

**United States Department of Labor
Employees' Compensation Appeals Board**

C.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

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**Docket No. 09-882
Issued: June 22, 2009**

Appearances:

Appellant, pro se

No appearance, for the Director

Oral Argument May 5, 2009

DECISION AND ORDER

Before:

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

JURISDICTION

On February 5, 2009 appellant filed a timely appeal from a February 8, 2008 merit decision of the Office of Workers' Compensation Programs denying her traumatic injury claim.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an injury on August 1, 2003 in the performance of duty.

FACTUAL HISTORY

On August 13, 2003 appellant, then a 41-year-old rural carrier, filed a claim alleging that on August 1, 2003 she sustained pain in her scapula, shoulder and right arm delivering mail. She noted that she had sustained three prior work injuries. The Office assigned the case file number

¹ The Board received appellant's appeal on February 17, 2009 by letter postmarked February 5, 2009.

xxxxxx260. In a statement accompanying her claim, appellant related that she experienced significant pain in her right shoulder on August 1, 2003 delivering mail.

The record indicates that appellant sustained a right shoulder injury on March 19, 1992 in file number xxxxxx256 and a right pectoral muscle tear on October 24, 1996 under file number xxxxxx534. On January 8, 1998 she sustained impingement syndrome of the right shoulder under file number xxxxxx869. Under file number xxxxxx776 the Office accepted appellant's 1992 occupational disease claims for lumbar subluxation.

By decision dated April 16, 2003, the Office terminated appellant's compensation and authorization for medical benefits in file number xxxxxx776. It noted that it had accepted that in 1992 she sustained lumbar subluxation due to factors of her federal employment. The Office found that appellant had no further residuals of her work injury based on the findings of Dr. Howard Zeidman, a Board-certified orthopedic surgeon and impartial medical examiner.

A July 3, 2002 magnetic resonance imaging (MRI) scan of the cervical spine showed a left paracentral disc osteophyte and some foraminal narrowing at C6-7. A July 3, 2002 MRI scan of the right shoulder revealed some mild tendinopathy. An August 3, 2003 MRI scan of appellant's cervical spine revealed a left posterolateral disc bulge at C6-7 and a broad-based posterior disc bulge at C5-6. An August 3, 2003 MRI scan of the right shoulder revealed a tear of the anterior mid labrum and tendinopathy of the supraspinatus tendon.

In a report dated August 19, 2003, Dr. Brian J. Sennett, a Board-certified orthopedic surgeon, reviewed the results of the August 3, 2003 MRI scan and diagnosed cervical radiculopathy.²

In a report dated October 24, 2003, Dr. David H. Kim, a Board-certified physiatrist, summarized his treatment of appellant since August 22, 2002 for pain in her neck, right shoulder, elbow, chest and low back after she injured her right shoulder in 1992 after carrying a heavy object. He described her symptoms of pain which he found "appeared to be compensatory mechanisms for her underlying problems, aggravated by repetitive motions at work, heavy lifting, carrying and loading." Dr. Kim stated:

"[Appellant] reinjured herself in early August 2003 and presented with severe pain in the neck and right scapula and arm, left scapula and shoulder, and low back. A right shoulder MRI [scan] on [August] 3[,] [20]03 revealed an anterior mid labral tear and supraspinatus tendinopathy. A repeat EMG [electromyogram] revealed right C5-7 radiculopathy and suprascapular entrapment I feel that [appellant's] reinjury in August was the result of a long history of poorly managed prior injuries, which accumulated to result in a severe condition. I am in agreement with Dr. Sennett who felt a lot of her problems are related to her cervical spine, however she also has a regional myofascial, and possibly neuropathic pain syndrome at this point."

² On August 28, 2003 Dr. Michael J. Miranda, a chiropractor, indicated that he had treated appellant for 10 years for an employment-related neck and back injury. He opined that she was unable to work from August 3 to September 23, 2003. Dr. Miranda submitted form reports dated October 3 through December 12, 2003.

By decision dated January 27, 2004, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she sustained an injury causally related to factors of her federal employment. It indicated that it was adjudicating her claim as an occupational disease as she attributed her condition to events occurring over the course of more than one workday.

In a decision dated March 31, 2004, issued under file number xxxxxx776, a hearing representative vacated the Office's April 16, 2003 termination of benefits. She discussed appellant's history of prior employment injuries to her right shoulder in file numbers xxxxxx256, xxxxxx534 and xxxxxx869. The hearing representative noted that she had filed a traumatic injury claim on August 1, 2003 which the Office assigned file number xxxxxx260 and adjudicated as an occupational disease claim. She instructed the Office to combine all of appellant's case under one file number and to refer her for an impartial medical examination to determine whether she had any further employment-related condition or disability.

