

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE L. SAUERWEIN and DEPARTMENT OF THE AIR FORCE,
MILITARY AIRLIFT COMMAND, SCOTT AIR FORCE BASE, TX.

*Docket No. 99-800; Submitted on the Record;
Issued April 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she sustained a back injury on September 7, 1997 in the performance of duty causally related to factors of her federal employment.

On September 24, 1997 appellant, then a 46-year-old international clearance specialist, filed a claim alleging that on September 7, 1997 she sustained an injury to her lower back with pain radiating into her left leg when she lifted and carried a box of paper. Appellant stopped work on October 1, 1997 and returned to work on October 8, 1997 for four hours per day.

By decision dated December 8, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she did not establish fact of injury. The Office accepted the occurrence of the claimed employment incident but found that the medical evidence was insufficient to establish an injury resulting from the event.

Appellant, through her representative, requested a hearing before an Office hearing representative, which was held on July 28, 1998. In a decision dated September 17, 1998, the hearing representative vacated the Office's December 8, 1997 decision and instructed the Office to refer appellant for a second opinion evaluation on the issue of whether the September 7, 1997 employment incident caused or aggravated her preexisting back condition.

Following development of the case record, in a decision dated November 12, 1998, the Office denied appellant's claim on the grounds that she did not establish that she sustained an injury on September 7, 1997.

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

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

In a report dated November 3, 1997, Dr. David L. Wilkinson, a neurosurgeon and appellant's attending physician, diagnosed degenerative disc disease and recommended an interbody fusion. He noted that appellant related symptoms of left leg numbness and radiating pain into the foot after lifting computer paper at work on September 7, 1997. In a report dated July 20, 1998, Dr. Wilkinson stated, "I saw [appellant] in the office today for a routine check up. She had surgery by me in the past and was doing fairly well until she reinjured herself in September 1997, while lifting some heavy computer paper." Dr. Wilkinson noted that an magnetic resonance imaging (MRI) scan obtained on October 29, 1997 did not show a recurrent disc herniation but rather "scar tissue and degenerative disc disease." He found that appellant's "symptoms appeared to have been reexacerbated by the lifting incident on September 7, 1997. I cannot say, though, that we have clearly defined any disc herniation and do not see any development of slippage."

In a report dated August 12, 1998, Dr. Wilkinson related that he originally treated appellant for a 1989 injury to her back. He indicated that he had performed an L4-5 lumbar laminectomy on appellant in 1989 and an L5-S1 lumbar laminectomy in 1991. He stated:

"At the office visit on November 3, 1997, [appellant] informed me that she injured her back as a result of lifting computer paper at work on September 7, 1997. At that time, she experienced pain down the back of her left leg with numbness and pain in to the foot, along with weakness of the leg. At the time of my physical examination of [appellant], she demonstrated pain on straight leg raising on the left, which was consistent with subjective complaints she made at the time of the office visit for an aggravation of her preexisting injury."

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Id.*

Dr. Wilkinson noted that a MRI performed on October 29, 1997 showed disc space narrowing and scar tissue but no herniation. He indicated that he had referred appellant to Dr. Peter Mirkin, who concurred with his recommendation of surgery.⁶ Dr. Wilkinson listed the dates he treated appellant following the September 7, 1997 employment incident and related:

“The examinations performed by me on these dates confirms my opinion with a reasonable degree of medical certainty, that [appellant] sustained an aggravation of her preexisting disc injury, as a result of lifting computer copy paper at work on September 7, 1997. The basis of my opinion is on the history of the injury given to me by [appellant], that she experienced significant pain down the back of her left leg, pain in the foot and weakness of the leg after lifting the copy paper at work; the absence of any intervening injury since the last time I had seen [appellant] in 1992 and before the injury at work on September 7, 1997, the subjective complaints of [her] and the objective findings I made during my examinations.

“It is my opinion, within a reasonable degree of medical certainty, that the aggravation of the earlier ruptured disc resulting from the incident at work on September 7, 1997 is a permanent condition, which requires surgery, as recommended above. It is my opinion, within a reasonable degree of medical certainty, that the aggravation of [appellant’s] preexisting ruptured disc is from the lifting of a box of copy paper at work on September 7, 1997. It is my opinion, within a reasonable degree of medical certainty, that [appellant] will continue to have significant pain and discomfort to her lower back until the surgery is performed. The permanency of the aggravation to [appellant’s] preexisting back injury is confirmed by my examination of [her] on May 29, 1998, that revealed her symptoms were the same as before except that she now has sensory changes and curling of the toes. The curling of the toes is a further sign of the aggravation of the preexisting disc injury, that her symptoms are worsening and the recommended surgery is needed.”

Based on the opinion of Dr. Wilkinson and the form reports from Dr. Cindy Troiano, the hearing representative found that appellant had submitted sufficient evidence to warrant further development of her claim.⁷ The Office referred appellant to Dr. Michael C. Chabot, an osteopath, for a second opinion evaluation. In a report dated October 22, 1998, Dr. Chabot discussed appellant’s preexisting back condition for which she underwent lumbar laminectomies. He noted that appellant related that “even following her second procedure, she still had some persisting back and left leg symptoms but complains that her prior baseline symptoms were aggravated by this most recent injury.” Dr. Chabot indicated that an MRI of the lumbar spine

⁶ In a report dated November 26, 1997, Dr. Mirkin discussed appellant’s history of medical treatment for her back and noted that she related an injury to her back on September 7, 1997 lifting paper. He diagnosed degenerative disc disease and status post-lumbar disc procedure.

⁷ In form reports beginning October 1, 1997, Dr. Cindy Troiano, a general practitioner, diagnosed acute low back pain, and, in later reports, a probable herniated disc. She checked “yes” that the condition was caused or aggravated by the employment activity described.

obtained on October 29, 1997 “revealed advanced degenerative disc disease at L4-5 and L5-S1 and postop[erative] changes at L4-5 and L5-S1 on the left.”⁸ He stated:

“There is no objective evidence that the alleged work-related injury of September 7, 1997 inflicted any injury to the individual. [Appellant] did not file a work[-]related injury claim until September 24, 1997. She was not evaluated by Dr. Cindy Troiano until October 1, 1997. This significant lapse of time between the alleged injury and the actual claim and [her] pursuit of medical treatment for the condition would argue against any significant initial injury on the alleged date of September 7, 1997.”

Dr. Chabot related that the September 7, 1997 employment incident may have “caused a mild temporary aggravation of her preexisting back condition of degenerative disc disease, which may have lasted several days,” but further opined that “her current symptoms merely represent a continuation of a chronic degenerative condition involving the disc spaces of L4-5 and L5-S1 that would be consistent with the natural history of the disease.” He opined that appellant could continue with her regular employment.

The Board finds that there is a conflict in the medical evidence between Dr. Wilkinson, a neurosurgeon and appellant’s attending physician and Dr. Chabot, an osteopath and Office referral physician. Section 8123(a) of the Act,⁹ 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 the examination.”¹⁰

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant sustained an aggravation of her preexisting back condition causally related to the September 7, 1997 employment incident and, if so, whether surgery is required due to the employment-related aggravation. After such development as it deems necessary, the Office shall issue a *de novo* decision.

⁸ In an addendum dated October 27, 1998, Dr. Chabot reviewed the October 1997 MRI and opined that it did not show a recurrent disc herniation but rather findings “consistent with prior surgeries at L4-5 and L5-S1 levels, with disc degeneration.”

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8123(a).

The decision of the of Workers' Compensation Programs dated November 12, 1998 is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
April 14, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member