United States Department of Labor
Employees' Compensation Appeals Board

TERRI J. HILT, Appellant	)	
and	)	**Docket No. 04-1541**
	)	**Issued: September 13, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Wichita, KS, Employer	)	

Appearances:
Beth Regier Forester, Esq., for the appellant
Thomas G. Giblin, Esq., for the Director

Oral Argument March 15, 2005

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
A. PETER KANJORSKI, Alternate Judge

JURISDICTION

On May 25, 2004 appellant filed a timely appeal from the March 8, 2004 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.[1]

ISSUES

The issues are: (1) whether appellant's L5 spondylolysis and L5-S1 spondylolisthesis are causally related to her January 6, 1999 employment injury; (2) whether the January 6, 1999 employment injury caused disability for work beginning November 18, 1999; and (3) whether the Office properly denied authorization for appellant's October 9, 2000 low back surgery.

[1] The Board's jurisdiction is confined to the matters decided in the Office's March 8, 2004 decision. The Board has no jurisdiction to review the January 9, 2001 termination of appellant's compensation for refusing suitable work. Appellant did not pursue the suitable work issue in her subsequent hearing before an Office hearing representative or in her subsequent requests for reconsideration. The Director of the Office argues on appeal that further development and a merit decision are now warranted on the issue of suitable work. Under 5 U.S.C. § 8128(a), the Secretary may review an award for or against the payment of compensation at any time on his own motion.

FACTUAL HISTORY

On January 6, 1999 appellant, then a 31-year-old distribution clerk, injured her lower right back in the performance of duty while lifting a box overhead. The contents shifted, pulling her upper body backward and causing her to step back off a six-inch platform. She did not fall to the ground. The Office accepted her claim for lumbosacral strain. Appellant did not stop work. But beginning January 8, 1999 she worked limited duty eight hours a day. Beginning November 18, 1999 she worked six hours a day until she stopped work completely on January 20, 2000.

Appellant filed claims for disability beginning November 18, 1999. In decisions dated January 25, February 29, June 10 and October 31, 2000, the Office denied compensation for wage loss.

A conflict arose between appellant's physician, Dr. Eustaquio O. Abay, II, a Board-certified neurological surgeon, and Dr. James Armstrong, a Board-certified orthopedic surgeon and Office referral physician. Dr. Abay proposed surgery. He diagnosed bilateral spondylolysis of L5 with spondylolisthesis and right S1 radiculopathy. Dr. Abay reported that appellant's pars defect at L5 was most probably preexisting and that she had a Grade 1 anterior subluxation of L5 on S1 that most probably resulted from the January 6, 1999 work injury. He also recommended that appellant work no more than six hours a day with restrictions beginning November 18, 1999.

Dr. Armstrong reported that appellant had a temporary aggravation of her preexisting L5 spondylosis and Grade 1 L5-S1 spondylolisthesis. He stated that the January 6, 1999 incident was not a major slip and that the twinge of pain she felt in her back was consistent with a strain in someone with a preexisting L5 spondylolysis. Dr. Armstrong reported that appellant had recovered from her lumbosacral strain based upon his physical examination, that she could have continued to work limited duty eight hours a day beginning November 18, 1999, that he did not relate the proposed surgery to the January 6, 1999 incident and, further, that no surgical indications were present.

To resolve the conflict, the Office referred appellant to Dr. David J. Clymer, a Board-certified orthopedic surgeon, for an impartial medical examination. On July 24, 2000 Dr. Clymer reported that the work incident resulted in a mild lumbosacral strain and some mild symptomatic aggravation of her preexisting spondylolysis/spondylolisthesis process, causing some mild neurologic irritability resulting in leg pain. Both the strain and the aggravation, he reported, had stabilized without resolving completely. Dr. Clymer stated that appellant could have continued to work limited duty eight hours a day from November 18, 1999 to the present. He also reported that the proposed surgery was not causally related to the January 6, 1999 work incident and was not medically necessary.

On September 1, 2000 the Office advised appellant that the employing establishment had offered her a job that was suitable, based on Dr. Clymer's restrictions. The Office notified her of the penalty under 5 U.S.C. § 8106(c)(2) and gave her 30 days to accept the job, which was still available or to give reasons for refusing it. On September 25, 2000 appellant refused because she was scheduled to have back surgery on October 9, 2000. On October 2, 2000 the Office advised that her reason for refusing was not acceptable and that she had 15 days to accept the

offer or have her compensation terminated for refusing suitable work. On October 10, 2000 appellant again refused because of her back surgery.

