United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 08-1660**
	)	**Issued: January 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Wausau, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2008 appellant filed a timely appeal from a May 15, 2008 merit decision of the Office of Workers' Compensation Programs finding that she did not establish a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly framed the issue as to whether appellant sustained a recurrence of disability beginning August 31, 2006 causally related to her accepted employment injury and, if so, (2) whether the Office properly found that she did not establish an employment-related recurrence of disability.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated April 15, 2008, the Board set aside a September 18, 2007 decision finding that appellant had not established that she was disabled beginning August 31, 2006 due to her accepted work injury and a September 20,

2007 decision finding that her actual earnings effective February 23, 2006 fairly and reasonably represented her wage-earning capacity.[1] The Board noted that appellant attributed her recurrence of disability to new work factors and that her claim was thus for an occupational disease. The Board found that the opinion of Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon and impartial medical examiner, was insufficiently rationalized to establish that appellant could work full time as of August 31, 2006. The Board further noted that he did not adequately address whether appellant sustained cervicobrachial syndrome. The Board noted that Dr. Weiss diagnosed possible cervical degenerative disc disease or carpal tunnel syndrome or Guyon canal syndrome but indicated that he required further objective testing to make an accurate diagnosis. The Board remanded the case for the Office to obtain a supplemental report from Dr. Weiss sufficient to resolve the pertinent issues in the case.[2] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

A computerized tomography angiography of appellant's chest, obtained on January 31, 2008, revealed "significant impingement of the subclavian artery on the right side following Adson's maneuver consistent with thoracic outlet." On April 9, 2008 the Office authorized a resection of the first cervical rib to treat her thoracic outlet syndrome.

On April 25, 2008 the Office requested that Dr. Weiss provide a supplemental opinion explaining why he believed that appellant could work full time beginning August 31, 2006. It specifically requested that he identify findings on examination that supported his conclusion that she was not disabled from her limited-duty employment. The Office enclosed a statement of accepted facts, the March 4, 2006 job offer and medical evidence obtained subsequent to his examination.

In a supplemental report dated May 14, 2008, Dr. Weiss stated:

> "I have reviewed the additional records provided, as well as my previous report of September 13, 2007. Basically, I am indicating that in view of her diagnoses and physical findings, [appellant] could perform light work activities as light work activities would neither progress nor aggravate any of her possible diagnoses. Specifically, performing light-duty work activities would not aggravate a thoracic outlet syndrome or cervical degenerative disc disease nor would it aggravate her carpal tunnel or Guyon canal syndromes. In summary, I believe, given all the information available to me, that [appellant] could have worked full time with light-duty restrictions (no lifting more than 10 pounds frequently or more than 20 pounds occasionally) from August 31, 2006 onward."

[1] Docket No. 07-2419 (issued September 20, 2007). The Office accepted that appellant, then a 31-year-old automation clerk, sustained cervical strain, thoracic outlet syndrome and hypermobility syndrome causally related to factors of her federal employment. Appellant worked in a limited-duty capacity beginning March 21, 2002. On March 4, 2006 she began performing a limited-duty position which required no lifting over 10 pounds and no overhead work with the right arm. Appellant stopped work after two hours on August 31, 2006. She returned to part-time limited-duty employment on October 11, 2006.

[2] The Board determined that it was premature to address the issue of whether appellant's actual earnings effective February 23, 2006 fairly and reasonably represented her wage-earning capacity.

By decision dated May 15, 2008, the Office found that appellant did not establish that she sustained an employment-related recurrence of disability beginning August 31, 2006.[3]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

Section 8123(a) provides that, 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.[7] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8]

When there exist 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 upon a proper factual background, must be given special weight.[9] In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate

[3] The Office noted that appellant stopped work on May 12, 2008 for an authorized rib resection.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[10]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for cervical strain and thoracic outlet syndrome. She worked limited-duty beginning February 27, 2002. On September 1, 2006 appellant filed a notice of recurrence of disability beginning August 31, 2006. She attributed her condition in part to work duties performed after her return to work on February 27, 2002. The Office determined that a conflict in medical opinion existed on the extent of her disability and referred her to Dr. Weiss to resolve a conflict in medical opinion. It instructed Dr. Weiss to ascertain whether she sustained cervicobrachial syndrome.

On prior appeal the Board determined that appellant's claim was for a new occupational disease rather than a recurrence of disability. The Board found that Dr. Weiss did not provide any opinion regarding whether she sustained cervicobrachial syndrome due to factors of her employment duties as requested by the Office. The Board further found that he did not bolster his opinion that appellant was not disabled from her limited-duty employment with any medical reasoning. The Board remanded the case for the Office to secure a supplemental report from Dr. Weiss on the relevant issues.

On remand the Office requested that Dr. Weiss explain why he believed that appellant could work full-time light duty beginning August 31, 2006. It asked that he specify the physical findings he relied upon to support that she was not disabled from her limited-duty employment. In a supplemental report dated May 14, 2008, Dr. Weiss concluded that appellant's light-duty work would not aggravate thoracic outlet syndrome, cervical degenerative disc disease, carpal tunnel syndrome or Guyon canal syndrome. He asserted that she could have performed her limited-duty employment from August 31, 2006.

The Office did not, as instructed by the Board on prior appeal, develop the issue of whether appellant sustained cervicobrachial syndrome due to employment factors and did not adjudicate the claim as one for an occupational disease rather than a recurrence of disability. Additionally, it relied upon Dr. Weiss to find that appellant was not disabled from her limited-duty employment even though he did not sufficiently explain his finding. Dr. Weiss concluded that appellant's duties would not aggravate her condition but did not provide any rationale for his finding.[11] In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original

[10] *See Phillip H. Conte*, 56 ECAB 213 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003); *Talmadge Miller*, 47 ECAB 673 (1996).

[11] *See Willa M. Frazier*, 55 ECAB 379 (2004).

opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[12]

On remand the Office should develop whether appellant sustained an occupational disease due to work duties performed after February 27, 2002 and whether she sustained cervicobrachial syndrome due to her federal employment. It should refer her to a second impartial medical examiner to resolve the extent of her disability beginning August 31, 2006. Following this and such development as it deems necessary, the Office should issue an appropriate *de novo* decision.[13]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 15, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 8, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[12] *See Phillip H. Conte, Guiseppe Aversa, supra* note 10.

[13] In view of the Board's disposition of the first issue, the issue of whether appellant sustained a recurrence of disability on August 31, 2006, is moot.