

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERTA KIRWIN and DEPARTMENT OF HEALTH & HUMAN SERVICES, NEW YORK OFFICE, New York, N.Y.

*Docket No. 97-1772; Submitted on the Record;  
Issued February 25, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof to establish that she sustained a cervical condition in the performance of duty causally related to her federal employment.

On April 15, 1992 appellant, then a 48-year-old hearing analyst, filed a traumatic injury claim stating that she sustained a cervical injury. In an August 12, 1994 letter, the Office of Workers' Compensation Programs requested appellant to submit additional evidence which included a factual statement describing how the injury occurred and medical evidence, including a medical report from her physician describing the history of her injury, the diagnosis of her condition, and the physician's rationalized opinion on the causal relationship, if any, between the history and the condition for which appellant was being treated. Appellant did not submit additional information. By decision dated September 22, 1994, the Office denied the claim on the basis that the evidence of file failed to demonstrate that fact of injury had been established.

A request for a hearing was filed and a hearing was held on April 26, 1995. Appellant was represented by William Crossett, IV and Patrick Quinn, attorneys at law. At the hearing, appellant described how her injury occurred. She stated that she was reaching for a file from another clerk, the file slipped out of her hand and, as she tried to grab it, she hurt her neck. Appellant described her job duties as a hearing analyst. Appellant noted that she had problems with her neck in 1987 or 1988 after which she underwent a course of physical therapy and her neck problems resolved completely. She noted that she began to have minor neck pain in January 1992, for which she sought medical attention and stated that her physician referred her to physical therapy. Appellant stated that on March 31, 1992, she fell with a file. At the hearing, appellant presented a two page typed memorandum dated April 15, 1992. Appellant stated that she gave the memorandum to her supervisor. Appellant stated that in addition to having pain in her neck, she was experiencing tingling and loss of sensation in both hands. She further stated that she filed a claim for carpal tunnel syndrome which was accepted. As a result of the carpal tunnel syndrome, appellant had surgery and was unable to work for a period of time. She stated that she returned to work and started to have neck pain and could not concentrate. Appellant further stated that her physician told her in January 1993 that she had two herniated disc and a third one that was bulging. She had surgery on March 10, 1993. Appellant stated that in

December 1993, her physician told her that she may not be able to return to work. Appellant noted that she was involuntarily terminated on November 3, 1993 based on Dr. Stephen C. Robinson, an orthopedic surgeon's, reports. Several medical reports were submitted.

In a July 2, 1993 medical report, Dr. Robinson, stated in part:

“The patient has a clarification of her history. She states that her neck pain actually began in April of 92. She was trying to pick up a heavy file at work when she apparently fumbled it and this resulted in injury to her neck. She states that January 92 onset was a date that she was given by the company to put down in order to fill form out. She states that she had been having some neck pain off and on since the original onset of symptoms in the late 80's but they were not particularly until the April 92 injury. It would appear that this injury was the precipitating cause of her present condition and would represent an aggravation of a preexisting neck injury. I think for this reason, this would appear to be compensation related.”

In a February 4, 1994 report, Dr. Robinson noted that he treated appellant on December 22, 1992.

In an April 27, 1994 report, Dr. Glenn B. Axelrod, a Board-certified orthopedic surgeon, stated that he was unaware of the two work incidents which allegedly occurred on March 31 and April 14, 1992.

Following the hearing, the Office received additional medical evidence which included physical therapy progress notes beginning February 13, 1992, progress notes from Dr. John F. Finkenstadt, a Board-certified family practitioner, beginning March 5, 1992, a computerized tomography scan of the cervical spine dated November 5, 1992, medical reports dated May 5, 11 and 27, 1992 1992, and May 27, 1992 from Dr. Jeffrey Kahn, a Board-certified physiatrist, and reports dated June 1 and 25, 1992 from Dr. Axelrod.

In a December 22, 1992 clinical report, Dr. Robinson noted that appellant was referred to him for evaluation of neck and left shoulder pain. He provided a history that appellant stated that she began to have left sided neck pain radiating over her left shoulder in 1987. She was doing well until January, 1992 when she again had the onset of neck pain and pain radiating over the left shoulder down the left arm to the elbow. Although she had carpal tunnel releases by Dr. Axelrod, she stated that her neck pain and left shoulder pain is continuing. Dr. Robinson provided an impression of chronic cervical radiculopathy with clinical and electromyogram (EMG) evidence of C5 involvement. In the operative report dated March 16, 1993 of appellant's C5-6 and C6-7 anterior cervical discectomy and fusion, Dr. Robinson indicated that appellant has a history of left sided neck, shoulder and arm pain since 1987. He further wrote that the symptoms remained severely disabling and responsive to prolonged trial of conservative treatment.

By letter dated April 27, 1995, appellant submitted copies of her earnings and leave statements starting with her final pay period in 1992 until she was terminated.

By decision dated July 28, 1995, the hearing representative found that appellant failed to supply sufficient medical evidence to establish that she sustained her cervical condition in the

performance of duty on April 14, 1992. Accordingly, the September 22, 1994 decision was affirmed.

