, the causative events are somewhat unclear."

Based on Dr. Zeidman's May 23, 2002 report, the Office, by decision dated June 20, 2002, denied appellant's claim.

Appellant disagreed with the decision and requested an oral hearing. At the hearing held on March 11, 2003 appellant submitted additional medical reports from Dr. Dubowitch dated

May 22 and June 26, 2002 and a report from Dr. John Ashby, Board-certified in physical medicine and rehabilitation, dated June 19, 2002.

By decision dated June 5, 2003, the Office hearing representative affirmed the June 20, 2002 decision on the grounds that Dr. Zeidman's report was sufficiently well rationalized and constituted the weight of the medical evidence.

The Board finds that this case is not in posture for a decision.

When the Office 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, the Office must secure a supplemental report from the specialist to correct the defect in his original report. 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, the Office 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.³

In this case, the Office referred appellant to Dr. Askin, a Board-certified orthopedic surgeon, for an independent medical examination to resolve a conflict in the medical evidence regarding whether she had employment-related left carpal tunnel syndrome. Despite the Board's determination that the opinion of Dr. Askin required clarification, the Office did not attempt to obtain a clarification report from Dr. Askin before referring appellant to another impartial medical examiner.

Under Board case precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required under specific circumstances. In *Joseph R. Alsing*,⁴ the Board excluded the medical report from a second impartial medical specialist, which was obtained prior to any attempt to have the original medical referee clarify his medical opinion. The Board stated: "Since the report from Dr. Koester was improperly obtained, it will not be given any weight on review by the Board and should not be considered by the Office." The Board remanded the case to the Office to obtain a clarification report from the first impartial medical specialist and to issue a *de novo* decision.⁵

The evidence of record indicates that the Office claims examiner did not agree with the Board's determination that Dr. Askin did not give reasons for his opinions in his August 20, 1999 report. The examiner independently determined that, since the Board's remand "did not direct that the Office return to Dr. Askin" and since the examination was done almost three years earlier, he would arrange for a new independent medical examination.

The Board stated in its March 1, 2002 decision, that "Dr. Askin's report is insufficiently well rationalized and requires clarification." The Board also examined specific statements made

³ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

⁴ *Joseph R. Alsing*, 39 ECAB 1012 (1988); *Jeannine E. Swanson*, 45 ECAB 325 (1994).

⁵ See also Docket No. 87-80.

by Dr. Askin and explained why they were insufficiently well rationalized. Even though the Board did not specifically state in the last sentence of the decision that the Office should only obtain a clarification opinion from Dr. Askin, the Board did state that the case was remanded for further proceedings “consistent with this opinion of the Board.”

This case will be remanded to the Office for it to obtain a supplemental report from Dr. Askin with a well-rationalized opinion and clarification as to whether appellant’s left carpal tunnel syndrome and the thickening of the tissues of the carpal tunnel syndrome is related to her employment duties or the original work injury of December 26, 1991. If Dr. Askin is unwilling or unable to clarify his opinions, the case should be referred to another impartial medical specialist.⁶ After such development as it deems necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers’ Compensation Programs dated June 5, 2003 is hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
November 26, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ *Harold Travis, supra* note 3.