

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNIE D. SHADLEY and U.S. POSTAL SERVICE,
POST OFFICE, Medina, Ohio

*Docket No. 96-1691; Submitted on the Record;
Issued May 26, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability commencing June 20, 1994 causally related to her June 8, 1993 accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

On June 23, 1993 the Office of Workers' Compensation Programs accepted that appellant, then a 42-year-old postal worker, sustained cervical, right shoulder and back strains resulting from a motor vehicle accident in the course of her federal employment.

In a report dated June 14, 1993, appellant's physician, Dr. T. Newman, reported that appellant's cervical strain had resolved, but that she was still undergoing treatment for her lumbar strain. On June 28, 1993 appellant was released to sedentary duty while she continued to undergo back treatment, with an anticipated return to full duty on July 5, 1993.

Following a month long course of physical therapy, on August 16, 1993, Dr. Newman stated that appellant's lumbar strain had resolved and released her to full duty.

On July 22, 1994 appellant filed a claim for a recurrence of disability (Form CA-2a) due to her previously accepted employment injury. She stated that following her return to work after her prior injury, she continued to have pain which she thought would cease over time, but did not. Then, on June 20, 1994 she awoke and her arms were numb.

In support of her claim, appellant submitted treatment notes from her attending physician, Dr. Graciano B. Dichoso, an internist. In his chart note dated June 21, 1994, Dr. Dichoso stated that appellant complained of aches and pains in both shoulders with radiation into the middle of her back. He noted that she also had low back pain secondary to degenerative arthritis. He stated that x-rays of the shoulders revealed no evidence of calcium deposits and that clinically appellant might have had bursitis or fibromyalgia. Dr. Dichoso also noted that appellant

complained of pain and numbness in her wrists and fingers. He felt this might be carpal tunnel and subsequently arranged for her to undergo nerve conduction studies. Dr. Dichoso's notes do not mention appellant's June 1993 car accident.

Nerve conduction studies, performed on June 28, 1994, yielded essentially normal results, but as there was a possibility of cervical radiculopathy, not detectable by nerve conduction studies alone, electromyography (EMG) was recommended.

In a report dated July 21, 1994, Dr. Dichoso diagnosed severe cervical disc disease with diffused disc bulge around C5-6 causing pain and discomfort in both arms. Dr. Dichoso stated that appellant would be referred to a specialist for further treatment.

On August 19, 1994 appellant was seen by Dr. Bienvenido D. Ortega. In his report dated August 22, 1994, Dr. Ortega noted appellant's history of having been in a motor vehicle accident in June 1993, at which time she experienced pain in her neck, radiating to the shoulders and arms. He also noted that on June 20, 1994, she awoke with numbness and tingling in her fingers. Dr. Ortega noted that her electroencephalogram and nerve conduction studies were normal, but that computerized tomography (CT) revealed slight bulges at C4-5, and recommended magnetic resonance imaging (MRI).

By letter dated December 2, 1994, the Office requested further information including a history of injury, clinical course followed, and a physician's rationalized medical opinion supporting causal relationship. The Office specifically noted that while appellant stated that she had continuing pain and other symptoms since her original injury, there was no reference in the medical file to continuing medical treatment between her release to full duty and her claim for a recurrence of disability. The Office advised appellant to provide statements from coworkers, and other persons documenting these complaints.

In response appellant submitted additional medical records. In a report dated January 16, 1995, Dr. Ortega noted that appellant was seen that day complaining of increasing symptoms of neck pain and other symptoms of possible painful cord compression. At his recommendation, an MRI was performed on January 18, 1995, and revealed normal results. Appellant also underwent CT and EMG on February 20, 1995, which revealed a diffuse disc bulge at C5-6 and evidence of mild spondylosis at C4-5 and C5-6, with mild spurring.

Appellant also submitted a narrative report from Dr. Ortega dated April 17, 1995, in which he attempted to respond to the Office's request for additional information. The physician noted appellant's history of having been in a car accident in June 1993, and stated that although she received physical therapy, she did not improve. Dr. Ortega drew the following conclusions:

“(1) Neck injury causing symptoms referable to her neck, shoulders and upper extremities.

“(2) Disc protrusions at C4-5 and 5-6, as shown on MRI on August 19, 1994. Without any other history on injury, the most probable cause of this would be the motor vehicle accident in June 1993.

“(3) Progression of symptoms clinically, with recession of the disc protrusions, and development of osteophytic spurs at C4-5 and 5-6, secondary to degenerative changes. If there are no other histories of injuries, then these changes would be related to the injury in 1993.

“(4) Prognosis is guarded. Further treatment will depend upon her progress. Surgery is not anticipated at this time. In fact, I have sent her for a work hardening program.”

In a decision dated May 11, 1995 the Office rejected appellant’s recurrence claim indicating that the evidence submitted did not establish a causal relationship between the claimed condition and the accepted employment injury.

