

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERILYN McLEHAN and U.S. POSTAL SERVICE,
NORTHWESTERN STATION, Detroit, MI

*Docket No. 97-2628; Submitted on the Record;
Issued August 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained low back and right shoulder injuries causally related to an accepted December 20, 1991 motor vehicle accident, in which she sustained a right ankle fracture; and (2) whether appellant has established that she sustained a ratable permanent impairment of the right ankle entitling her to a schedule award.

The procedural history of the case is as follows. The Office of Workers' Compensation Programs accepted that on December 20, 1991, appellant, then a 43-year-old city letter carrier, sustained a right ankle fracture requiring December 22, 1991 open reduction, in a work-related motor vehicle accident.¹ In her December 20, 1991 claim form, appellant described the nature of injury as "broken ankle plus?"² She received continuation of pay from December 21, 1991

¹ Appellant filed a prior claim, No. A09-0359993, for an alleged September 18, 1991 lumbar strain sustained when she was "almost attacked by a dog." The Office denied the claim by November 5, 1992 decision. The record indicates that in development of the claim, it was ascertained that appellant had a history of degenerative lumbosacral arthritis, scoliosis and a nonoccupational January 12, 1990 back injury. Following additional development by the Office, appellant filed an appeal with the Board. By decision issued on June 8, 1994, Docket No. 93-968, the Board affirmed the November 5, 1992 decision finding that appellant had not established fact of injury. The adjudication of this claim is not before the Board on the present appeal.

² In a December 23, 1991 hospital discharge form, it was noted that appellant was "the driver of a motor vehicle accident which she was struck on the driver's side ... thrown into the passenger side as a result of impact. [Appellant] immediately complained of chest pain and right ankle pain" and denied abdominal pain or other symptoms. Cervical spine x-rays were negative. Appellant underwent open reduction and internal fixation of a right medial malleolar fracture on December 22, 1991. In a January 7, 1992 accident report prepared and signed by appellant, she described being struck on the driver's side of the vehicle by a speeding car which ran a red light. She stated that she was "knocked unconscious and upon awakening," a witness gave her information about the hit and run driver. This report does not mention the nature of appellant's injuries.

through February 3, 1992, wage-loss compensation from February 4 to August 19, 1992 and returned to limited duty on July 1, 1992.³

Beginning in July 1992, appellant alleged that she had sustained lumbar and right shoulder injuries in the December 20, 1991 accident and submitted medical reports discussing these conditions.⁴ By decision dated August 12, 1994, the Office found that appellant had not established that she sustained a back injury causally related to the December 20, 1991 motor vehicle accident and that the medical evidence did not establish that she sustained a ratable permanent impairment of the right ankle according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (third edition) (hereinafter, the A.M.A., *Guides*).⁵ Appellant made three subsequent requests for reconsideration, submitting additional medical evidence pertaining to alleged lumbar and right shoulder injuries, but not her right ankle. The Office denied modification by decisions dated September 19, 1995,⁶ December 3, 1996⁷ and June 2, 1997⁸ on the grounds that appellant submitted insufficient rationalized medical evidence to establish causal relationship.⁹

Regarding the first issue, after a thorough review of the case record, the Board finds that appellant has not established that she sustained low back and right shoulder injuries causally related to the December 20, 1991 motor vehicle accident.

³ In an April 6, 1993 letter, the employing establishment stated that appellant was currently disabled for work due to uncontrolled hypertension. In an April 13, 1993 letter, the Office advised appellant's attorney that as the medical evidence indicated that appellant had "fully recovered from the injury of December 20, 1991, [was] able to work without restrictions and d[id] not require any specific medical treatment at th[at] time," there would be no future "eligibility for additional compensation for wage loss" or medical care related to the December 20, 1991 right ankle fracture.

