

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANNIE M. JOHNSON and DEPARTMENT OF LABOR,
REGIONAL OFFICE, Chicago, IL

*Docket No. 98-984; Submitted on the Record;
Issued March 13, 2000*

DECISION and ORDER

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

The issue is whether appellant's medical condition was caused or aggravated by factors of her federal employment.

On March 6, 1996 appellant, then a 40-year-old former employee, filed a claim for compensation alleging that her duties as an automation clerk caused or aggravated conditions of her lower extremities.

Appellant stated in her supporting narrative that she had contracted polio as a young girl, which left her "with very weak muscles in my body, especially in my feet and legs." She noted that when she does "too much walking, standing, climbing of stairs or just a lot of movement it causes me a great deal of pain and my legs can and have given out on me." Appellant added that she uses a cane and a knee brace for support. She further noted that her position in the Labor/Employee Relations Office required a great deal of movement including walking and standing.

In a medical report dated January 30, 1996, Dr. Saul S. Haskell, Board-certified in orthopedic surgery, stated that appellant suffers from severe low back pain, scoliosis of the spine and pain in the left foot and knee. He added that appellant had drop foot on the right, which causes her to fall frequently. Dr. Haskell also noted that "[s]ubsequent aggravation of preexisting injury at work has caused [appellant] to be unable to continue working."

By letter dated May 8, 1996, the Office of Workers' Compensation Programs advised appellant that she needed to submit additional information regarding her claim including all medical records concerning her polio treatment.

On July 19, 1996 the Office referred appellant, a copy of her medical record and a statement of accepted facts to Dr. Jordan H. Trafimow, Board-certified in orthopedic surgery, for

a second opinion.¹ The statement of accepted facts included appellant's preexisting, nonwork-related polio, scoliosis, left femoral biceps transfer surgery, left subtalar arthrodesis of ankle, right triple arthrodesis and Jones arthrodesis of ankle and foot, rheumatic heart disease and fracture of left knee.

In a medical report dated August 1, 1996, Dr. Trafimow stated that appellant's current medical condition was not due to her post-polio syndrome but were due to a specific defect in her musculoskeletal armor.

In a supplemental report dated September 26, 1996, Dr. Trafimow stated that appellant's "key problem is [her] lack of normal endurance," noting that she "gets tired because she has to work and she has to carry her body throughout the day." The Office noted, in a memorandum for the record, that Dr. Trafimow was unresponsive because he did not list work factors as a cause, aggravation or precipitation of appellant's condition.

On October 28, 1996 the Office referred appellant, a copy of her medical records and the statement of accepted facts to Dr. Jules Shapiro, Board-certified in orthopedic surgery, for a second opinion evaluation. The Office requested that Dr. Shapiro determine whether appellant had a current diagnosable condition causally related to her federal employment and, if so, whether the condition was temporary or permanent.

In a medical report dated November 6, 1996, Dr. Shapiro stated that he had examined appellant on November 5, 1996 and noted that appellant stopped work because of increasing pain and an inability to continue to do her job. He also noted appellant's history including that as a result of a hiring freeze appellant was required to work at three separate positions including training assistant, as a back-up receptionist and as a labor relations automation clerk. Appellant related that the work these jobs required resulted in increasing pain in her back and both legs. Upon examination, Dr. Shapiro noted appellant's poliomyelitis and "a long thorical lumbar C curve concavity left and drop foot on the right, "rheumatic heart disease and a hyperextended left knee. He noted that without her brace appellant was unable to extend against gravity on the left, with excellent extension of the right. Dr. Shapiro also stated that appellant had dorsiflexion of the right ankle and no flexion of the left ankle, which was evidence of prior fusion of the great toe and deformity of the left great toe. He noted excellent range of motion of both hips. Dr. Shapiro added that appellant was not capable of returning to her prior work due to the progressive effects of her polio and the three position descriptions that she worked under. However, Dr. Shapiro noted that she was capable of returning in a different duty capacity because she had excellent upper extremity function with no evidence of residual polio and that appellant "also appears to be an intelligent young woman." He added that a "functional capacity evaluation should be performed" to allow the Office "to see what type of job descriptions she might be able to perform on as objective a manner as possible." In response to the Office's questions, Dr. Shapiro stated that appellant's current condition was "that of post-polio with the aforementioned noted operative procedures." He stated that the combination of jobs that appellant had aggravated her preexisting problems related to her polio.

