United States Department of Labor
Employees' Compensation Appeals Board

GINGER E. SWIFT, Appellant	)	
and	)	**Docket No. 05-1807**
	)	**Issued: January 3, 2006**
U.S. POSTAL SERVICE, LAS VEGAS DOMICILE, Las Vegas, NV, Employer	)	

Appearances:
Ginger E. Swift, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 30, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 7, 2005, denying her claim for disability or a medical condition after June 30, 2003 causally related to her December 9, 2002 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 7, 2005 decision.

ISSUE

The issue is whether appellant had any disability after June 30, 2003 causally related to her December 9, 2002 employment injury.

FACTUAL HISTORY

On October 17, 2003 appellant, then a 52-year-old inspection service operations technician, filed an occupational disease claim alleging that beginning December 9, 2002 she developed degenerative disc disease and a herniated disc at L4-5 due to repetitive twisting movements necessitated by her job duties. The Office accepted her claim for a temporary

aggravation of preexisting degenerative lumbar disc disease and a consequential herniated lumbar disc at L4-5 on May 15, 2003 which resolved following surgery on June 3, 2003. Appellant's June 3, 2003 surgery included a lumbar microdiscectomy at L4-5 to correct a large herniated disc which was causing left-sided leg pain. She was released to return to work on June 30, 2003 with no limitations.

In a January 7, 2004 report, Dr. Hugh L. Bassewitz, an attending Board-certified orthopedic surgeon, stated that appellant's back condition had initially improved following the June 3, 2003 L4-5 disc surgery, but she had since developed significant back pain and left leg problems. He indicated that some patients who undergo discectomies later develop severe back pain related to disruption and central disc pain. Dr. Bassewitz stated, "This appears to be the condition of [appellant] at this point and it appears that the return to work, bending and twisting activities have exacerbated this condition."

In a February 27, 2004 report, Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon and an Office referral physician, provided findings on physical examination and opined that appellant had no continuing disability or medical condition causally related to her employment.

Due to the conflict in the medical opinion evidence between Dr. Bassewitz and Dr. Sherman, the Office referred appellant, together with a statement of accepted facts, a list of questions and the case record, to Dr. Jayaraja Yogaratnam, a Board-certified orthopedic surgeon.

In a report May 28, 2004, Dr. Yogaratnam provided a history of appellant's condition and course of treatment, a review of the medical records and findings on physical examination.[1] He indicated that her work-related temporary aggravation of preexisting degenerative disc disease ceased following surgical removal of the disc at the L4-5 level. Dr. Yogaratnam opined that appellant's continuing back problems were due to the natural progression of her underlying degenerative disc disease. He stated:

> "There is evidence according to the records of degenerative joint disease at the L4-5 and the L5-S1 levels of a moderately advanced degree and are preexistent to the [employment] injury…. The changes are consistent with [appellant's] age and her obesity. It is my impression that these degenerative changes were probably aggravated resulting in the dis[c] protrusion … given the [magnetic resonance imaging] MRI [scan] findings of a large herniated dis[c] extending into the left L4-5 neural foramen ….
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> "The aggravation, in my opinion, was of a temporary nature and resulted in the dis[c] herniation for which [appellant] underwent surgical treatment and this ceased after the offending dis[c] was removed causing [her] to state that there was

[1] Appellant filed a claim for a traumatic injury to her L-3 disc which she alleged was due to a bumpy taxi ride to the May 28, 2004 examination by the impartial medical specialist. The Office denied her traumatic injury claim by decision dated September 22, 2004. Appellant is not appealing the September 22, 2004 decision.

improvement. The aggravation, in my opinion, was not permanent and the only permanent feature is the presence of degenerative disease, which would continue to give her ongoing back pain by a process of natural progression, which is a characteristic feature of this condition…. [Appellant's] symptoms continue on her left side; therefore, … the [herniated] disc … reported on the right side [is] irrelevant.

"There should be no injury related factors of disability in spite of [appellant's] subjective complaints which are consistent with a preexisting condition in her back. The numbness and burning in her left leg are also, in my opinion, associated with the preexisting degenerative condition in the back…. This is confirmed by [appellant's] subjective symptoms of numbness over the distribution of the L5 nerve root and pain in the low back … which is consistent with the degenerative disease in her lumbar spine…. There is no evidence of any neurologic deficit in her lower extremities other than the described numbness in her left lower extremity and is consistent with the degenerative findings in the [September 16, 2003] MRI [scan], post surgery…."