⁴ In an April 24, 1993 letter, appellant stated that she had a "preexisting back problem" related to the September 1991 incident, which she claimed as a lumbar strain. She asserted that at the time of the December 20, 1991 accident, she informed doctors at the hospital that she had sustained a back injury in the accident. Appellant stated that the December 20, 1991 accident aggravated a preexisting back condition.

⁵ In an August 9, 1995 letter, appellant, through her attorney requested reconsideration. She submitted additional medical evidence pertaining to the alleged back and shoulder injuries, but not her right ankle or the schedule award claim.

⁶ In a September 17, 1996 letter, appellant, through her attorney requested reconsideration and submitted additional evidence pertaining to the alleged lumbar and right shoulder injuries.

⁷ In a May 23, 1997 letter, appellant, through her attorney requested reconsideration and enclosed additional evidence pertaining to her alleged back and right shoulder injuries.

⁸ The Office found that Dr. Johnson's April 15, 1997 report was based on an inaccurate history as appellant did not claim other than a right ankle injury at the time of the December 1991 motor vehicle accident. The Office noted that "[t]he conditions that [appellant] has later attempted to blame on the 1991 vehicle accident are of such a serious nature that they could not have possibly been overlooked by [appellant] or the trained physicians who treated her at the time of the accident and in the months following."

⁹ The Office also noted that the medical record did not mention a back injury until June 29, 1992 or right shoulder complaints until 1994.

When an employee claims a new injury or condition causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the newly alleged condition and any related period of disability, are causally related to the accepted injury. It is not sufficient merely to establish the presence of a condition. In order to establish his or her claim, appellant must also submit rationalized medical evidence, based on a complete and accurate factual and medical background, showing a causal relationship between the employment injury and the claimed conditions.¹⁰

As applied to this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed lumbar and right shoulder injuries and the December 20, 1991 motor vehicle accident.¹¹ Causal relationship is a medical issue.¹² The medical evidence required to establish a causal relationship, generally, is medical opinion evidence,¹³ of reasonable medical certainty,¹⁴ supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁵ An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's belief of causal relation unsupported by the medical record.¹⁶ The Board has held that the mere concurrence of a condition with a period of employment does not raise an inference of causal relationship between the two.¹⁷

There is no mention of trauma affecting the low back or right shoulder in the portion of the record made contemporaneously to the December 20, 1991 accident. A December 23, 1991 hospital discharge report does not mention any injury other than the accepted right ankle fracture. A January 7, 1992 accident report prepared and signed by appellant, does not mention any back or right shoulder injuries.

The first mention of record of a back condition appears approximately six months after the December 20, 1991 accident, in a June 29, 1992 report, by Dr. Berton Moed, an attending Board-certified orthopedic surgeon, who treated appellant for the accepted right ankle fracture. Dr. Moed noted that appellant's attorney suggested that appellant "seek medical opinion for her back." He noted appellant's ankle was well healed, cleared her to return to work and referred appellant to Dr. Shlomo S. Mandel, a Board-certified orthopedic surgeon, "for evaluation of her

¹⁰ See *Armando Colon*, 41 ECAB 563 (1990).

¹¹ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

¹² *Mary J. Briggs*, 37 ECAB 578 (1986).

¹³ See *Naomi Lilly*, 10 ECAB 560, 572-73 (1959).

¹⁴ See *Morris Scanlon*, 11 ECAB 384-85 (1960).

¹⁵ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁶ *Ausberto Guzman*, 25 ECAB 362 (1974).