In a decision dated January 9, 2001, the Office found that the weight of the medical opinion evidence rested with Dr. Clymer, the impartial medical specialist. The Office denied appellant's claim for wage loss beginning November 18, 1999 and denied authorization for her back surgery. The Office also found that she was not entitled to future compensation for wage loss because she had refused suitable work under 5 U.S.C. § 8106(c)(2).

In a decision dated January 7, 2002, an Office hearing representative found that Dr. Clymer's opinion represented the weight of the medical evidence and failed to support that the disability claimed after November 18, 1999 was causally related to the employment injuries sustained on January 6, 1999. The hearing representative affirmed the Office's January 9, 2001 decision. The hearing representative also found that the opinion of Dr. Glenn M. Amundson, a Board-certified orthopedic surgeon, was of diminished probative value because it failed to provide an accurate history of injury, failed to provide an unequivocal opinion on causal relationship and failed to provide medical rationale.

Appellant requested reconsideration on January 6, 2003 and submitted additional medical reports from Dr. Amundson and Dr. Abay.

In a decision dated January 31, 2003, the Office denied modification of the hearing representative's January 7, 2002 decision. The Office found that Dr. Amundson offered no medical reasoning to support his conclusion that the January 6, 1999 incident aggravated appellant's preexisting spondylolisthesis and therefore his opinion was of diminished probative value notwithstanding his professorial status. The Office also found that a new report by Dr. Abay was speculative and not supported by medical reasoning.

Appellant requested reconsideration and offered Dr. Amundson's sworn statement to address the deficiency found by the Office's January 31, 2003 decision.

In a decision dated March 8, 2004, the Office denied modification of the January 31, 2003 decision. The Office found that Dr. Amundson's statement related medical concepts already of record and that a medical opinion based on a temporal relationship was not a basis for accepting surgery.

LEGAL PRECEDENT -- ISSUES 1 & 2

A claimant seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[3] including that she sustained an injury in the performance of duty and that any specific condition

[2] 5 U.S.C. §§ 8101-8193.

[3] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

or disability for work for which she claims compensation is causally related to that employment injury.[4]

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her claimed condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the claimed condition is related to the injury.[5]

ANALYSIS -- ISSUE 1

A conflict arose between Dr. Abay, appellant's neurosurgeon, and Dr. Armstrong, the referral orthopedist, on whether the January 6, 1999 incident at work aggravated appellant's preexisting L5 spondylosis and L5-S1 spondylolisthesis. Dr. Abay reported that appellant's Grade 1 anterior subluxation of L5 on S1 most probably resulted from the January 6, 1999 work injury. Dr. Armstrong reported that the January 6, 1999 incident was not a major slip and that the twinge of pain appellant felt in her back was consistent with a strain in someone with a preexisting L5 spondylolysis.[6]

Section 8123(a) of the Act provides in 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."[7] The Board finds that the Office properly referred appellant to Dr. Clymer, a Board-certified orthopedic surgeon, for an impartial medical examination.[8]

The Office provided Dr. Clymer with appellant's case file and a statement of accepted facts so that he could base his opinion on a proper factual and medical history. He described appellant's history of injury, her subsequent medical care and her current complaints. Dr. Clymer related his findings on physical examination and reviewed a number of radiographic studies, including x-rays taken at the time of injury, which he stated revealed satisfactory alignment of the lumbar spine. Based upon appellant's history and findings, Dr. Clymer reported that appellant had a preexisting L5 spondylosis with a mild spondylolisthesis of L5 on S1. He noted that the January 6, 1999 incident caused no apparent change in bony architecture or

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[6] Appellant argues that Dr. Armstrong's opinion should be excluded from the record on grounds of bias. The evidence, however, demonstrates no bias or unfairness on the part of Dr. Armstrong in the evaluation he conducted as an Office referral physician. In the absence of such a demonstration, the Board finds that Dr. Armstrong's opinion should not be excluded. *Anthony La-Grutta*, 37 ECAB 602 (1986).

[7] 5 U.S.C. § 8123(a).

