

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOU ANN NORMAN and DEPARTMENT OF DEFENSE,
HICKAM AIR FORCE BASE COMMISSARY, Aiea, Hawaii

*Docket No. 96-1714; Submitted on the Record;
Issued May 8, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant established that she sustained any disability causally related to work factors after August 1, 1994.

On June 5, 1994 appellant, then a 41-year-old store worker, filed a notice of traumatic injury, claiming that she hurt her back as she picked up a rubber floor mat at work. In support of her claim appellant submitted reports from Dr. Rex K. Niimoto, a chiropractor, who found lumbar subluxations and diagnosed degenerative disc disease and radicular syndrome.¹

In a decision dated February 23, 1995, the Office of Workers' Compensation Programs accepted the claim for lumbosacral strain, but determined, based on the second opinion evaluation of Dr. Ramon H. Bagby, a Board-certified orthopedic surgeon, that the residuals of the June 5, 1994 injury had resolved and, therefore, appellant was not entitled to further compensation. Appellant timely requested reconsideration and submitted medical reports from Dr. Tim J. Watt and Dr. John J. Collins, both practitioners in neurosurgery.²

On September 11, 1995 the Office denied appellant's request, on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office again relied on the opinion of Dr. Bagby, indicating that the conclusion of Drs. Watt and Collins that appellant's back pain was directly related to the June 5, 1994 injury failed to account for appellant's general deconditioning.

Appellant again requested reconsideration and submitted a December 24, 1995 report from Dr. Collins. On February 15, 1996 the Office denied appellant's request on the grounds that Dr. Collins' opinion was insufficient to warrant modification of its prior decision. The

¹ A June 9, 1994 x-ray showed mild disc narrowing and degenerative spurring, but no spondylolysis, acute fracture, or subluxation.

² On April 28, 1995 the Office denied appellant's request for a hearing as untimely filed.

Office noted that the evidence failed to address how or why Dr. Bagby's conclusions regarding appellant's back condition were incorrect.

The Board finds that this case is not in posture for decision, because of a conflict in the medical opinion evidence and thus must be remanded for further evidentiary development.

Section 8123 of the Federal Employees' Compensation Act³ provides that if there is disagreement between the physician making the examination, for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁴

In this case, the Board finds a conflict created by the opinions of Drs. Watt and Collins that there is a causal relationship between appellant's back pain and the June 5, 1994 incident, contrasted with Dr. Bagby's conclusion that all residuals of the injury had resolved. Dr. Bagby evaluated appellant on December 12, 1994, took a medical and family history, reviewed the medical records and performed a physical examination. Dr. Bagby stated that appellant had experienced general deconditioning since 1991 and as a consequence was "predisposed to recurrent sprain/strain injuries of the lumbar spine with minimally strenuous activities."

He opined that appellant's continuing symptomatology resulted from a lack of exercise, that she had a mild restriction of range of motion of the lumbar spine and that she exhibited no radicular symptoms. Dr. Bagby concluded that the lumbar strain, which aggravated her preexisting degenerative arthritis, had healed as of August 1, 1994 and that there was no evidence of permanent impairment.

On March 6, 1995 Dr. Watt examined appellant, noting a history of chronic back pain since a work injury in June 1994. He reviewed a magnetic resonance imaging (MRI) scan, which showed a mild-to-moderate congenital spinal stenosis, worsening at the L3-4 level, because of a central disc bulge. This produced impingement of the neural foramina, causing back pain.

Dr. Watt opined that while he could not state with certainty that the June 1994 incident caused the bulge, there was "no reason to suppose that the type of event [appellant] described at work was not capable of causing a disc protrusion or at least exacerbating a preexisting disc protrusion. As such, it is reasonable to consider this a work-related event."

In a report dated June 21, 1995, Dr. Collins diagnosed degenerative disc disease of L3-4 and L4-5 with diffuse disc bulging, acute disc herniation at L3-4, and myofascial pain syndrome, based on the MRI scan. He stated that appellant's pain syndrome was directly related to the June 5, 1994 event, which resulted in straining the posterior longitudinal ligament and caused the sudden protrusion of her L3-4 disc. Dr. Collins concluded that appellant's injury was work related and that she needed to refrain from heavy lifting, bending, or stooping and prolonged standing, walking and sitting.

³ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

⁴ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

On December 24, 1995 Dr. Collins reported, on his treatment of appellant for myofascial pain and her office visits on November 28 and December 19, 1995, including an electromyogram and nerve conduction studies. He revised his diagnosis to a right L4 radiculopathy, caused by the diffuse herniated disc at L3-4. He noted that appellant's myofascial pain had resolved but the worsening of her nerve root pain would probably require surgery.

The Board notes that all three physicians diagnosed degenerative disc disease, but that Dr. Bagby did not have the opportunity to review the MRI scan. While he opined that appellant's lumbar sprain/strain had "medically probably" resolved and related her recurrent symptomatology to generalized deconditioning, Drs. Watt and Collins concluded, after reviewing appellant's MRI, that a bulging disc was causing appellant's pain symptoms. Further, Dr. Bagby found no radiculopathy in his December 1994 examination, while Dr. Collins diagnosed such a condition at L4.

The Board finds that in this case, the medical opinions are of relatively equal weight and rational. Therefore, there is a conflict in the medical opinion evidence, which requires remand for resolution.⁵

On remand, the Office should refer appellant, the case record and the statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a).⁶ After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The February 15, 1996 and September 11, 1995 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
May 8, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski

⁵ See *George S. Johnson*, 43 ECAB 712, 716 (1992) (finding that a conflict in medical opinion was not resolved because the opinion of the referee physician was insufficiently rationalized; thus, further remand was required).

⁶ See 20 C.F.R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).

Alternate Member