

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR K. POTOCKI and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, AIR ROUT TRAFFIC CONTROL CENTER,
Ronkonkoma, NY

*Docket No. 00-379; Submitted on the Record;
Issued July 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether appellant sustained a recurrence of disability on June 12, 1996 causally related to his March 17, 1994 employment injury.

On March 18, 1994 appellant, then a 48-year-old computer operator, filed a claim for an injury to his right elbow, right hip, back and neck sustained on March 17, 1994 when he slipped and fell on a snowy sidewalk. The Office of Workers' Compensation Programs accepted that appellant sustained subluxations at C2-3 and C6-7 and thoracic and low back strains. Appellant received continuation of pay from March 21 to May 4, 1994 and the Office began paying him compensation for temporary total disability on May 5, 1994.

On January 8, 1996 appellant returned to work in his regular assignment as a computer operator. By decision dated March 4, 1996, the Office found that this reemployment resulted in no loss of wage-earning capacity.

On June 19, 1996 appellant filed a claim for a recurrence of disability related to his March 17, 1994 employment injury. Appellant stated that he experienced pain in the lower right back on June 11, 1996 when he squatted to put paper in the daily box. Appellant stopped work on June 12, 1996.

By decision dated September 11, 1996, the Office found that the evidence submitted by appellant was not sufficient to establish that his disability beginning June 12, 1996 was causally related to his March 17, 1994 employment injury. Appellant requested a hearing and an Office hearing representative, by decision dated April 21, 1997, found that the opinions of appellant's attending medical specialists, who had examined appellant on numerous occasions over the years, though not containing much rationale, were sufficient to require further development of the evidence by the Office. Pursuant to this decision the Office referred appellant for a second opinion evaluation and based on this evaluation the Office by decision dated July 21, 1997, found that the evidence failed to demonstrate that the claimed recurrence of disability was causally related to appellant's March 17, 1994 employment injury.

By letter dated August 11, 1997, appellant requested a review of the written record. By decision dated February 2, 1998, an Office hearing representative found that there was a conflict of medical opinion between appellant's attending physicians and the Office's second opinion physician. Following a referral to an impartial medical specialist and receipt of this physician's report the Office by decision dated June 10, 1998, found that the medical evidence did not establish that appellant sustained a recurrence of total disability on June 11, 1996 that was causally related to his March 17, 1994 employment injury.

On May 25, 1999 appellant submitted a request for reconsideration. By decision dated August 2, 1999, the Office found that appellant had not established that he sustained a recurrence of total disability on June 11, 1996 that was causally related to his March 17, 1994 employment injury.

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

There was a conflict of medical opinion between appellant's attending physicians, Dr. Leon Finkelstein, a Board-certified orthopedic surgeon and Dr. Donald Holzer, a Board-certified neurologist and the Office's second opinion referral physician, Dr. Anthony Puglisi, a Board-certified orthopedic surgeon. In a report dated June 21, 1996, Dr. Finkelstein stated:

"Patient had an exacerbation of his symptomatology when he aggravated his symptoms at work. He was bending over, loading a machine with paper and felt his back pull in the typical 'going out' type of sensation.

"Since that time he has had significant pain in the low back region mostly in the right paravertebral musculature with tenderness to palpation in that area. I feel that what he sustained was an exacerbation of his preexisting continuing problem, that this is not a new injury in that he never fully recovered from his previous injury.

"He has been back to work but he has always been working in pain and has missed significant time from work."

In a report dated June 25, 1996, Dr. Holzer stated that on June 11, 1996 appellant had "a severe exacerbation of his lower back pain while bending down, to the point of where he was unable to continue working," and that on examination "marked paracervical and paralumbar spasm is noted with marked restricted motion of the cervical and lumbar spine in all directions." In a report dated August 23, 1996, Dr. Finkelstein stated that appellant was still in acute distress following the June 1996 incident of bending to put a heavy box of paper away, that his symptoms waxed and waned, that appellant was incapable of working and that his "condition is directly related to his initial injury and is nothing more than an exacerbation of his initial injury in that his symptomatology remains the same and he always had a problem from the time he did return to work." In a report dated September 19, 1996, Dr. Finkelstein stated that it was hard to believe that appellant had been denied compensation for his recurrence of disability, "in that his initial problem of herniated discs always remained though he was forced back to work, he worked in pain for a while until his reinjury occurred. The first problem was never cured and I certainly feel that his second injury is nothing more than an aggravation of his first injury and I firmly feel this should be covered under his workman's compensation injury."

