

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JAMES RICE and DEPARTMENT OF THE ARMY,  
Fort Rucker, AL

*Docket No. 99-1813; Submitted on the Record;  
Issued November 23, 1999*

---

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has established a C3-4 or C4-5 cervical spine injury causally related to his January 5, 1993 employment injury.

In the present case, the Office of Workers' Compensation Programs accepted that appellant sustained cervical strain, herniated nucleus pulposus (HNP) at C6-7, and aggravation of C7-T1 HNP. By decision dated October 26, 1994, the Office determined that appellant's disc conditions at C3-4 and C4-5 were not causally related to the employment injury. The Office denied modification of this determination in decisions dated August 5, 1995, October 18, 1996, December 12, 1997 and March 10, 1999.

The Board has reviewed the record and finds that the case is not in posture for decision.

In the present case, the Office initially attempted to further develop the medical evidence by referring appellant to Dr. Henry H. Barnard, II, an orthopedic surgeon, for an opinion as to whether a C3-4-5 condition was causally related to the January 5, 1993 employment injury.<sup>1</sup> His reports, however, did not provide an opinion on the relevant issue. In a May 26, 1995 report, Dr. Barnard indicated that he could not provide an opinion on causal relationship between appellant's current problems and the employment injury.

As the Office sought the opinion of a referral physician, it has the responsibility to obtain a report which properly addresses the issues presented in the case.<sup>2</sup> Moreover, the Board finds that in this case there is a conflict in the medical evidence that must be resolved. An attending physician, Dr. Robert F. Allen, a neurologist, opined in an undated report (received by the Office on November 30, 1994) that appellant exacerbated his preexisting C3-4 disc problem as a result

---

<sup>1</sup> The Office referred appellant to an associate of Dr. Barnard, but appellant was seen by Dr. Barnard.

<sup>2</sup> See *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

of the employment injury. Dr. Allen reiterated his opinion in a July 30, 1996 report, stating that the employment injury added to the instability at C3-4, and subsequent surgical fusions at C6-7 and C7-T1 rendered the C3-4 region more vulnerable to reinjury. On the other hand, an Office medical adviser provided a report dated September 30, 1994 stating that he could find no evidence of any relationship between the disc abnormalities at C3-4 or C4-5 and the employment injury. The medical adviser indicated that appellant had C5-6 surgery in 1992, prior to the employment injury, and his accepted conditions were below that level. The medical adviser concluded that if there was any causal relationship with respect to the C3-4-5, it was with the nonemployment-related C5-6 problem, not the employment injuries.

Accordingly, the Board finds that the record is in conflict on the issue. 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.<sup>3</sup> 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.<sup>4</sup>

The Office should refer appellant, a statement of accepted facts, and relevant medical records to an appropriate impartial medical specialist for resolution of the conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated March 10, 1999 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
November 23, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>3</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>4</sup> *William C. Bush*, 40 ECAB 1064 (1989).