[8] The Office's May 15, 2000 reference to a "second opinion evaluation" is harmless error. The Office made clear that the purpose of the evaluation was to resolve a conflict between Dr. Abay and Dr. Armstrong. *See Henry J. Smith Jr.*, 43 ECAB 524 (1992), *petition for recon. denied*, 43 ECAB 892 (1992).

alignment and no change in the relative appearance of the spondylosis or spondylolisthesis. And a magnetic resonance imaging revealed no disc herniation or marked canal or foraminal encroachment. "Consequently," he concluded, "I believe her increased subjective symptoms following her work incident were primarily the result of lumbosacral strain with associated lumbar myositis." He stated that appellant's subjective complaints of leg pain were suggestive of some nerve root irritability, which was probably also aggravated by the work incident, though these complaints were not confirmed by significant objective findings. Dr. Clymer determined that the January 6, 1999 incident resulted in a mild lumbosacral strain and some symptomatic aggravation of the preexisting spondylosis/spondylolisthesis process, which were not completely resolved but had stabilized with time and conservative management.

When 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.[9] The Board finds that Dr. Clymer's opinion is based on a proper history and is sufficiently supported by medical reasoning that it must be accorded special weight in resolving whether the January 6, 1999 incident at work aggravated appellant's preexisting L5 spondylosis and L5-S1 spondylolisthesis. Consistent with the director's argument on appeal, the Board will modify the Office's March 8, 2004 decision to reflect that the aggravation of these preexisting conditions is employment related and must be accepted as such by the Office.

ANALYSIS -- ISSUE 2

A conflict also arose between Dr. Abay and Dr. Armstrong on the issue of appellant's disability beginning November 18, 1999. Dr. Abay completed a duty status report on November 18, 1999 stating that he would recommend that appellant work no more than six hours a day with restrictions. Dr. Armstrong reported that she could have continued to work limited duty eight hours a day beginning November 18, 1999. The Office properly referred the issue to Dr. Clymer, the impartial medical specialist, for resolution.

In the statement of accepted facts, the Office spelled out physical demands of the limited-duty work appellant performed for eight hours a day through November 17, 1999. These duties included lifting 0 to 20 pounds intermittently. Dr. Clymer reported that the only work limitation resulting from the January 6, 1999 employment injury was a limited ability to lift, push or pull to the 30-pound range. He stated that appellant was capable of performing her regular duties as a part-time flexible clerk. In response to the specific question posed by the Office, Dr. Clymer reported: "I believe [appellant] could have continued to work at an [eight-]hour day limited[-]duty work from [November 18, 1999] to the present."

Knowing the nature of appellant's preexisting condition, her history of injury, her subsequent medical attention and the limitation on lifting, pushing and pulling caused by the January 6, 1999 employment injury, Dr. Clymer's opinion on the issue of disability beginning November 18, 1999 is unequivocal and supported by medical rationale. The Board finds that

[9] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Clymer's opinion is entitled to special weight and establishes that the January 6, 1999 employment injury caused no disability for work beginning November 18, 1999.[10] The Board will affirm the Office's March 8, 2004 decision on this issue.

LEGAL PRECEDENT -- ISSUE 3

Section 8103(a) of the Act[11] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation. The Office must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in the Act.[12]

ANALYSIS -- ISSUE 3

A third conflict arose between Dr. Abay and Dr. Armstrong on the need for surgery. Dr. Abay recommended surgery, which appellant underwent on October 9, 2000, while Dr. Armstrong reported that no surgical indications were present. Dr. Clymer acted as the impartial medical specialist under 5 U.S.C. § 8123(a).

Dr. Clymer found insufficient evidence of spinal instability or mechanical neurologic entrapment "to make me enthusiastic" about the procedure proposed. He reported that the likelihood of significant symptomatic improvement following such a surgery was poor. While he appreciate that some patients might wish to proceed with surgical treatment despite the limited likelihood of success, Dr. Clymer stated to a reasonable degree of medical certainty that such surgery was related to the correction of her preexisting spondylosis and spondylolisthesis condition and not directly the result of the mild work-related symptomatic aggravation, which did not structurally change the preexisting condition or result in significant canal or foraminal compromise. "To a reasonable degree of medical certainty," he reported, "I would not favor such surgery as medically necessary…." Further, he stated that, if such surgery should occur, he would personally advise against an anterior approach, as was recommended by Dr. Abay. He noted that any aggressive surgical approach might not result in a clear symptomatic benefit and that appellant's subjective sense of any postsurgical result and her ability to work after such surgery might be unchanged or even worse. Dr. Clymer concluded: "Consequently, to a reasonable degree of medical certainty I would not favor such surgery as medically necessary or indicated within the context of this workman's compensation issue."

