

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY JENKINS and U.S. POSTAL SERVICE,  
INTERBAY POST OFFICE, Tampa, FL

*Docket No. 99-2170; Submitted on the Record;  
Issued November 29, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has met his burden of proof to establish that his cervical herniated disc was causally related to his May 19, 1997 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On May 19, 1997 appellant, then a 48-year-old modified city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced shooting pain from his right elbow down to his right hand and finger while lifting a tub of flats onto a stool for casing.

The Office received medical evidence regarding appellant's claim. A May 19, 1997 disability certificate of Dr. Edward N. Feldman, an orthopedic surgeon and appellant's treating physician, revealed that appellant could not work until further notice. Dr. Feldman's May 19, 1997 medical report noted appellant's complaints, a history of the May 19, 1997 employment injury and medical treatment, and his findings on orthopedic examination. He diagnosed ulnar nerve neuropathy, status post ulnar nerve transposition in 1987 and acute ulnar neuropathy with a contusion to the ulnar nerve. Dr. Feldman opined that the objective findings and subjective complaints were causally related to the work-related accident of May 19, 1997. His May 20, 1997 disability certificate indicated that appellant could return to work with restrictions on May 21, 1997. Dr. Feldman's May 20, 1997 duty status report (Form CA-17) provided the date of injury as May 19, 1997, a diagnosis of right ulnar nerve entrapment and appellant's physical restrictions. His May 28, 1997 disability certificate provided that appellant could return to work on May 29, 1997 with restrictions. In his May 28, 1997 progress report, Dr. Feldman reiterated the diagnoses and opinion regarding causal relation as provided in his May 19, 1997 medical report. His June 3, July 22 and September 30, 1997 disability certificates indicated his treatment of appellant for injuries sustained on the job and that appellant's limitations had not changed since the last visit. Dr. Feldman's September 30, 1997 progress report provided diagnoses of ulnar nerve neuropathy, status post ulnar nerve transposition in 1987, lateral epicondylitis of the right elbow and a herniated cervical disc at C6-7 on the left. He opined that appellant's

conditions were causally related to the May 19, 1997 employment injury and that it was permanent.

The Office also received an undated narrative statement from appellant alleging that, in addition to his elbow condition, he sustained a herniated disc on May 19, 1997. Appellant stated that on July 24, 1997 he experienced a burning sensation in his left upper arm when prying bottom shelves on each letter case.

In addition, the Office received Dr. Feldman's November 4, 25 and 26, 1997 disability certificates revealing his treatment of appellant's injuries sustained on the job and that appellant's limitations had not changed since the last visit.

On December 31, 1997 Dr. Feldman submitted a request to the Office for authorization to treat appellant's cervical condition as well as his right elbow condition accompanied by his September 30, 1997 medical report indicating, *inter alia*, that appellant had a herniated cervical disc at C6-7 on the left side.

The record reveals that the Office accepted appellant's claim for right-sided ulnar neuropathy.

On January 9, 1998 an Office medical adviser reviewed appellant's medical records and opined that the evidence was insufficient to establish that appellant sustained a cervical herniated disc with left radiculopathy due to the May 19, 1997 employment injury consisting of right-sided ulnar neuropathy.

In a January 26, 1998 letter, the Office advised Dr. Feldman that it must defer its decision regarding his request for authorization to treat appellant's cervical condition since appellant's claim was only accepted for right-sided ulnar neuropathy as a result of the May 19, 1997 employment injury and that the factual and medical evidence was insufficient to establish that appellant sustained a left-sided cervical herniated disc due to the employment injury. The Office further advised Dr. Feldman to submit his opinion regarding the relationship between appellant's cervical condition and appellant's employment injury.

Appellant submitted a February 27, 1998 letter regarding the treatment he received for his right elbow condition and the results of a July 1, 1997 magnetic resonance imaging (MRI) test, which revealed a herniated disc at C6-7. His letter was accompanied by Dr. Feldman's February 10, 1998 progress report reiterating his diagnoses and opinion regarding causal relation as provided in his September 30, 1997 progress report. Regarding the cause of appellant's conditions, Dr. Feldman explained:

“[U]nfortunately medicine is an art and not a science and not all the pieces of the puzzle fit together. I realize the herniation is on the left side and, classically, [appellant] should have radiating pain down the left arm. However, it is sometimes difficult to account for the physiological consequences and before we consider surgery on this patient we would perform a myelogram and would probably have another MRI performed.”