By letter dated June 17, 1996, appellant, through her attorney, requested reconsideration. Appellant submitted reports from a physical therapist at North Syracuse Health Center a statement dated April 15, 1992 from appellant to Mr. David F. Neumann, Supervisory Staff Attorney and a June 7, 1996 medical report from Dr. Robinson

In his June 7, 1996 report, Dr. Robinson stated that he reviewed his records, Mr. Salamone's statements and the patient's note of April 15, 1992. Based on all of this information, Dr. Robinson stated:

"It is fairly clear the patient had preexisting cervical problems with neck and arm pain following the April 14, 1992 incident which she documents well in her statement. She clearly had an exacerbation of pain at that time. She had ongoing neck and left shoulder pain since that time. I could only conclude based on this information that the April 14 1992 incident certainly aggravated her preexisting cervical problem. Based on the categories of causal relationship that she detailed to me, I would have to say she had a permanent aggravation as I understand this terminology."

In a decision dated September 11, 1996, the Office performed a merit review and denied reconsideration of appellant's claim on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a cervical condition in the performance of duty on April 14, 1992.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.<sup>1</sup> The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.<sup>2</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>3</sup> must be one of reasonable medical certainty<sup>4</sup> and must be supported by medical

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<sup>1</sup> See *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>2</sup> The Board has held that in certain cases, where the causal connection is so obvious, expert medical testimony may not be necessary; see *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

<sup>3</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

In this case, the medical evidence establishes that appellant had a preexisting cervical condition prior to the work event of April 14, 1992 and that on March 10, 1993, she underwent an anterior cervical discectomy and fusion. The medical evidence, however, provides no medical history of injury and does not relate appellant's cervical condition to her federal employment until Dr. Robinson's July 2, 1993 report, which is more than 14 months after the alleged injury. In his July 2, 1993 report, Dr. Robinson does not describe how, from a medical perspective, the work incident caused or contributed to appellant's preexisting cervical condition. Although Dr. Robinson stated that it would appear that this injury was the precipitating cause of her present condition and would represent an aggravation of a preexisting neck injury, Dr. Robinson does not provide an explanation of how appellant's condition could be due to the April 14, 1992 employment incident and provided no opinion on the cause of appellant's condition. His opinion, therefore, has diminished probative value and is insufficient to establish that appellant's cervical condition is causally related to her federal employment. It is further noted that Dr. Robinson's initial report of December 12, 1992 does not mention the incident of April 14, 1992 and provides a history that appellant was doing well until January 1992.

The Board further finds that the Office properly denied modification in its decision of September 11, 1996.

While Dr. Robinson in his June 7, 1996 report has indicated that appellant's medical condition after the April 14, 1992 incident was causally related to her employment, the Board concludes that Dr. Robinson's opinion in this regard is of very limited probative value. The Board has long held that a physician's opinion regarding causal relationship may not be solely premised on findings that appellant's symptoms appeared after an employment incident.<sup>6</sup> Referring to the implicated incident of April 14, 1992, Dr. Robinson clearly states that appellant had an "exacerbation of pain at that time." The Board has long held that a medical report stating a claimant's complaint of pain while lacking any substantive objective findings of disability does not constitute a probative medical opinion or a basis for payment of compensation.<sup>7</sup> Moreover, Dr. Robinson failed to provide a medical explanation explaining why the implicated incident of April 14, 1992 aggravated appellant's preexisting cervical problem.<sup>8</sup> As such Dr. Robinson's June 7, 1996 report is not well rationalized and is of limited probative value.

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<sup>4</sup> See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>5</sup> See *James D. Carter*, 43 ECAB 113 (1991); *George A. Ross*, 43 ECAB 346 (1991); *William E. Enright*, 31 ECAB 426, 430 (1980).

<sup>6</sup> *Rebel L. Cantrell*, 44 ECAB 660 (1993).

<sup>7</sup> See *Anna Chrun*, 33 ECAB 829 (1982).

<sup>8</sup> *Lucrecia M. Nielsen*, 42 ECAB 583 (1991) (where the Board held that medical opinions must be supported by medical rationale to be of sufficient probative value).

The reports of appellant's physical therapist are without probative value as the Board has found that a physical therapist is not a physician under the Federal Employees' Compensation Act and therefore is not competent to give a medical opinion.<sup>9</sup>

Finally, although appellant's statement serves to provide a contemporary history relative to the April 14, 1992 incident, it duplicates material already of record and, thus, is insufficient to warrant modification.<sup>10</sup>

As appellant has failed to submit rationalized medical opinion evidence supporting the causal relationship between her April 14, 1992 employment incident and her cervical condition, she has failed to meet her burden of proof.

The decisions of the Office of Workers' Compensation Programs dated September 11, 1996 and July 28, 1995 are hereby affirmed.

Dated, Washington, D.C.  
February 25, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>9</sup> See 5 U.S.C. § 8101(2).

<sup>10</sup> *Daniel Deparini*, 44 ECAB 657 (1993).