On June 23, 2004 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. George Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination. In the statement of accepted facts, the Office noted that on August 7, 2003 appellant related that she was in pain because she did not have a nerve block injection. On July 20, 2004 Dr. Glenn reviewed the medical evidence of record. He noted that in a report dated October 24, 2003, Dr. Kim mentioned appellant reinjuring herself in August 2003 and that she told him that she tore her glenoid labral trying to pull bundles of mail out of a mailbox while in her vehicle. Appellant's symptoms increased significantly after the mailbox incident. Dr. Glenn found no evidence of any continuing diagnoses due to appellant's accepted work injuries. He opined that appellant could work full time but might need restrictions pending the results of further testing.

By decision dated August 5, 2004, the Office terminated appellant's compensation under file number xxxxxx776 after finding that Dr. Glenn's opinion constituted the weight of the evidence and established that her injury-related disability had ceased.

On August 24, 2004 appellant requested an oral hearing. In a report dated May 5, 2004, Dr. Sennett diagnosed impingement syndrome of the right shoulder. He noted that appellant experienced a sharp pain in her shoulder delivering mail on August 1, 2003 and that a subsequent MRI scan showed a labrum tear. Dr. Sennett found that appellant's injury was employment related and required surgery. On October 15, 2004 he performed a subacromial decompression of the right shoulder with a debridement of the rotator cuff. On January 5, 2005 Dr. Sennett diagnosed impingement syndrome and found that appellant could not work from March 17, 2004 to January 10, 2005. He released her to resume light-duty employment on January 10, 2005.

By decision dated November 3, 2005, the hearing representative affirmed the August 5, 2004 decision. She found that Dr. Glenn's report established that appellant had no further disability or need for medical treatment due to her work injuries.

On October 28, 2006 appellant requested reconsideration under file number xxxxxx260. She asserted that she filed a traumatic injury claim in August 2003 but the Office adjudicated it as an occupational disease. Appellant related that, at her hearing in file number xxxxxx776, the

hearing representative indicated she would also review her case under number xxxxxx260 but then failed to render a decision in the case.

On December 14, 2006 the Office combined file numbers xxxxxx669 and xxxxxx260 into file number xxxxxx776. In a decision dated December 28, 2006, an Office hearing representative noted that Office did not double the case files as instructed and also found that the prior hearing representative failed to address the Office's January 27, 2004 decision, issued under file number xxxxxx260. The hearing representative set aside the November 3, 2005 decision. He affirmed the August 5, 2004 decision terminating appellant's compensation. The hearing representative however, set aside the January 27, 2004, decision denying her claim for a traumatic injury on August 1, 2003 and remanded the case for further development. He noted that appellant related that she experienced pain in her right shoulder on August 1, 2003 delivering mail. The hearing representative found that the Office erred in changing appellant's claim for a traumatic injury on August 1, 2003 to an occupational disease claim. He noted that she underwent arthroscopic surgery of the right shoulder on October 15, 2004. The hearing representative instructed the Office to request a supplemental report from Dr. Glenn regarding whether appellant sustained a cervical or shoulder condition due to the August 2003 employment injury and whether the surgery on October 15, 2004 resulted from the incident.³

Dr. Glenn declined to provide a supplemental medical report without a repeat examination.⁴ On November 15, 2007 the Office determined that a conflict existed between Drs. Sennett and Glenn and referred her to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated November 27, 2007, Dr. Stark noted that in August 2003 appellant "was pushing mail into a box and felt a sharp stabbing pain in her right shoulder." Appellant had arthroscopic surgery in October 2004 and returned to work in January 2005. Dr. Stark reviewed the medical records. He stated:

"The medical evidence does not demonstrate that [appellant] sustained any injuries to her cervical spine or her right shoulder as a result of the August 2003 work injury. [She] was diagnosed with pathology regarding her right shoulder and Dr. Sen[n]et, as early as December of 1996, established a diagnosis or impingement syndrome of the right shoulder with AC [acromioclavicular] joint arthropathy. Although [appellant] underwent an MRI [scan] of her right shoulder

³ On February 16, 2007 under file number xxxxxx776, the Office accepted thoracic or lumbosacral neuritis or radiculitis, thoracic spine pain, an open dislocation of cervical vertebra, myalgia and myositis, a closed dislocation of unspecified cervical vertebra and a closed dislocation of lumbar vertebra.