¹ The statement of accepted facts included a hand written addendum that noted that appellant's application for disability retirement was approved on June 1, 1996.

On November 15, 1996 the Office requested Dr. Shapiro to advise the Office whether appellant's aggravation was temporary or permanent and, if temporary, whether the aggravation had ceased.

In a supplemental report dated November 27, 1996, Dr. Shapiro stated that the aggravation of the type of work appellant was performing, which included holding three job descriptions as she related them to the doctor, was permanent and that if she returned "to doing this type of work in this quantity that it will merely once again increase her problems." He added that appellant's diagnosis was post-polio with postoperative procedures.

In a January 23, 1997 functional capacity evaluation, it was determined that appellant's level of functioning was light level for static lifts with the exception of squat and knuckle lift, which are medium level, light level for dynamic lifts and sedentary strength level for carrying. It was further noted that appellant could return to work with a 10-pound lifting restriction, a maximum of 7 pounds carrying restriction and infrequent walking or standing requirements. Further, appellant was to be allowed frequent rest breaks when using her right shoulder.

In a March 10, 1997 internal Office memorandum, the Office noted that it requested that Dr. Shapiro review appellant's functional capacity evaluation (FCE) results.

In a medical report dated March 27, 1997, Dr. Shapiro stated that he had reviewed appellant's FCE results and determined that appellant "could return to a single job description (instead of the three she was working at the time of stopping)." Dr. Shapiro added that the study recommended several restrictions including no carrying more than 7 pounds, no lifting more than 10 pounds, frequent rest breaks and infrequent requirements to perform standing or walking activities.

On November 4, 1997 the Office requested Dr. Shapiro to address two issues: was appellant's post-polio weakness increased as a consequence of her job duties and was her status from the time of the doctor's assessment due to the natural history of the post-polio syndrome.

On December 3, 1997 Dr. Shapiro stated that "appellant's post-polio muscle weakness definitely increased as a consequence of her job duties, however, limited her job duties and exceeding the limits of her weakness limited her ability to do those jobs. There is no objective medical reason to explain this." He then stated that appellant's physical status at the time of his assessment was due to the natural progression of the post-polio syndrome. Dr. Shapiro noted that he had seen appellant "at one point in time and, therefore, one point on a natural history curve for post-polio syndrome."

In a decision dated January 21, 1998, the Office denied appellant's claim for compensation on the grounds that the medical evidence failed to establish that her medical condition was caused or aggravated by factors of federal employment.

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

An employee seeking compensation under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,³ including that he or she sustained an injury in the performance of duty as alleged and that his or her disability, if any, was causally related to the employment injury.⁴

In this case, the Office's second opinion physician, Dr. Shapiro, stated initially in his November 6, 1996 report that appellant was unable to return to her previous position because it included three position descriptions but that she could return to work in a different capacity. He noted that appellant should be subject to a functional capacity evaluation to determine what kind of position she could return to. However, Dr. Shapiro did not report whether appellant's aggravation was causally related to her employment or whether the aggravation was temporary or permanent. In his December 3, 1997 response, Dr. Shapiro stated that there was no medical reason to explain why appellant's preexisting medical weakness increased as a result of her job requirements. He also noted that her increased symptoms were the result of a natural progression of her preexisting condition. Given the contradictory, ambiguous and incomplete responses to the Office's requests to determine whether appellant's aggravation was causally related to an employment factor, Dr. Shapiro's medical reports are of limited probative value.

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence and has the obligation to see that justice is done. Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.⁵ As Dr. Shapiro, the Office second opinion physician, is inconsistent and ambiguous in his responses to the Office's attempts to determine whether appellant's aggravation of her underlying condition was causally related to an employment factor, the Office is under an obligation to refer the case to another second opinion specialist for the purposes of determining whether appellant's aggravation was causally related to her employment. Accordingly, the Board finds that the case must be remanded to the Office for a referral of the medical evidence and a statement of accepted facts to another impartial medical specialist to address the question of causal relationship between appellant's condition and her employment.

² 5 U.S.C. §§ 8101-8193.

³ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *See Robert F. Hart*, 36 ECAB 186 (1984); *Isidore J. Gemmino*, 35 ECAB 442 (1983).

The decision of the Office of Workers' Compensation Programs dated January 21, 1998 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, D.C.
March 13, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member