In a report dated June 23, 1997, Dr. Puglisi stated that “the symptoms that the patient has related in the past indeed had something to do with that fall of 1994. My following statement indicates that while I feel some of those symptoms were due to that fall, the continued symptoms at this point in time are simply due to other matters.” Dr. Puglisi continued that “the patient does have an underlying condition which was preexistent to the fall, which I feel is the cause of any symptomatology that he relates in June of 1996 and I do not feel that this is causally related to the fall of 1994. I will restate that by saying, no I do not feel that the disability found on examination is causally related to the injury of 1994, but simply the fact that the patient has previously stated nonrelated conditions of his being overweight and general osteoarthritic condition.” Dr. Puglisi also stated that the 1994 incident caused appellant’s disability until he returned to work in January 1996 and that “once the patient went back to work in January of 1996 that incident of 1994 was no longer the underlying cause of any further discomfort.”

The June 23, 1997 report from Dr. Puglisi was this physician’s second report to the Office. In his initial report, which was dated May 28, 1997, Dr. Puglisi stated, “It is my feeling that the changes noted on the MRIs [magnetic resonance imaging scans] were certainly preexistent, but his condition may well have been aggravated by the injury sustained, bringing on the symptoms the patient presently relates.” In this report, Dr. Puglisi stated that appellant was disabled from June 1996 and that “the disability found on examination is causally related to the accepted injury.” Dr. Puglisi also stated, “I do feel that he is sincere in the complaints of discomfort following his fall but unfortunately I can find nothing at this point in time to suggest to me that any residuals of the discomfort are due to other than what is the general status of this individual, that is, his overweight status and his general osteoarthritic condition may be the only factors causing him his discomfort as anything that may have been aggravated by the fall, I feel, at this point is well resolved and has been treated appropriately.” The Office’s June 13, 1997 request to Dr. Puglisi for clarification of the contradictory statements in his May 28, 1997 report was appropriate and Dr. Puglisi’s June 23, 1997 report, quoted above, was unequivocal and sufficient to create a conflict of medical opinion with the reports of Drs. Holzer and Finkelstein.

To resolve this conflict of medical opinion the Office pursuant to section 8123(a) of the Federal Employees’ Compensation Act,¹ referred appellant the case record and a statement of accepted facts to Dr. Arnold M. Schwartz, a Board-certified orthopedic surgeon. In a report dated May 8, 1998, Dr. Schwartz described appellant’s history, treatment, complaints and findings on examination and on MRIs, noting that the herniated disc seen on the lumbar MRI did “not correlate whatsoever with his symptoms,” as the MRI indicated a disc herniation on the left side and appellant’s complaints were on the right side. He then stated:

“With respect to answering your four questions to resolve the conflict of opinions, it is my opinion that [appellant’s] disability at the present time is due to his underlying obesity and disc degeneration as well as diabetes mellitus. His injury in 1994 aggravated a preexisting condition and it is apparent that this resolved enough for him to return to work. His current disability is due to his preexisting condition and I do not think that this is related to his injury of March 17, 1994.”

¹ 5 U.S.C. § 8123(a) states in pertinent part “If there is 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.”

The Board has held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.² The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.³

The Board finds that the opinion of Dr. Schwartz does not contain sufficient rationale to be afforded special weight. Dr. Schwartz's report addresses only appellant's condition at the time of this physician's examination of appellant on May 7, 1998 and does not directly address whether appellant sustained a recurrence of disability on June 11, 1996. Dr. Schwartz does not address the exacerbation of appellant's symptoms found by Drs. Holzer and Finkelstein in June 1996, or the increased objective findings reported by Dr. Holzer on June 25, 1996 of marked, as opposed to the previously reported moderate, paracervical and paralumbar spasm and restricted cervical and lumbar spine motion. Dr. Schwartz's May 8, 1998 report contains no rationale to support a finding that appellant did not sustain a recurrence of total disability on June 11, 1996. The case will, therefore, be remanded for the Office to obtain a supplemental report from Dr. Schwartz correcting the defects in his May 8, 1998 report.

The August 2, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
July 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

² *James P. Roberts*, 31 ECAB 1010 (1980).

³ *Harold Travis*, 30 ECAB 1071 (1979).