¹⁷ *Charles E. Richardson*, 34 ECAB 1413 (1983).

back.” Dr. Moed did not express an opinion regarding the causal relationship of appellant’s back complaints to the accepted December 20, 1991 accident.¹⁸

In a June 3, 1993 report, Dr. Mandel noted that appellant “[d]enied experiencing pain in the lower back prior to the motor vehicle accident” and prescribed physical therapy and an exercise program. The Board notes, however, that appellant had previously filed a claim for a September 18, 1991 low back injury¹⁹ and in an April 24, 1993 letter, stated that she had a “preexisting back problem” related to the September 1991 incident and that the December 20, 1991 accident aggravated a preexisting back condition. Thus, Dr. Mandel’s opinion is based on an inaccurate factual and medical history and is of greatly diminished probative value.²⁰

Appellant also submitted a November 4, 1992 report by Dr. William Higginbotham, an attending orthopedic surgeon, who related her account of a 1990 lumbar strain when attacked by a dog and “pain in her back that was as a result of an automobile accident that occurred in December 1991.” Dr. Higginbotham noted some degenerative changes in the lumbar spine without radiculopathy, but did not express his independent opinion on the causal relationship of these findings to the December 20, 1991 accident. Similarly, in an August 6, 1993 report, Dr. Meredith E. Keller, an employing establishment physician, noted appellant’s account of a September 1991 back injury and that the December 1991 motor vehicle accident caused “a strain to her low back.” Dr. Keller noted a decreased range of lumbar motion without spasm, but did not address causal relationship other than repeating appellant’s account of events.²¹

Appellant also submitted reports from Dr. Walter Johnson, an attending family practitioner, which she alleged established causal relationship. In a November 3, 1993 report, Dr. Johnson, related appellant’s account of sustaining a low back injury with radiculopathy in the December 20, 1991 motor vehicle accident and diagnosed a “[p]robable ruptured lumbar intervertebral disc.” In an August 29, 1996 report, he opined that appellant’s right shoulder condition, first diagnosed as a torn right rotator cuff on May 3, 1994²² and ruptured L5-S1 disc, were “consistent with ... trauma that she sustained in her original injury” on December 20, 1991, causing permanent disability for her date-of-injury job.²³ These opinions are based on

¹⁸ Appellant underwent a physical therapy program for lumbar strengthening in August 1992.

¹⁹ See *supra* note 1.

²⁰ See *Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

²¹ In November 16, 1992 and February 4, 1993 reports, Dr. Keller found appellant unfit for duty due to uncontrolled hypertension. There is no claim of record for hypertension. Also, in a February 12, 1993 letter, Dr. Charlie W. Fields, an attending osteopath, stated that appellant was unable to work “since November 5, 1992 due to a contusion of her right hip.” There is no claim of record for a right hip contusion.

²² In periodic reports through February 21, 1995, Dr. Johnson diagnosed lumbar radiculopathy, a deteriorated L5-S1 disc, degenerative arthritis of the right acromioclavicular joint.

²³ Dr. Johnson noted that his June 20, 1996 report erroneously referred to appellant’s left shoulder whereas her complaints were to the right shoulder.

appellant's later recollection of events and not the contemporaneous medical or factual record from December 1991.

Similarly, in an April 15, 1997 report, Dr. Johnson noted appellant's newly detailed recollection that the December 20, 1991 collision "threw her against the door," injuring the right "shoulder and also directly her lower back" and that "deceleration force ... during the impact" also caused the injuries.²⁴ The Board notes that while a December 23, 1991 hospital discharge report does state that appellant was "thrown into the passenger side as a result of impact," there was no mention of a right shoulder injury. As these opinions on causal relationship are not based on an accurate factual history, they are of greatly diminished probative value.²⁵ In a March 1, 1995 form report, Dr. Johnson diagnosed right shoulder bursitis and impingement syndrome, S1 radiculopathy and L5-S1 ruptured intervertebral disc and indicated that these conditions were due to the December 20, 1991 motor vehicle accident.²⁶ Without supporting medical rationale, this opinion on causal relationship is of very little probative value.²⁷ Thus, Dr. Johnson's reports are of insufficient weight to establish appellant's assertion of a causal relationship between right shoulder and low back conditions and the December 20, 1991 accident.²⁸

Consequently, appellant has submitted insufficient rationalized medical evidence to establish that she sustained a low back or right shoulder injury causally related to the December 20, 1991 motor vehicle accident in which she sustained a right ankle fracture.