*** * ***

"The prognosis is that [appellant] would continue to have low back pain with the likelihood of radicular symptoms as a result of the advancing degenerative process resulting in increased facet hypertrophy causing impingement of nerve roots exiting from the neural foramina due to narrowing as a result of the facet hypertrophy ….

"[Appellant's] present physical limitations would pertain to the degenerative dis[c] disease in her lumbar spine and preclude her from performing certain activities, such as bending at the waist repeatedly [or lifting] over 15 to 20 pounds repetitively."

On June 22, 2004 the Office asked Dr. Yogaratnam to provide a supplemental report stating whether appellant's temporary aggravation of her preexisting degenerative disc disease and subsequent back surgery were work related, to explain why her left side symptoms were not due to her work activities following her return to work after surgery and to recommend possible treatments for appellant's continued right and left side symptoms.

In a report dated June 30, 2004, Dr. Yogaratnam stated that appellant's work activities which included, twisting and bending frequently probably caused the temporary aggravation of her degenerative disc disease and June 3, 2003 surgery. He noted that, when he examined her, she had no symptoms on the right side but, if appellant experienced such symptoms, she should undergo a myelogram followed by an electromyogram (EMG) of the lower extremities to determine whether there was any residual disc material present on the left or right to correlate with her symptoms. Dr. Yogaratnam stated, "If the latter provide the evidence sought, then, one would have to consider that the aggravation continues or has ceased.

By decision dated July 9, 2004, the Office found that the weight of the medical evidence, as represented by the opinion of Dr. Yogaratnam, established appellant's claim for a temporary aggravation of preexisting degenerative lumbar disc disease and a consequential herniated lumbar disc at L4-5, corrected by surgery, had ceased. The Office found that the weight of the medical evidence did not establish that her underlying degenerative disc disease and subsequent disc problem at L4-5 were caused or aggravated by her employment.

By letter dated August 11, 2004 to Dr. Yogaratnam, the Office noted that appellant had recently undergone a lumbar computerized tomography (CT) scan and discogram and EMG studies of both lower extremities. It provided copies of those reports and asked Dr. Yogaratnam whether this additional evidence caused any change in his opinion.

In an August 13, 2004 report, Dr. Mark B. Kabins, an attending orthopedic surgeon, stated that discography had revealed positive disc disruption at L4-5 and L5-S1. He stated:

> "[Appellant] has undergone EMG/NCS [nerve conduction study] testing that demonstrates acute and chronic left L5 radiculopathy consistent with her work-related injury and discogenic injury to her lumbar spine. [She] remains markedly symptomatic, [appellant] has failed conservative care and has undergone an initial decompression which has failed. [Appellant] has a failed laminectomy syndrome and treatment of her industrial injury. [She] has ongoing radiculopathy in the left lower extremity with disc disruption present, most marked at L4-5.
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> "[Appellant] is best recommended to undergo surgical reconstruction including decompression and stabilization of the lumbar spine and treatment of the failed laminectomy syndrome. Discogenic injury, low back and left lower extremity radiculopathy are present. The need for surgery should be considered industrial in nature. Approval is requested so we may implement care. [Appellant] has motor and sensory dysfunction on physical examination on the left lower extremity. She has a positive straight leg raise and Laseque's sign on the left lower extremity. [Appellant] has weakness with [extensor hallucis longus/extensor digitorum communis muscles] EHL/EDC peroneal and anterior tibialis, as well as toe flexors on the left lower extremity. [She] has symmetrical reflexes. With an L5 radiculopathy one does not typical[ly] [lose] reflex ….
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> "To dismiss [appellant's] underlying presentation as merely degenerative, preexisting or nonsurgical would be[,] to the best of my understanding[,] incorrect. On an industrial basis [she] is recommended to undergo surgery."

