

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM J. PORFIRIO and DEPARTMENT OF DEFENSE,  
DEFENSE LOGISTICS AGENCY, New Cumberland, PA

*Docket No. 00-1324; Submitted on the Record;  
Issued August 29, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that his alleged neck and back conditions were sustained in the performance of duty.

Appellant, a 41 year-old material examiner, filed a Form CA-2 claim for benefits on August 24, 1998, alleging that he sustained back and neck conditions caused by factors of his federal employment. In a handwritten letter accompanying the form, he stated that these conditions were triggered by an incident at work which occurred in August 1996, when he tripped and fell over a pallet. Appellant had originally filed a claim based on this incident.

In a letter to appellant dated September 8, 1998, the Office of Workers' Compensation Programs requested that appellant submit additional information in support of his claim, including a medical report and opinion from a physician, supported by medical reasons, describing the history of the alleged work incident and indicating how the reported work incident caused or aggravated the claimed injury, plus a diagnosis and clinical course of treatment for the injury. The Office informed the employee that he had 30 days to submit the requested information.

Appellant was examined by a chiropractor, Dr. Mary Ellen Marranca, who stated in an August 20, 1998 report that appellant had chronic traumatic contusion subluxation at C2-3, with strain and sprain of the cervical spine with attendant cervical hypolordosis and chronic capsular adhesions attendant with persistent and sustained splinting spasm of suboccipital and paravertebral musculature. Dr. Marranca also diagnosed a chronic traumatic subluxation sprain with consequent splinting muscle spasm and attendant bilateral extension sciatic neuralgia to both knees. She further stated:

“[A] x-ray examination performed at this office on August 20, 1998 revealed a cervical hypolordosis with mild nural and C2-3 subluxation. Lumbar spine x-ray performed on August 6, 1998 ... revealed degenerative osteoarthritis changes predominantly confined to the L5-S1 level. [An] MRI [magnetic resonance

imaging scan] of the lumbar spine performed on October 2, 1998 revealed degenerative disc changes at L5-S1 with a disc bulge.

“On his last visit of October 16, 1998 [appellant] reported returning home from work with a sudden onset of extreme leg weakness and low back pain. He complains regularly of low back pain and soreness of varying degrees and neck soreness and stiffness with right arm numbness which has been decreasing in frequency and severity.... He experiences difficulty performing his activities of daily living including the demands of employment due to the chronic residuals of his trauma. It is not likely that he will experience a full recovery due to formation of fibrotic adhesions in the soft tissues including osteoarthritic changes resulting from the injury.”

Dr. Marranca concluded based on the history, radiographic analysis and examination findings that appellant’s condition was causally related to the August 1, 1996 work injury.

In a report dated November 12, 1998, an Office medical adviser stated it was not medically reasonable that the August 1996 fall should cause acute muscle spasms and subluxations two years later. He stated: “[Appellant] has underlying [d]egenerative [j]oint [d]isease] of the lumbar spine This is a progressive degenerative condition and will be symptomatic.” The Office medical adviser stated that after the employing establishment clinic notes and the medical records of the other physicians treating appellant were obtained, a second opinion might be in order.

By decision dated February 5, 1999, the Office denied appellant’s claim on the grounds that he did not submit evidence sufficient to establish that the claimed condition was causally related to factors or incidents of employment.

By letter dated March 5, 1999, appellant’s attorney requested an oral hearing, which was held on July 21, 1999. Appellant submitted a February 16, 1999 report from Dr. Vincent J. DiGiovanni, a specialist in neurology, a June 14, 1999 report from Dr. Perry Black, a Board-certified neurosurgeon and a May 25, 1999 report from Dr. Robert J. Schwartzman, Board-certified in internal medicine, psychiatry and neurology. Dr. DiGiovanni stated that appellant had probable myofascial disease, “after a fall” and that he had a complete work up which was basically unremarkable. He referred appellant for an electromyogram of his right arm and right leg.

In his report, Dr. Black noted history of injury and stated that appellant related complaints of low back pain, pain in his lower extremities and pain in the back of the neck and across both shoulders and upper extremities and bilateral pain in his neck.

In his April 9, 1999 report, Dr. Schwartzman stated findings on examination and related appellant’s complaints of back and neck pain. In his May 9, 1999 report, he stated that appellant was under his care for a brachial plexus traction injury and L5-S1 radiculopathy, which was the direct result of the 1996 accident, that he was presently disabled and unable to perform any repetitive movements.

By decision dated October 28, 1999, an Office hearing representative affirmed the February 5, 1999 decision.

By letter dated December 28, 1999, appellant requested reconsideration. Appellant did not submit any new medical evidence with his request.

By decision dated January 31, 2000, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the case is not in posture for a decision.

In the present case, there was disagreement between the Office medical adviser and Drs. Marranca and Schwartzman regarding whether appellant's alleged neck and back conditions were sustained in the performance of duty. Dr. Marranca stated in her August 20, 1998 report that based on x-ray findings that appellant had chronic traumatic contusion subluxation at C2-3, strain and sprain of the cervical spine with attendant cervical hypolordosis and chronic capsular adhesions attendant with persistent and sustained splinting spasm of suboccipital and paravertebral musculature. She further stated that appellant had chronic traumatic subluxation sprain with consequent splinting muscle spasm and attendant bilateral extension sciatic neuralgia to both knees. Dr. Marranca further found based on lumbar spine x-ray that appellant had degenerative osteoarthritis changes at the L5-S1 level and that an MRI scan revealed degenerative disc changes at L5-S1 with a disc bulge and concluded that these conditions were causally related to the August 1, 1996 work injury.

In addition, Dr. Schwartzman stated in his May 9, 1999 report, that appellant was under his care for a brachial plexus traction injury and L5-S1 radiculopathy, which was the direct result of the August 1996 accident, that he was presently disabled and unable to perform any repetitive movements. The Office medical adviser, in contrast, opined that it was not medically reasonable that the August 1996 fall should cause acute muscle spasms and subluxations two years later. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."<sup>1</sup> It was, therefore, incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence. The Office should, therefore, on remand, refer the case to an appropriate medical specialist to submit a rationalized medical opinion on whether appellant's claimed neck and back conditions

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<sup>1</sup> Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f 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 an examination." See *Dallas E. Mopps*, 44 ECAB 454 (1993).

were sustained in the performance of duty. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The Office's decision of April 29, 1999, is, therefore, set aside and the case is remanded to the Office of Workers' Compensation Programs for further action consistent with this decision of the Board.

Dated, Washington, DC  
August 29, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member