Subsequently, the Office received Dr. Feldman's March 26, 1998 Form CA-17 revealing the May 19, 1997 employment injury, a diagnosis of ulnar nerve neuropathy on the right, status post ulnar nerve transposition in 1987, lateral epicondylitis of the right elbow and a herniated disc at C6-7 extending toward the left side, and appellant's physical restrictions.

Further, the Office received Dr. Feldman's December 18, 1997 disability certificate indicating his treatment of appellant's injuries that he sustained on the job and that appellant's limitations had not changed since the last visit.

By letter dated April 24, 1998, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Fred I. Ferderigos, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Ferderigos of the referral.

On June 12, 1998 Dr. Ferderigos submitted a medical report providing a history of the May 19, 1997 employment injury, appellant's medical treatment and complaints, and his findings on physical and objective examination. He opined that appellant had symptoms of bilateral ulnar nerve neuropathy that had been persistent. Dr. Ferderigos further opined that nerve conduction studies performed and somatosensory evoked potentials did not demonstrate any obvious findings consistent with a herniated disc of the cervical spine at the C6-7 level. He also opined:

“[Appellant] apparently sustained an injury on May 19, 1997 but according to his history, did not develop any findings of the left lower extremity until July 22, 1997 which is not consistent with an injury since at the time of the injury, if he did have a herniated disc, the symptoms would be immediate after the injury. It is unlikely that the herniated disc on the C6-7 occurred secondary to the injury that he sustained on May 19, 1997 since the symptoms did not begin until two months later. Since all these studies have been performed prior to the symptoms presented of July 1997 with respect to electrodiagnostic studies, this may be repeated to see if they localize any abnormality of the C6-7 level with a herniated disc. [Appellant] at this time has mostly peripheral compression neuropathy.”

By decision dated June 24, 1998, the Office found the evidence of record insufficient to establish that appellant sustained a cervical condition caused by his May 19, 1997 employment injury.

Subsequent to its June 24, 1998 decision, the Office received medical treatment notes dated July 1, 1998 from Dr. Robert C. Nucci, an orthopedic surgeon, regarding appellant's neck and back.

Dr. Feldman submitted his June 16, 1998 progress report seeking to obtain authorization to conduct tests for cervical radiculopathy. His report revealed a diagnosis of a left herniated cervical disc at C6-7, lateral epicondylitis of the right elbow, status post ulnar nerve distribution on the right in 1987 and ulnar nerve neuropathy. Dr. Feldman opined that the objective findings and subjective complaints were causally related to the work-related accident of May 19, 1997 and were permanent. He stated:

“I have read the report of Dr. Frederigos regarding [appellant] and, by and large, we concur. [Appellant] injured his neck while lifting flats on the job on May 19, 1997 and both Dr. Ferderigos and I concur that this did injure his neck. However, there is a question of whether or not the disc herniation was caused by that. I agree with Dr. Ferderigos that, classically, a herniated disc should immediately manifest symptoms. However, there are variations of symptomatology and a small herniation which proceeds to become a frank herniation will produce symptoms when it is impinging on the nerve root. This is the case with [appellant] as he did have an immediate onset of neck pain. The pain radiating down the arm developed two months later and his condition has gone progressively downhill since then. I have no explanation for the positive MRI other than the injury on the job of May 19, 1997 as there was no preceding or interceding episodes that could have caused it.”

Dr. Feldman also submitted a July 21, 1998 progress report to support his request for additional treatment for appellant. In this report, he provided a diagnosis of herniated lumbar discs at L3-4, L4-5 and L5-S1, left facet irritation at L1, and a chronic lumbosacral sprain. Dr. Feldman opined that the objective findings and subjective complaints were causally related to the May 19, 1997 employment injury. He noted that appellant continued to be severely symptomatic and that he was scheduling him for epidural blocks. Dr. Feldman also recommended that appellant undergo acupuncture treatments.

Additionally, Dr. Feldman submitted a progress report of the same date to obtain medical treatment for appellant. In this report, he reiterated his previous diagnoses of ulnar nerve neuropathy on the right, status post ulnar nerve transposition in 1987 and lateral epicondylitis of the right elbow. Dr. Feldman also diagnosed a herniated cervical disc at C6-7 extending to the left side. He further reiterated his opinion that the objective findings and subjective complaints were causally related to the May 19, 1997 employment injury. Dr. Feldman opined that appellant's herniated disc at the C6-7 level was related to the lifting injury on May 19, 1997. He also submitted Dr. Nucci's July 15, 1998 medical report indicating that, based on a review of appellant's records and statements, appellant suffered a herniated disc at the C6-7 level on May 19, 1997 while lifting approximately a 20-pound object and jerking it. Dr. Nucci stated that, upon review of a MRI scan, the herniation was protruding on both sides of appellant's neck which would account for bilateral arm pain. He noted that appellant had severe pain in his neck and shoulder area, and that he needed immediate surgery to prevent further loss of upper body strength.

