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KATHERINE A. FITZGERALD, Appellant)	
)	
and)	Docket No. 02-2266
)	Issued: March 23, 2004
DEPARTMENT OF THE NAVY, PATUXENT)	
RIVER NAVAL AIR STATION,)	
Patuxent River, MD, Employer)	
)	

Oral Argument Held February 11, 2004

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 12, 2002 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 24, 2002 denying her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 10.501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof in establishing a causal relationship between her alleged recurrence of disability on or after May 22, 2000 and her December 18, 1989 employment injury.

FACTUAL HISTORY

On December 18, 1989 appellant, then a 49-year-old computer specialist, filed a notice of traumatic injury alleging that she injured her low back when she slipped in the performance of

duty. The Office accepted her claim for lumbar strain on June 21, 1990 and later expanded her claim to include a herniated disc at L5-S1.

On July 26, 2000 appellant filed a notice of recurrence of disability alleging that on May 22, 2000 she sustained a recurrence of disability causally related to her December 18, 1989 employment injury. By decision dated March 31, 2000, the Office denied appellant's claim finding that she failed to submit the necessary medical evidence to establish a causal relationship between her current condition and her accepted employment injury.

Appellant requested an oral hearing on October 18, 2001 and alleged that the Office mailed the March 31, 2000 decision to an incorrect address. The hearing was held on February 14, 2002. Appellant submitted additional medical evidence following the hearing. By decision dated May 9, 2002, the hearing representative vacated the March 31, 2000 decision of the Office and remanded the claim for additional development of the medical evidence.

On June 24, 2002 the Office referred appellant, a statement of accepted facts and a list of questions to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated July 11, 2002, Dr. Draper opined that appellant's current condition was not due to her accepted employment injuries. By decision dated July 24, 2002, the Office denied appellant's claim finding that the medical evidence failed to establish a causal relationship between her current condition and her accepted employment injuries.¹

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing May 22, 2000 and her December 18, 1989 employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³

ANALYSIS

In this case, the Office accepted that appellant sustained a low back strain and herniated disc at L5-S1 as a result of a fall at work on December 18, 1989. She returned to work on December 30, 1989. The medical evidence included in the record establishes that appellant's attending physician, Dr. James E. Tozzi, a Board-certified orthopedic surgeon, performed cervical surgery in 1991. Appellant then sought treatment for low back pain on November 17, 1998 which she attributed to yard work. On May 22, 2000 she was involved in a motor vehicle accident. Dr. Tozzi noted that appellant experienced pain at L4-5 and L5-S1 following this

¹ Following the Office's July 24, 2002 decision and before the Board, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board will not review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

incident. On January 24, 2001 he performed a decompression laminectomy at L3-4, L4-5 and L5-S1. Dr. Tozzi performed additional surgery on April 6, 2001 to relieve right L5 nerve root compression. In a report dated November 6, 2001, Dr. Tozzi noted appellant's May 2000 motor vehicle accident and the onset of neck, right arm, back and leg pain following this incident. He found evidence of degenerative changes and stenosis in both the cervical and lumbar spines. Dr. Tozzi concluded: "The sole structural problem that one could attribute to the car accident is the disc protrusion of the low back at L4-5 partly necessitating her spinal surgery."

On March 12, 2002 Dr. Tozzi noted that he reviewed appellant's December 20, 1989 magnetic resonance imaging (MRI) scan. He found that this MRI showed a moderated-sized central disc herniation at L5-S1. Dr. Tozzi stated:

"Assuming that this is truly the case as this report indicates that if she did in fact herniate her disc at this level in 1989 and then subsequently this was the cause of progression of degenerative disease and subsequent stenosis. There is a direct link, therefore, between the injury of 1989 and this eventual surgery even though the link is one that is not a cause-and-effect as a herniation in 1989 to require surgery some 11 years later. The cause-and-effect is that once the disc herniates, it subsequently degenerates and in some patients develop arthritic degeneration of the spine and stenosis subsequently requiring surgery...."

Dr. Tozzi based his report on a complete history of injury including reviewing appellant's 1989 MRI, his examination of her following her 2000 motor vehicle accident and surgical treatments and concluded that her current condition of spinal stenosis at L5-S1 was due to her accepted employment injury in 1989.

The Office referred appellant for a second opinion evaluation with Dr. Draper to determine the causal relationship between her current condition and her accepted employment injury in 1989. In his July 22, 2002 report, Dr. Draper reviewed the statement of accepted facts as well as the December 28, 1989 and July 19, 2000 MRIs. He performed a physical examination and concluded that appellant's current back condition was causally related to preexisting degenerative arthritis involving the lumbar spine as well as preexisting degenerative lumbar disc disease and facet arthrosis and subsequent degenerative lumbar disc disease. Dr. Draper concluded that appellant's current back condition was related to the aging process and not to her accepted employment injuries.

Appellant's attending physician, Dr. Tozzi, a Board-certified orthopedic surgeon, noted appellant's history of injury, reviewed the medical records and concluded that her current spinal stenosis was due to degeneration as a result of her accepted 1989 employment injury. Dr. Draper, the second opinion physician and a Board-certified orthopedic surgeon, reviewed appellant's medical treatment as well as the statement of accepted facts and concluded that appellant's low back condition was related to degenerative lumbar disc disease and degenerative conditions of the back which resulted from the aging process. Section 8123(a) of the Federal Employees' Compensation Act⁴ provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

⁴ 5 U.S.C. §§ 8101-8193, 8123(a).

shall appoint a third physician who shall make an examination.” As there is a disagreement between appellant’s attending physician and the Office’s physician regarding the causal relationship between her current low back condition and her accepted employment injury, the Office must refer appellant, a detailed statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine whether appellant’s alleged recurrence of disability on or after May 22, 2000 is causally related to her December 18, 1989 employment injury. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that there is an unresolved conflict of the medical opinion evidence on the central issue of whether appellant’s current low back condition is causally related to her accepted employment injury which requires referral to an impartial medical examiner. The Office must resolve this conflict in accordance with the Act and then render an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2002 decision of the Office of Workers’ Compensation Programs is set aside and remanded for additional development consistent with this decision of the Board.

Issued: March 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member