[10] Dr. Amundson's yes-no responses to questions posed during a February 19, 2003 telephonic statement are not sufficient to create a conflict with Dr. Clymer on this point. Dr. Amundson indicated with a "yes" that appellant's condition was one that would have caused intermittent total disability and that appellant was unable to perform full-time work. The Board notes that appellant did perform full-time work through November 17, 1999. Dr. Amundson indicated with a "no" that appellant was unable "to work solidly" in light of what he saw and her need for the upcoming surgery. He did not explain.

[11] 5 U.S.C. § 8103(a).

[12] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

As Dr. Clymer was selected to resolve a conflict on the need for surgery and as he offered a reasoned opinion on whether the proposed surgery was medically necessary or indicated, the Board finds that the Office did not abuse its discretion in denying authorization for the surgery.

Appellant submitted the March 14, September 23 and December 2, 2001 reports of Dr. Amundson, a Board-certified orthopedic surgeon of professorial rank, who stated that her back surgery was reasonable and necessary for her chronic pain complaints and debility that occurred as a result of the January 6, 1999 injury, which "caused her previously asymptomatic spondylolisthesis to become symptomatic. But it is not clear that Dr. Amundson had an accurate history of injury. He reported that appellant lifted a 10-pound box and was leaning forward when she "lost her balance, fell and suffered immediate pain." He stated that she suffered a significant hyperextension injury to her low back "as a result of a fall on [January 6, 1999]" and that "the fall initiated a chronic pain syndrome manifested as low back and eventually bilateral radicular pain." There is no evidence, however, that appellant lost her balance and fell to the ground. Although she indicated on her claim form that she was falling backward and that she fell back off the six-inch platform, the record makes clear that she stepped back off the platform without falling to the ground. This is the history reflected in contemporaneous duty status reports and the January 8, 1999 report of her chiropractor. Even when she reported to Dr. Abay on October 26, 1999 that being forced further back into extension caused her "to fall off a [six]-inch step" and jam her back, there is no sense that she was describing to him how her body fell to the floor, only that she stepped back off the platform as a matter of necessity to regain her balance and in the process of doing so jammed her back. The Board has held that medical conclusions based on inaccurate or incomplete histories are of little probative value.[13] For this reason the Board finds that Dr. Amundson's reports in 2001 are not sufficient to create a conflict with Dr. Clymer on the issue of medical authorization for surgery.

During a telephonic sworn statement on February 19, 2003, appellant's attorney supplied Dr. Amundson with an accurate description of the January 6, 1999 incident. He stated that the incident initiated appellant's pain syndrome and caused the necessity for surgery when it proved refractory by all other forms of treatment. This was the extent of his rationale. Dr. Amundson did not address Dr. Clymer's concern that there was insufficient evidence of spinal instability or mechanical neurologic entrapment. He did not rebut Dr. Clymer's opinion that the likelihood of significant symptomatic improvement following such a surgery was poor. The Board finds that Dr. Amundson's February 19, 2003 opinion is of diminished probative value because he failed to explain whether the surgery was to effect the purposes specified in the Act.[14]

Appellant also submitted an October 31, 2001 report from Dr. Abay, indicating that the surgery was precipitated by the January 6, 1999 injury. As Dr. Abay was already on one side of the conflict when the Office referred the matter to an impartial medical specialist, his additional

[13] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

[14] The Board has held that medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

report does not recreate the conflict.[15] The Board will affirm the Office's March 8, 2004 decision on the issue of medical authorization.

CONCLUSION

The Board finds that the weight of the medical evidence, as represented by the opinion of the impartial medical specialist, establishes that appellant's L5 spondylolysis and L5-S1 spondylolisthesis are causally related to her January 6, 1999 employment injury and that the January 6, 1999 employment injury caused no disability for work beginning November 18, 1999. The Board further finds that the Office did not abuse its discretion in denying authorization for appellant's October 9, 2000 low back surgery.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2004 decision of the Office of Workers' Compensation Programs is modified to reflect that the January 6, 1999 work incident aggravated appellant's preexisting L5 spondylosis and L5-S1 spondylolisthesis and is affirmed as modified.[16]

Issued: September 13, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[15] *E.g.*, *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

[16] A. Peter Kanjorski, Alternate Judge, retired from the Board on August 31, 2005 and did not participate in the preparation of this decision.