

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRIVELLA COLQUITT and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Washington, D.C.

*Docket No. 98-206; Oral Argument Held October 20, 1998;
Issued May 12, 1999*

Appearances: *John G. Kaden, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant's disability causally related to her June 22, 1983 employment injury ended by July 11, 1986.

This case has been before the Board on two prior occasions. On the most recent prior appeal, the Board, by decision and order dated January 11, 1995, found that the supplemental report the Office of Workers' Compensation Programs obtained from Dr. Chester A. DiLallo, a Board-certified orthopedic surgeon serving as an impartial medical specialist resolving a conflict of medical opinion, was "not sufficient to resolve the conflict in medical opinion." The Board remanded the case "to the Office for it to further develop the medical evidence on whether appellant had any disability causally related to her June 22, 1983 injury on or after July 11, 1986."¹

On June 21, 1995 the Office referred appellant, the case record and a statement of accepted facts to Dr. Sanford H. Eisenberg, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. In a report dated June 27, 1995, he reviewed appellant's history and her prior medical reports and set forth findings on a physical examination and x-rays. Dr. Eisenberg noted that appellant walked better without than with her cane and knee brace, that her response to sensory testing on the right side was "strictly functional and subjective in nature

¹ Docket No. 93-1800.

and not objective” and that her “complaints of pain in the right lower extremity were not substantiated by objective findings.” Dr. Eisenberg concluded:

“With the information that is presently available to me including the history of [the] 1982 accident, it would be my opinion that this patient does not have any disability that is causally related to the work-related injury of [June] 22[,] [19]83. The degenerative phenomena that is described in the lower cervical and lower lumbar area shortly after the accident and which is further advanced as seen in the x-rays made subsequent to today’s examination would indicate that degenerative changes were occurring prior to the [June] 22[,] [19]83 accident and there was no acute acceleration as evidenced by the many different studies over the last several years.

“It is obvious that this patient has chronic degenerative disease of the lumbosacral discs that started prior to the [June] [19]83 accident. At the present time, she does have a tendency to emphasize her difficulties as evidenced by the use of a knee brace and cane even though she walks with greater facility without the external aids. Her status as of this date would be identical if the [June] [19]83 accident had not occurred.”

In a supplemental report dated August 7, 1995, Dr. Eisenberg stated that he reviewed an interpretation of a June 1992 magnetic resonance imaging (MRI) scan, an August 20, 1992 myelogram and a report of surgery performed on October 14, 1992. He stated that these additional reports “in no way change my opinion as expressed following the orthopedic evaluation of [June] 27[,] [19]95. The degenerative lumbosacral disc disease started prior to the [June] [19]83 trauma and was not altered on this accident.”

By decision dated August 26, 1995, the Office found that “the medical evidence of record fails to support entitlement to compensation and medical benefits subsequent to July 11, 1986 causally related to the accepted work injury of June 22, 1983.” At appellant’s request, an Office hearing representative reviewed this decision and in a decision dated June 10, 1996, remanded the case to the Office for it to obtain a supplemental report from Dr. Eisenberg reflecting his awareness of another employment injury sustained by appellant in 1982.

On July 16, 1996 appellant submitted a report dated May 7, 1996 from Dr. Gary C. Dennis, a Board-certified neurosurgeon. After setting forth appellant’s history and reviewing prior medical reports, Dr. Dennis concluded:

“It is my opinion to a reasonable degree of medical certainty that [appellant] was reasonably asymptomatic from injuries sustained on January 8, 1982 when she fell on a waxed floor on June 22, 1983. The June 22, 1983 injury resulted in a disc herniation/bulge at L4-5, L5-S1 identified on [computerized tomography] CT scans and MRI’s of 1986, 1987 and 1992 and postoperative findings involving L4-5. Since the patient did not exhibit sciatica before June 22, 1983 and had no diagnostic studies to definitively evaluate this area before a CT scan of August 18, 1986 and MRI of September 18, 1986 were performed, the only

conclusion that can be drawn is that the disc herniation/bulges at L4-5, L5-S1 were caused by the injury of June 22, 1983.

“The collective reports of Dr. Sanford Eisenberg of June 27 and August 7, 1995 state that the patient’s condition would have been no different if the June 22, 1983 had never occurred. Since sciatica did not occur until the June 22, 1983 injury, I cannot agree with Dr. Eisenberg.”

