

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN R. HANSEN and U.S. POSTAL SERVICE,
POST OFFICE, Glenview, IL

*Docket No. 98-904; Submitted on the Record;
Issued November 9, 1999*

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a back injury causally related to factors of his federal employment.

In the present case, appellant filed a claim on November 11, 1992 alleging that he had sustained a herniated disc and other back injuries causally related to his federal employment. In a supplemental statement, appellant attributed his injuries to approximately 22 years of carrying mail, including such activities as lifting, walking and bending.

By decision dated November 23, 1993, the Office of Workers' Compensation Programs denied the claim on the grounds that the medical evidence did not establish an injury causally related to the identified employment factors. In a decision dated September 26, 1994, an Office hearing representative affirmed the prior decision. Following a request for reconsideration, the Office issued an October 12, 1995 decision denying modification of the denial of the claim.

In a decision dated January 15, 1997, the Office again denied modification of its prior decisions.

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

In the present case, the Office referred appellant and the case record to Dr. James W. Milgram, an orthopedic surgeon, serving as a second opinion referral physician. In a report dated April 7, 1993, Dr. Milgram stated that, "It is true that one can get a herniated disc when one is doing a lifting activity or injuring the back, but then there is an immediate onset of symptomology that is causally connected. I find no evidence from the history here of causal connection for a work-related injury and the onset of back disease due to disc herniation." In a supplemental report dated July 7, 1993, he stated that appellant had a degenerative disc disease,

which is a universal aging phenomenon and there was no evidence that work activities caused or aggravated the degenerative process.

The Office also determined that another second opinion was required and referred appellant to Dr. David R. Appert, an orthopedic surgeon, who submitted reports dated November 8 and 23, 1993. The reports are of diminished probative value in that Dr. Appert did not clearly explain his opinion with respect to the relevant issue. He stated that appellant's degenerative arthritis "is a result of aging and is the result of everyday activity, be it the work setting, domestic situation, recreation, or athletic activity, etc. It is not the result of a specific work injury." Appellant's claim is that years of working as a mail carrier contributed to his back condition; Dr. Appert mentions activities in the work setting and it is not clear whether he believed the identified work factors contributed to appellant's condition.

In a report dated February 23, 1995, the attending physician, Dr. Jay L. Levin, an orthopedic surgeon, reviewed appellant's treatment history and diagnosed a disc herniation at L5-S1. He further stated:

"On the original history given on November 11, 1992, the patient was under the impression that his complaints were referable to a urinary complaint. Further on in the patient's care and treatment, the patient reflected in December 1992 that his complaints began after working as a mail carrier. Certainly, repetitive activities such as mail carrying can cause this type of problem. It is impossible to determine definitively etiology of the patient's pathology, but based upon the patient's representation that his complaints started in January 1991 after performing in a letter carrying capacity there appears to be a causal relationship to this.... I do believe that the type of work employed by a letter carrier including bending, lifting, walking can account for the etiology of the patient's condition of ill-being."

The Board is unable to find that the reports of the second opinion referral physicians are of such probative value that they outweigh the opinion of the attending physician. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.²

The Board, therefore, finds that under 5 U.S.C. § 8123(a), the case must be remanded to the Office to refer appellant, his medical records and a statement of accepted facts to an appropriate specialist to resolve a conflict in the medical evidence. After such further development as the Office deems necessary, it should issue an appropriate decision.

¹ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

² *William C. Bush*, 40 ECAB 1064 (1989).

The decision of the Office of Workers' Compensation Programs dated January 15, 1997 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
November 9, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member