

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE LECOQ-GADDY and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, Pa.

*Docket No. 98-1648; Oral Argument Held April 22, 1999;
Issued July 15, 1999*

Appearances: *Harold R. Weisbaum, Esq.*, for appellant; *Cornelius S. Donoghue, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on August 29, 1995 causally related to her July 3, 1993 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

In the instant case, the Office accepted that appellant sustained lumbosacral strain and a contusion of the right knee due to an employment-related injury on July 3, 1993. She returned to limited-duty employment for four hours per day on July 11, 1994. On September 20, 1995 appellant filed a notice of recurrence of disability due to her July 3, 1993 employment injury. She stopped work following the alleged recurrence of disability on August 29, 1995.

By decision dated August 2, 1996, the Office denied appellant's claim for a recurrence of disability on August 29, 1995 causally related to the July 3, 1993 employment injury.

Appellant requested a hearing before an Office hearing representative, which was held on June 12, 1997. In a decision dated July 31, 1997 and finalized August 1, 1997, the Office hearing representative affirmed the Office's August 2, 1996 decision after finding that the medical evidence did not establish that appellant sustained a recurrence of disability.

Appellant, through her attorney, requested reconsideration and submitted additional evidence. By decision dated April 15, 1998, the Office found that the evidence submitted was irrelevant and thus insufficient to warrant review of the prior decision.¹

¹ Appellant filed her appeal with the Board on April 28, 1998. By decision dated June 3, 1998, the Office vacated its April 15, 1998 decision and denied appellant's request for reconsideration after merit review. The

The Board has duly reviewed the case record and finds that the case is not in posture for a decision due to a conflict in the medical evidence.

In an initial evaluation dated April 17, 1996, Dr. Henry A. Saiontz, a Board-certified neurosurgeon and appellant's attending physician, noted that appellant had previously injured her back in 1986 and that "[c]opious notes, which I have had a chance to read, indicate that her most current problem comes from an accident on July 3, 1993. This has led to recurrence of back and right leg pain, but also to neck and right arm pain." Dr. Saiontz recommended objective testing. In an office visit note dated August 7, 1996. He diagnosed a herniated cervical disc and recommended fusion. Following the surgery, in a report dated July 23, 1997, Dr. Saiontz discussed his findings of "severe tenderness over the right sacroiliac joint" and opined that "all the problems, for which she has been and continues to be treated for, are consistent with her original accident on July 3, 1993." In a report dated October 10, 1997, he noted appellant's history of back and leg problems after a 1986 injury which he found were aggravated in 1993. Dr. Saiontz noted that appellant "has had evidence of right L5-S1 root type problems and C5 nerve root problems since shortly after the 1993 accident." He discussed the results of objective studies which he found were consistent with abnormalities at the L5-S1 and C4-5 discs. Dr. Saiontz opined that appellant "had a serious injury to the neck" and a "reinjury to the low back and right SI joint in 1993," and further related appellant's surgical fusion to the 1993 employment injury.

The Office referred appellant to Dr. Giles Floyd, a Board-certified orthopedic surgeon. In a report dated May 2, 1996, Dr. Floyd diagnosed status post contusion of the right knee, resolved, and chronic lumbosacral myofascial pain syndrome without radiculopathy. He described essentially normal findings on physical examination and opined:

"It would be my opinion, based upon reasonable medical probability that the event described to this examiner occurring on July 3, 1993 at best would have represented a temporary exacerbation of her long[-]standing preexisting chronic complaints in these areas and this would be expected to resolve to pre-injury status within six to eight weeks. I could identify no objective findings directly attributable to the July 3, 1993 incident as her symptomatology and the objective findings preexist that incident."

The Board finds that there is a conflict in the medical evidence between Dr. Saiontz, appellant's attending physician, and Dr. Floyd, an Office referral physician. Section 8123(a) of the Federal Employees' Compensation Act,² provides in pertinent part:

"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."³

Office's June 3, 1998 decision is null and void as both the Board and the Office cannot have jurisdiction over the same issue in the same case. 20 C.F.R. § 501.2(c); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. §§ 8101-8193.

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for a rationalized medical opinion regarding whether appellant had any disability on or after August 29, 1995 causally related to her July 3, 1993. After such development as it deems necessary, the Office shall issue a *de novo* decision.⁴

The decisions of the Office of Workers' Compensation Programs dated April 15, 1998 and July 31, 1997 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

³ 5 U.S.C. § 8123(a).

⁴ In view of the Board's disposition of the merits of the case, the issue of whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 is moot.