On March 16, 1998 an Office medical adviser reviewed Dr. Feldman's February 10, 1998 report and stated that appellant's left herniated disc at C6-7 was not causing any radiculopathy. He further stated that there was no evidence that appellant's activities on May 19, 1997 caused the herniated disc. The Office medical adviser also stated that there was no reason to treat, operatively or nonoperatively the asymptomatic herniated disc.

By letter dated August 7, 1998, appellant submitted Dr. Nucci's July 15, 1998 medical report.

The Office received Dr. Feldman's September 24, 1998 Form CA-17 indicating appellant's May 19, 1997 employment injury, the same diagnoses as provided in his March 26, 1998 Form CA-17 and appellant's physical restrictions.

In a September 30, 1998 decision, the Office denied appellant's request for modification based on a merit review. In this decision, the Office found the medical evidence submitted by appellant insufficient to establish that his cervical condition was caused by the May 19, 1997 employment injury. In letters dated January 30 and February 2, 1999, appellant requested reconsideration of the Office's decision. Appellant's requests were accompanied by Dr. Nucci's July 15, 1998 medical report. Appellant's requests were also accompanied by his December 18, 1998 medical report indicating that the Office's referral in its September 30, 1998 decision to appellant's lack of immediate onset of symptoms of neck pain did not have significant merit. Dr. Nucci stated:

"Firstly, because soft tissue neck injuries and back injuries are frequently insidious in nature and often, at times, take several months to cause symptoms. Secondly, because the disc herniation need not have been catastrophic in nature and certainly could have progressed due to the weakening of the surrounding structure."

Dr. Nucci opined that appellant's condition had gone downhill significantly, and that the disc herniation was the cause of appellant's continued pain. He again recommended immediate surgery to prevent further loss of upper body strength.

By decision dated April 21, 1999, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was of a cumulative nature, and thus, insufficient to warrant review of the prior decision.

The Board finds that the case is not in posture for decision regarding the issue of whether appellant has met his burden of proof to establish that his cervical herniated disc was causally related to his May 19, 1997 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitations period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Daniel J. Overfield*, 42 ECAB 718 (1991).

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.<sup>4</sup>

In the instant case, there is a conflict in the medical evidence, as there were opposing medical opinions regarding the issue of whether appellant's cervical herniated disc was caused by his May 19, 1997 employment injury. The Office referral physician, Dr. Ferderigos, a Board-certified orthopedic surgeon, found that appellant's cervical herniated disc was not causally related to the employment injury. In his undated medical report, Dr. Ferderigos explained that appellant's cervical herniated disc was not caused by his May 19, 1997 employment injury because appellant's symptoms did not manifest immediately. On the other hand, Dr. Feldman, an orthopedic surgeon and appellant's treating physician, and Dr. Nucci, an orthopedic surgeon, opined in several reports that appellant's cervical herniated disc was caused by his May 19, 1997 employment injury. Dr. Feldman explained in his June 16, 1998 progress notes that appellant's symptomatology varied from the classic case of disc herniation symptoms did not manifest immediately. Similarly, Dr. Nucci explained in his December 18, 1998 medical report why he believed that appellant's symptomatology did not manifest immediately. Accordingly, a conflict in the medical evidence exists and the case must be referred to an impartial medical examiner to resolve the conflict in medical evidence regarding whether appellant's cervical herniated disc is causally related to his May 19, 1997 employment-related injury. On remand, the Office should refer appellant along with an updated statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's cervical herniated disc is causally related to the May 19, 1997 employment injury. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.<sup>5</sup>

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<sup>4</sup> 20 C.F.R. § 10.110(a); see *John M. Tornello*, 35 ECAB 234 (1983).

<sup>5</sup> In view of the Board's disposition of the issue of whether appellant met his burden of proof to establish that his cervical herniated disc was causally related to his May 19, 1997 employment injury, the issue regarding whether the Office properly denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a) is moot.

The April 21, 1999, and June 24 and September 30, 1998 decisions of the Office of Workers' Compensations Programs are hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC  
November 29, 2000

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member