

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

T.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Glouster, OH, Employer**

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**Docket No. 09-353
Issued: September 3, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2008 appellant filed a timely appeal from an October 28, 2008 decision of the Office of Workers' Compensation Programs denying wage-loss compensation commencing July 18, 2006. 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 any employment-related disability commencing July 18, 2006.

FACTUAL HISTORY

This case was before the Board on a prior appeal.¹ By decision dated July 11, 2008, the Board remanded the case for further development of the medical evidence. The Board found that

¹ Docket No. 08-687 (issued July 11, 2008). Appellant's claim was accepted by the Office for degenerative disc disease of the lumbar spine, lumbar facet arthropathy and lumbar radiculitis.

the April 20, 2007 report of Dr. Alex Minard, an attending orthopedic surgeon, was sufficient to require further development. The history of the case as provided in the prior Board decision is incorporated herein by reference.

On remand, the Office referred appellant to Dr. Sushil Sethi, an occupational medicine specialist. In a report dated September 16, 2008, Dr. Sethi provided a history and results on examination. He opined that appellant did not have an aggravation of degenerative disc disease causally related to employment factors. Dr. Sethi stated that there were no x-rays or physical findings to show an increase in physical findings or structural changes to meet the definition of an aggravation. He noted that a magnetic resonance imaging (MRI) scan showed mild arthritic changes, not significant degenerative disc disease. Dr. Sethi further stated that the accepted condition of lumbar radiculitis was self-limiting and normally resolved in three to six weeks, and appellant's condition had resolved long ago.

By letter dated October 6, 2008, the Office asked Dr. Minard to review Dr. Sethi's report and provide an opinion regarding disability. In a report dated October 13, 2008, Dr. Minard reported that appellant's "MRI [scan] was not extremely impressive. [Appellant] did have some early degenerative dis[c] disease as well as swelling and early arthropathy in the facet joints at the two lower levels." He considered the aggravation to be temporary rather than permanent. Dr. Minard further stated, "I do think that her activities with the [employing establishment] did aggravate a preexisting degenerative condition[;] the repetitive motion and lifting created strain on the lumbar spine. Although it is true that lumbar radiculitis is often self-limiting that normally resolves itself within [three to six] weeks as Dr. Sethi opined, this is not universally true. I treat a number of patients who have radicular pain on a chronic basis." Dr. Sethi stated that when he saw appellant a year ago she could do light duty with lifting of 10 pounds regularly and 20 pounds occasionally.

By decision dated October 28, 2008, the Office denied appellant's claims for compensation commencing July 18, 2006. It found the weight of the evidence was represented by Dr. Sethi.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that, if there is a 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.² 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.³

² 5 U.S.C. § 8123.

³ 20 C.F.R. § 10.321 (1999).

ANALYSIS

As the Board noted in its prior decision, Dr. Minard provided a probative medical opinion that appellant was disabled as of July 18, 2006 due to an employment-related aggravation of degenerative disc disease. In an October 13, 2008 report, Dr. Minard reiterated that he believed appellant sustained an employment-related aggravation that was disabling. While Dr. Sethi, the second opinion physician, was not specifically asked for an opinion as to disability commencing July 18, 2006, he clearly disagreed with Dr. Minard. He found no employment-related aggravation, and he believed the accepted lumbar radiculitis had resolved.

Since there is a disagreement between an attending physician and a second opinion referral physician, the Board finds a conflict was created under 5 U.S.C. § 8123(a). To resolve the conflict, the case will be remanded for referral to a referee physician. The referee physician should be asked to provide an opinion as to whether there was an employment-related disability on or after July 18, 2006. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds a conflict in the medical evidence exists and the case will be remanded for resolution of the conflict pursuant to 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the decision dated October 28, 2008 be set aside and the case remanded to the Office for further proceedings consistent with this decision.

Issued: September 3, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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