In an August 20, 2004 supplemental report, Dr. Yogaratnam stated that appellant's work activities caused the temporary aggravation of her preexisting degenerative disc disease and necessitated the June 2003 back surgery, but the aggravation should have resolved following surgery. He stated:

> "If [appellant] states [that] she is still having symptoms postsurgery, the aggravation, by a process of deduction, has not ceased? This appears to be contradictory, as symptoms of continuing 'aggravation' are on the *left* lower extremity … and the 'pathology' is now on the *right* side, with no symptoms to correlate with it. No objective evidence for continuing aggravation on the left side.
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> "[Appellant] told Dr. David J. Olivieri, MD,[2] [that] prior to the EMG study that the surgery did not help her *left* leg pain. If I recall, she told me that after surgery her drop foot and pain were resolved, but she continued to have numbness in the leg ….
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> "[Appellant] told Dr. Olivieri [that] she also has low back pain. This, in my opinion, is due to natural progression of the multilevel degenerative disc disease per MRI [scan], (not of industrial causation). I also strongly believe the numbness in the *left* leg continues due to irritation of the *left* L5 nerve root at or around the neural foramen, even though the disc was removed and which (disc), by its pressure caused a 'motor' deficit, *i.e.*, a foot drop, which was relieved by the surgery, in that [appellant] was able to ambulate without assistance.
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> "So the issue now is 'numbness' continuing due to the aforesaid irritation from degenerative disc disease. There is no foot drop, the latter caused suddenly on [May 15, 2003] due probably to a nonspecific precipitating factor, a disc herniation, secondary to multilevel degenerative disc disease and relieved by surgery. Thus, the precipitating factor from the 'injury' of [May 15, 2003] has been corrected by disc removal --- end of precipitating factor. Based on my experience, I have found at times, no specific physical cause to develop a sudden disc herniation, but is more common in preexisting degenerative disc disease.
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> "The EMG indicates 'acute and chronic L5 radiculopathy and I am convinced this is due to degenerative disc disease and was present before the 'precipitating event' (disc herniation), but no doubt due to preexisting degenerative disc disease in the absence of a physical precipitating event. [Appellant] admits to, on [December 9, 2002] experiencing burning/numbness in the *left* foot and big toe and taking pills for pain (back) as well as legs.… Therefore, this was present previously and is consistent with degenerative disc disease, based on my experience. It was on [May 15, 2003] that she developed foot drop and could not walk -- (precipitation -- disc herniation).

[2] Dr. Olivieri is the physician who conducted the August 3, 2004 EMG and NCS.

"Thus, what [appellant] has now, after the surgery, is not anything new. It was present before the surgery and not due, in my opinion, to the disc herniation of [May 15, 2003], but ongoing due to degenerative disc disease with no relationship to her work, but a natural process. Thus, *there is no continuing aggravation* due to work, but due to the nature of the condition. The surgery accomplished what it had to convey, relieve the foot drop.

"The disc protruding into the *right* neural foramen, minimally displacing the *right* S1 nerve root is not yet causing symptoms, but may do so due to natural progression of the degenerative disc disease and if it does cause increasing neurologic effects, it is due to the characteristics of this degenerative process."

"The development of the foot drop necessitating surgery for herniated disc, was probably a 'precipitation' for no known physical activity on [May 15, 2003] apart from the usual activity, but [appellant] was sitting at the time and this could have caused it, as sitting increases pressure on a disc, as compared to standing. The precipitating factor causing foot drop ceased after surgery.

"The precipitation was of a temporary nature until the disc was removed and resulted in the relief of the foot drop that developed from the 'precipitating factor," probably sitting, secondary to multilevel degenerative disc disease.

"I doubt [appellant] has worsening symptoms, though claimed. Any further treatment would be on a nonindustrial basis due to progression of degenerative disc disease which is probably pressuring the left L5 nerve root due to facet hypertrophy and irritation thereby, which is not at all unusual, one side may be more affected by the degenerative process and this probably explains why, in spite of a protruding disc on the right side, the protrusion is insufficient to cause radicular symptoms in the right side as there is no significant narrowing of the neural foramen as well.

"There is no narrowing of the neural foramen on the left side at L5-S1 per CT [computerized tomography] scan reported and presuming attention was also paid to this level, I will have to conclude, I find it difficult to correlate [appellant's] continuing claim as being credible, on the one hand or have to presume the left L5 nerve is being irritated due to facet and ligament hypertrophy consistent with the multilevel degenerative disease as being a more likely explanation, as it was present long before the surgery on [December 9, 2002] and continues due to natural progression of this condition. Whether it is due to the former or latter fact, it is not *industrial* aggravation." (Emphasis in the original).

Appellant requested reconsideration of the July 7, 2004 decision.