⁴ In a memorandum to file dated October 4, 2007, the Office noted that it initially made appellant and appointment with Dr. Glenn but later requested a supplemental report without an examination. It received no response and so cancelled the appointment. The Office indicated that Dr. Glenn's office told them the physician would not review records without performing a second examination. Dr. Glenn submitted an unsolicited report dated October 4, 2007, which it excluded from the record.

in August 2003, which did report a tear of the mid-portion of the right anterior glenoid labrum and supraspinatus tendinopathy, and that diagnosis was repeated on the [November] 25[,] [20]03 MRI [scan], the arthroscopic surgery performed in 2004 failed to show any evidence that such pathology existed. Furthermore, the physical examination by Dr. Sen[n]et did not suggest such pathology. As for [appellant's] cervical spine, she did have a prior diagnosis of cervical radiculopathy by EMG, which was not substantiated by any clinical findings in the records, and my findings today do not show the cervical spine done in August 2003 are degenerative in nature and are not post-traumatic. The shoulder arthroscopy that was performed in October 2004 is not causally related to the August 2003 work incident. It is further my opinion that [she] did not sustain any disability as the result of the work injury in August 2003. She is currently working, and she can do her regular work as a rural letter carrier with no restrictions."

By decision dated February 8, 2008, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that she sustained an injury on October 1, 2003 in the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁵ 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.⁶ 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.⁷

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁹ An employee may establish that the employment

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Anthony P. Silva*, 55 ECAB 179 (2003).

⁷ *See Ellen L. Noble*, 55 ECAB 530 (2004).

⁸ *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁹ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.¹⁰

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.¹¹ The implementing regulations 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.¹²

ANALYSIS

Appellant alleged that she sustained an injury to her right shoulder on August 1, 2003 delivering mail. She has established that the August 1, 2003 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.

The Office complicated the proceedings by initially adjudicating appellant's traumatic injury claim as an occupational disease. After finding that appellant's claim was for an occupational disease, it denied her claim in a decision dated January 27, 2004. By decision dated March 31, 2004, a hearing representative found that all of appellant's claims, including her August 1, 2003 claim for occupational disease, should be combined and the case referred for an impartial medical examination. On July 20, 2004 Dr. Glenn performed an impartial medical examination and found that she had no residuals from her accepted work injuries. He did not address whether she sustained an injury on August 1, 2003. Based on Dr. Glenn's opinion, by decision dated August 5, 2004, the Office terminated appellant's compensation. A hearing representative affirmed the August 5, 2004 termination decision on November 3, 2005; however, on December 28, 2006 another hearing representative set aside the November 3, 2005 decision. He affirmed the Office's August 5, 2004 termination of benefits but found that the Office erred in adjudicating appellant's claim for a traumatic injury on August 1, 2003 as an occupational disease.¹³ The hearing representative remanded the case for the Office to obtain a supplemental report from Dr. Glenn addressing whether she sustained a traumatic injury on August 1, 2003.

Dr. Glenn was not responsive to the Office's request for a supplemental report. The Office determined that a conflict existed between Drs. Sennett and Glenn and referred appellant to Dr. Stark for an impartial medical examination. The Board finds, however, that at the time of

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a).

¹² 20 C.F.R. § 10.321.

¹³ The Board does not have jurisdiction over the Office's termination of appellant's compensation as it was issued more than one year prior to the filing of this appeal to the Board. See 20 C.F.R. §§ 501.2(c) and 501.3.

the Office's referral to Dr. Stark, the record did not contain a conflict in medical opinion. In a report dated May 5, 2004, Dr. Sennett, appellant's attending physician, noted her history of right shoulder impingement syndrome. He discussed her history of a sharp pain in her shoulder on August 1, 2003 while delivering mail and found that an MRI scan showed a labrum tear. Dr. Sennett attributed the labrum tear and her need for surgery to her August 1, 2003 work injury. On October 15, 2004 he performed a subacromial decompression of the right shoulder with a debridement of the rotator cuff.

In a report dated July 20, 2004, Dr. Glenn found that appellant had no further condition due to her previously accepted work injuries. He noted that appellant related a history of tearing her labral trying to get mail out of a mailbox in August 2003 but did not specifically address whether she sustained an injury on that date. A hearing representative instructed the Office to obtain an opinion from Dr. Glenn regarding whether she injured herself on August 1, 2003, however, Dr. Glenn did not respond to the Office's request. As Dr. Glenn did not provide an opinion on whether the August 1, 2003 work incident resulted in an injury, his report is insufficient to create a conflict with Dr. Sennett. Consequently, Dr. Stark's opinion is that of a referral physician rather than an impartial medical examiner.

In a report dated November 27, 2007, Dr. Stark found that appellant did not sustain a right shoulder or cervical spine condition due to her August 2003 employment injury. The Board finds that the record contains a conflict between Dr. Sennett, her attending physician, and Dr. Stark, the Office referral physician, regarding whether she sustained a work injury on October 1, 2003. Consequently, the case will be remanded for the Office to refer appellant to an impartial medical examiner for an opinion on whether she experienced a traumatic injury on October 1, 2003 and, if so, the nature and extent of the injury, including whether she aggravated any preexisting condition and whether she required surgery for the injury. The impartial medical examiner should also provide an opinion, if needed, on any periods of disability. After this and any further development as deemed necessary, the Office shall issue a *de novo* decision.

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 February 8, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 22, 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