Consistent with the Office hearing representative’s June 10, 1996 decision, the Office prepared a new statement of accepted facts describing appellant’s January 8, 1992 employment injury and submitted it to Dr. Eisenberg with a request for a supplemental opinion. In a report dated September 25, 1996, Dr. Eisenberg concluded:

“A review of the entire record on this patient, as well as direct history indicates that she has had a long history of slowly progressive degenerative changes about the lower back area, which gradually led to compressive abnormality of the L5 nerve root. I do believe that her history is typical of a slowly developing degenerative abnormality about the lower lumbar area and it is most unusual for one traumatic episode to produce a herniated intervertebral disc and none was demonstrated in all the CT scans and MRI studies that were performed on this patient from 1983 to 1992. The only abnormalities that were noted were slowly degenerative bulging, which is typical in the development of an intervertebral disc problem and subsequent L5 radiculopathy that developed shortly prior to surgery.

“I am of the opinion that the [June] 22[,] [19]83 accident was not the cause of the surgery that was performed for the nerve root compression and disc pathology.

“Her status as of this date would be identical irrespective of the [June] 22[,] [19]83 accident.”

By decision dated October 16, 1996, the Office found that the “medical evidence of record fails to support the claimant’s disability subsequent to July 11, 1986 is causally related to the accepted work injury of June 22, 1983.” At a hearing held on April 10, 1997, appellant submitted an April 9, 1997 report from Dr. Alan G. Schreiber, a Board-certified orthopedic surgeon, who stated, “I feel that all of her disc problems are directly related to her original injury back in 1983, and I have stated this in several letters in the past.” At the hearing Dr. Dennis testified that appellant had a normal x-ray after her 1982 injury but after the June 22, 1983 injury her x-rays showed “a narrow dis[c] space at L5-S1, which would suggest that she has a lumbar dis[c] problem at L5-S1,” that the June 27, 1983 x-ray did not show degenerative changes or osteoarthritis but instead showed “a focal injury of the spine,” that he saw “patients every day who have one episode that causes a herniated dis[c],” that the dis[c] herniation for which surgery was performed was not a degenerative kind of bulge and that the dis[c] bulges and degenerative changes also were attributable to her June 22, 1983 injury, as they were not diffuse but occurred

focally. In explaining how patients with an initial back injury require surgery five or six years later when their condition worsens, Dr. Dennis stated:

“[w]ell, one reason is because the disk bulges, it herniates, it scars down, the nerve is injured and degenerative osteoarthritis begins to occur at the level of the injury. As that occurs, it’s a combination of hypotrophic ligament, osteoarthritis of the -- of the joints and the disk bulge, which begin to compress the nerves more. It’s just -- it starts a cascade of events that requires eventually surgical intervention.”

In a decision dated July 15, 1997, an Office hearing representative found that Dr. Eisenberg’s reports constituted the weight of the medical evidence and established that appellant’s disability related to her June 22, 1983 employment injury ended by July 11, 1986.

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

The reports of Dr. Eisenberg were based on an accurate history and contained rationale for his that appellant’s employment-related disability had ended. These reports thus were entitled to special weight and were a sufficient basis to justify the termination of appellant’s compensation.²

There is, however, presently a new conflict of medical opinion in this case, necessitating referral to an impartial medical specialist, pursuant to section 8123(a) of the Federal Employees’ Compensation Act.³ This conflict is between Dr. Eisenberg, to whom the Office referred appellant and Dr. Dennis, a Board-certified neurosurgeon, for appellant. Dr. Eisenberg concluded that appellant’s June 22, 1983 employment injury was not the cause of her October 14, 1992 surgery and that her condition would have been the same had the June 22, 1983 employment injury not occurred. Dr. Dennis reviewed Dr. Eisenberg’s reports and specifically stated that he disagreed with Dr. Eisenberg’s conclusion that appellant’s condition would have been the same without the June 22, 1983 employment injury. In his testimony at a hearing held on April 10, 1997, Dr. Dennis explained why he believed that appellant’s June 22, 1983 employment injury had initiated a cascade of events that led to appellant’s October 14, 1992 surgery. His testimony at the April 10, 1997 hearing created a new conflict of medical opinion.

On appeal, appellant contends that the Office, pursuant to the Board’s decision in the most recent prior appeal, should have sent the case back to Dr. DiLallo for a supplemental opinion rather than referring appellant to Dr. Eisenberg to resolve the conflict of medical

² In situations where there are 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 on a proper factual background, must be given special weight. *Darlene Warren*, 37 ECAB 731 (1986); *James P. Roberts*, 31 ECAB 1010 (1980).

³ 5 U.S.C. § 8123(a) states 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.”

opinion. However, the Board, on the prior appeal, found that Dr. DiLallo's opinion was "not sufficient to resolve the conflict in medical opinion." The Board did not direct the Office to send the case back to Dr. DiLallo, who had already been given an opportunity to clarify his initial opinion.

The decision of the Office of Workers' Compensation Programs dated July 15, 1997 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
May 12, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member