Regarding the second issue, the Board finds that appellant has not established that she sustained a ratable permanent impairment of the right ankle related to the accepted December 20, 1991 fracture.

Section 8107 of the Federal Employees' Compensation Act²⁹ and section 10.304 of the implementing regulations³⁰ provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the

²⁴ Dr. Johnson noted that an magnetic resonance imaging (MRI) scan "showed an impingement syndrome of the right shoulder with a torn glenoid labrum."

²⁵ See *Cowan Mullins*, *supra* note 20.

²⁶ He continued to noted appellant's right shoulder and low back complaints in periodic reports through August 27, 1996.

²⁷ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

²⁸ Appellant also submitted objective test reports. A November 4, 1993 lumbar MRI scan showed degenerative changes at L5-S1 "with narrowing of the disc space," and "posterior osteophyte formation with resultant mild impression upon the thecal sac" at L5-S1. A November 12, 1993 electromyogram (EMG) showed possible nerve root irritation at L3 on the right. January 25, 1994 right shoulder x-rays showed minimal "subchondral cystic degeneration of the greater tuberosity of the right humeral head." An August 17, 1994 EMG and NCV (nerve conduction velocity study) showed possible nerve root irritation at L3. These reports do not address causal relationship.

²⁹ 5 U.S.C. § 8107.

³⁰ 20 C.F.R. § 10.304.

percentage of impairment. Therefore, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.³¹ Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants. The A.M.A., *Guides* lists specific procedures for determining impairment of affected body parts. A physician must first determine the effect of the medical condition on life activities and determine the date of maximum medical improvement.³² Then, according to the nature of the impairment, the physician consults the appropriate tables and grading schemes to calculate any percentage of permanent impairment.

The pertinent medical record is as follows. In a March 16, 1992 report and periodic notes through June 1992, Dr. Moed, an attending Board-certified orthopedic surgeon, noted that appellant was progressing regarding the right medial malleolus fracture. He released appellant to limited-duty work as of June 30, 1992. In a September 14, 1992 report, Dr. Moed released appellant to full duty. In a March 15, 1993 report, he noted that appellant had “no complaints about the ankle” and found a full range of right ankle motion: 50 degrees dorsiflexion and plantar flexion; 30 degrees inversion and eversion; no pain or swelling. Dr. Moed recommended a zero percent impairment rating of the right lower extremity according to the A.M.A., *Guides*. In a June 11, 1993 report,³³ an Office medical adviser stated a date of maximum medical improvement of September 11, 1992 and reviewed and concurred with Dr. Moed’s determination of a zero percent impairment of the right ankle according to the A.M.A., *Guides*. Based on the opinions of Dr. Moed and the Office medical adviser, the Office found that appellant had a zero percent permanent impairment of the right ankle according to the A.M.A., *Guides* and, therefore, found appellant ineligible for a schedule award for right ankle impairment.

The Board finds that Dr. Moed and the Office medical adviser used the appropriate tables and grading schemes of the A.M.A., *Guides* in determining that appellant did not have a ratable permanent impairment of the right ankle. Also, appellant has provided no subsequent evidence indicating a worsening of her right ankle and has not asserted or established that he or the Office medical adviser erred in their schedule award calculation or incorrectly applied the A.M.A., *Guides* grading schemes in her case. Thus, there is insufficient evidence to establish that appellant sustained a permanent impairment of the right ankle entitling her to a schedule award.

³¹ *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

³² A.M.A., *Guides*, 9.

³³ On its face the report is dated “June 11, 1992.” However, due to its reference to specific measurements taken by Dr. Moed, the use of a September 1992 date of maximum medical improvement and the report’s position in the case record, it appears that the report was actually prepared on June 11, 1993.

The decisions of the Office of Workers' Compensation Programs dated June 2, 1997 and December 3, 1996 are hereby affirmed.

Dated, Washington, D.C.
August 24, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member