Subsequent to the Office’s decision, appellant submitted an additional medical report from Dr. Ortega, dated July 21, 1995. In this report, Dr. Ortega stated that appellant continued to have symptoms of neck pain and associated left arm pain, with weakness and numbness of the tips of the fingers of the left hand, and that she had had these symptoms since the June 1993 motor vehicle accident. He further stated that appellant reported that her job activities aggravated her pain, and concluded that appellant had a 30 percent permanent disability as a result of her injury.

On December 12, 1995 appellant, through counsel, requested an oral hearing before an Office representative. In a decision dated February 1, 1996, the Office denied appellant’s request as untimely, and further noted that appellant’s claim could be equally well resolved through reconsideration.

Appellant subsequently submitted an additional medical report from Dr. Ortega dated May 19, 1995. In this report, Dr. Ortega again noted appellant’s history of involvement in a motor vehicle accident in June 1993, and attempted to explain the relationship between her current condition and her accepted employment injury, stating:

“[Appellant] suffered injuries to the cervical spine and adjacent soft tissues, which are supporting structures of her neck. Injuries to the soft tissues and spine generally do not heal to the preinjury state, but would heal with some scarring, bruises and permanent functional limitation. The nucleus pulposus would tend to dehydrate or desiccate, and could now enhance the formation of degenerative changes. Although treatments may have reduced her symptoms, they have little or no effect on the long-term prognosis. In my opinion, within reasonable medical certainty, she will need to continue observing principles of neck care, with limitation of certain activities and motions. She also would most likely require short-term care. It is anticipated that she will develop degenerative changes at the affected levels. While this does not require surgery in general, I cannot rule out the possibility of this in the future.”

By letter dated April 11, 1996, appellant requested reconsideration and enclosed an April 2, 1996 report from Dr. Ortega. In this report, Dr. Ortega reviewed appellant's history and medical treatment, and stated, in pertinent part:

“The patient's history suggested progression of the neck and shoulder symptoms, with aggravation by work activities. It appears to me, within reasonable medical certainty, that her symptoms have never let up, and had a causal and direct relationship with the injury in June 1993. There is evidence to support pre-existing, although mild, cervical spondylosis that based on her history, was asymptomatic prior to the June 1993 injury. In my opinion, within reasonable medical certainty, her continuing symptoms stem from the injury of 1993.”

In a decision dated April 23, 1996, the Office reviewed all the evidence submitted subsequent to the prior decision, and found it insufficient to warrant modification of the prior denial. The Office noted that the record contained no evidence that appellant had continued to complain of cervical pain after June 14, 1993, when her cervical condition was determined by her physician to have resolved and therefore found Dr. Ortega's medical opinion, based in large part on appellant's history of ongoing cervical symptoms, of limited probative value.

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

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.²

However, proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence so that justice is done.³

In the present case, appellant submitted several reports from Dr. Ortega. In each of his reports Dr. Ortega stated that appellant had continuing pain and other cervical complaints following the original June 1993 accident, and specifically noted the lack of any intervening causes of her complaint. In his May 19, 1995 report in particular, Dr. Ortega specifically addressed the causal relationship between appellant's original accepted injuries and her current complaints, by explaining the course of dehydration and desiccation which occurs in the nucleus pulposus following injury. He further attempted to explain the lack of cervical complaints

¹ 5 U.S.C. § 8101 *et seq.*

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *William J. Cantrell*, 34 ECAB 1223 (1983).

documented in the record following the resolution of the injury and prior to her claim for recurrence, stating that treatment would have reduced her symptoms.

Although Dr. Ortega's reports are insufficient to completely discharge appellant's burden of establishing by the weight of the reliable, substantial and probative medical evidence that the 1994 alleged recurrence was causally related to appellant's 1993 accepted lumbar and cervical muscular strain injuries, they constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.⁴ Additionally, there is no opposing medical evidence in the record.

Upon remand the Office should, therefore, refer appellant, along with the case record and a statement of accepted facts, to an appropriate medical specialist for a well-rationalized opinion, based on a complete and accurate factual and medical background, regarding the causal relationship between the accepted cervical and lumbar muscular strain injuries in 1993 and the 1994 claimed recurrence. The Office should thereafter issue a *de novo* opinion on appellant's entitlement to compensation under the Act.

The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office representative.

Following the Office's May 11, 1995 decision denying appellant's claim for recurrence of disability, on December 12, 1995 appellant requested an oral hearing before an Office representative.

In a decision dated February 1, 1996 the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration. In view of the Board disposition of the claim on the merits the issue of whether she timely requested a hearing is moot.

⁴ See *Horace Langhorne*, 29 ECAB 821 (1978) (when the attending physician provided no rationale for his conclusion that appellant's hearing loss was causally related to his occupational noise exposure, and the Office medical adviser provided no rationale for his conclusion that appellant's hearing loss was not so related, the medical evidence was insufficient to establish appellant's claim but was sufficient in support thereof to require further development of the record by the Office). The Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

The April 23, 1996 and May 11, 1995 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further development and a *de novo* opinion in accordance with this decision.

Dated, Washington, D.C.
May 26, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member