On October 14 and 17, 2004 appellant underwent back surgery at the L3-4, L4-5 and L5-S1 levels. The surgery was performed to treat traumatic internal disc disruption at L4-5, failed laminectomy syndrome with spinal stenosis, epidural fibrosis, a herniated disc at L4-5; traumatic

internal disc disruption at L5-S1 with disc osteophyte complex; degenerative spondylolisthesis at L3-4 with severe degenerative changes and lower extremity radiculopathy.

In an April 25, 2005 report, Dr. Kabins stated that appellant underwent microdecompressive surgery for her December 9, 2002 employment injury and had failed laminectomy syndrome and marked pain emanating from the L4-5 segment. He stated:

> "It was this work-related injury and failed laminectomy syndrome that necessitated further surgical intervention on [October 14 and 17, 2004]. [Appellant] was also found to have pain generation and discogenic abnormalities at the L3-4 and L5-S1 levels. It would have been inappropriate to have stabilized the L4-5 segment without directly addressing the adjacent segments. The need for surgery should be considered directly related to the work-related injury and failed laminectomy syndrome and discogenic pathology at the L4-5 segment."

By decision dated July 7, 2005, the Office denied modification of the July 9, 2004 decision.[3]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proving, by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.[5] Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.[6] Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.[7]

Under the Act, when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[8] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is

[3] Appellant submitted additional evidence subsequent to the July 7, 2005 Office decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board has no jurisdiction to consider this additional evidence for the first time on appeal.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Thomas M. Petroski*, 53 ECAB 484 (2002).

[6] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

[7] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] *Raymond W. Behrens*, 50 ECAB 221 (1999).

medically disqualified to continue employment because of the effect work factors may have on the underlying condition.[9]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.[10] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11]

ANALYSIS

Due to the conflict in the medical opinion evidence between Dr. Bassewitz and Dr. Sherman, as to whether appellant had any work-related disability or medical condition after June 30, 2003, the Office properly referred her to Dr. Yogaratnam, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Yogaratnam provided comprehensive reports, including a history of appellant's condition, course of treatment and a review of the medical records. He provided detailed findings on physical examination and stated his opinion that her work-related temporary aggravation of preexisting degenerative disc disease ceased following surgical removal on June 3, 2003 of the herniated disc at the L4-5 level. Dr. Yogaratnam concluded that appellant's continuing back problems were due to the natural progression of her underlying degenerative disc disease. He noted that there was a history of degenerative disc disease at the L4-5 and the L5-S1 levels of a moderately advanced degree which preexisted the employment injury. Dr. Yogaratnam noted that appellant's symptoms after June 30, 2003 involved the left lower extremity and that she had the June 3, 2003 surgery which did not relieve her left leg pain. She had given a history of left lower extremity problems prior to the December 9, 2002 employment injury. The Board finds that Dr. Yogaratnam's through and well-rationalized medical reports are entitled to special weight and establish that appellant had no disability or medical condition after June 30, 2003 causally related to her December 9, 2002 employment injury.

The August 13, 2004 and April 25, 2005 reports of Dr. Kabins are insufficient to create a new conflict with the opinion of Dr. Yogaratnam. Dr. Kabins indicated that EMG/NCS testing demonstrated acute and chronic left L5 radiculopathy consistent with appellant's work-related injury. He stated that she remained symptomatic with ongoing radiculopathy in the left lower extremity and disc disruption at L4-5. Dr. Kabins provided findings on physical examination and recommended surgery. He opined that appellant's continuing back and lower extremity problems were due to a continuing aggravation of her underlying degenerative disc disease. In an April 25, 2005 report, Dr. Kabins stated that her December 9, 2002 employment injury and

[9] *Id.*

[10] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[11] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

failed laminectomy syndrome necessitated further surgical intervention in October 2004. His reports are insufficient to create a new conflict with the opinion of Dr. Yogaratnam as he provides insufficient medical rationale explaining how appellant's condition and disability after June 30, 2003 was causally related to her December 9, 2002 employment injury.

CONCLUSION

The Board finds that the reports of Dr. Yogaratnam, an impartial medical specialist and Board-certified orthopedic surgeon, are well rationalized and based on a proper factual and medical background and are, therefore, entitled to special weight. His reports establish that appellant's work-related temporary aggravation of degenerative disc disease and herniated disc resolved as of June 30, 2003. Accordingly, the Office properly denied her claim for continuing disability after June 30, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2005 is affirmed.

Issued: January 3, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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