

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONI KAWICK and U.S. POSTAL SERVICE,
HAXTON STATION, Huntington Beach, CA

*Docket No. 00-1960; Submitted on the Record;
Issued July 13, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant did not have any disability after August 1, 1998 that was causally related to the August 27, 1997 employment injury.

On August 27, 1997 appellant, then a 49-year-old customer service supervisor, slipped on a new floor while coming out of a bathroom, landing on her buttocks. She stated that she felt pain in her neck and shoulders after her fall. In a March 9, 1998 report, Dr. Scott Shoemaker, an orthopedic surgeon, stated that an electromyogram (EMG) and nerve conduction studies showed bilateral ulnar neuropathy at both elbows with denervation. Dr. Shoemaker related appellant's condition to her fall. Appellant underwent surgery on May 4, 1998 for anterior transposition of the left ulnar nerve and on June 11, 1998 for anterior transposition for the right ulnar nerve. The Office accepted appellant's claim for cervical strain, lumbosacral strain and bilateral ulnar neuropathy. Appellant used sick and annual leave from May 4 through July 31, 1998.

In a June 14, 1999 decision, the Office rejected appellant's claim for compensation, effective August 1, 1998, on the grounds that the medical evidence of record showed appellant no longer suffered spinal medical residuals of the employment injury and her employment-related bilateral elbow condition did not prevent her from returning to her former position.¹ Appellant requested a hearing before an Office hearing representative, which was conducted on December 15, 1999. In a March 6, 2000 decision, the Office hearing representative found that the weight of the medical evidence established that appellant's disability causally related to the employment injury had ceased by August 1, 1998. She, therefore, affirmed the Office's June 14, 1999 decision. In an April 11, 2000 letter, appellant's attorney requested reconsideration. In an April 26, 2000 decision, the Office denied appellant's request for modification of the prior decisions.

¹ In a June 16, 1998 decision, the Office issued a schedule award for a 10 percent permanent impairment of each arm. Appellant did not appeal this decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's benefits.

Once the Office accepts a claim, it has the burden of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.² The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant. The burden is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.³

Appellant contended that she continued to be disabled due to her cervical condition. In a September 24, 1997 report, Dr. Steven Wheeler, a neurologist, indicated that in 1992 appellant underwent surgery for cervical discectomy and fusion at the C5-6 level. In a January 9, 1998 report, Dr. Anthony Stauffer, a Board-certified radiologist, reported that a magnetic resonance imaging (MRI) scan showed a solid cervical discectomy and fusion at C5-6 without evidence of residual or recurrent disc herniation. The scan also showed degenerative changes at C3-4 and C4-5 without evidence of disc herniation.

In a June 19, 1998 report, Dr. Kenneth W. Kengla, a Board-certified orthopedic surgeon, stated that appellant was recovering from the surgery on her arms and was disabled through August 1, 1998. In a July 10, 1998 report, Dr. Kengla indicated that he expected appellant to return to work on August 1, 1998. In a July 27, 1998 report, he commented that appellant continued to have neck symptoms. Dr. Kengla extended her disability to August 17, 1998.

In an October 20, 1998 report, Dr. Ram Mudiya, a Board-certified orthopedic surgeon, diagnosed chronic musculoligamentous injury to the cervical and lumbar regions of the spine, status post discectomy and fusion C5-6 and degenerative narrowing at C3-4, C4-5, L4-5 and L5-S1. Dr. Mudiya related appellant's symptoms to the August 27, 1997 employment injury. He reported that appellant's elbows initially were more symptomatic but over the prior few months her symptoms had become more focused to the cervical and lumbar spine. Dr. Mudiya noted that appellant had preexisting pathology in her neck but did not have any preexisting symptomatology in the thoracolumbar and lumbosacral regions of the spine. He stated that the spinal condition in the thoracic and lumbosacral regions was a new injury and the cervical spine condition was an aggravation of the preexisting condition.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for an examination and second opinion. In a January 11, 1999 report, Dr. Dorsey stated that a January 6, 1999 MRI scan of the lumbar spine showed minimal disc desiccation at L4-5 and L5-S1. He noted that a thoracic MRI scan of the same date was normal. Dr. Dorsey reported that a January 5, 1999 EMG and nerve conduction were normal in both legs. He commented that appellant's examination showed findings for minimal residual ulnar neuropathy at the elbows. Dr. Dorsey

² *Edwin Lester*, 34 ECAB 1807 (1983).

³ *See George J. Hoffman*, 41 ECAB 135 (1989); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

stated that appellant's ulnar neuropathies were related to the employment injury. He indicated that he found no evidence of any ongoing diagnosis with regard to the cervical spine, lumbar spine, shoulders or hips as a result of the employment injury. Dr. Dorsey commented that appellant would have sustained at most a lumbar musculoligamentous sprain/strain. He stated that it was well known that such strains would resolve within 30 days. Dr. Dorsey reported no evidence of aggravation of appellant's preexisting cervical condition. He stated that appellant was not disabled and was able to work full time. Dr. Dorsey reviewed appellant's position description and stated that appellant was able to perform those duties. He reported that appellant continued to have residuals of the employment injury in her elbows.

In a June 15, 1999 report, Dr. Don R. DeFeo, a Board-certified neurosurgeon, stated that trauma to the spine could manifest itself later in cervical and lumbar areas. Dr. DeFeo commented that it was impossible to state with certainty where appellant's current injury had actually begun. He indicated that it had probably been generated or aggravated by injuries to the spine in the past. Dr. DeFeo stated that no one could say for sure whether appellant's current problems were related to the fall of 1997 but noted that it probably was to some degree.

In a December 8, 1998 report, Dr. Mudiyam stated that appellant's employment injury on August 27, 1997 involved back, neck and both arms. He noted appellant's 1992 cervical surgery in 1992 but commented that she had been doing reasonably well before the employment injury. Dr. Mudiyam stated that a computerized tomography (CT) scan showed osteophyte ridging at C3-4, C4-5 and C5-6, which resulted in partial effacement of the thecal sac with no evidence of significant cord impingement. The CT scan also showed foraminal narrowing at the same levels of the cervical spine. He stated that some of these degenerative changes were, in all likelihood, present prior to the employment injury but appellant subsequently developed more significant symptoms. Dr. Mudiyam apportioned a significant amount of appellant's current problems to the employment injury as she had been doing reasonably well prior to the injury and was able to work without major difficulties. He concluded that a percentage of appellant's cervical problems were related to the employment injury.

In a January 19, 2000 report, Dr. Steven Nagelberg, a Board-certified orthopedic surgeon, diagnosed status post bilateral ulnar nerve decompression at the elbow, status post anterior cervical discectomy and fusion, probable degenerative symptomatic changes in the cervical spine with probable cervical disruption and symptomatic degenerative changes in the lumbar spine with possible lumbar disc disruption. Dr. Nagelberg reviewed appellant's MRI scan and stated that he could not determine whether the degenerative changes in the MRI scan were related to appellant's symptoms. As a result, he admitted that he could not objectify appellant's symptoms as a result of the employment injury. Dr. Nagelberg commented that a review of the medical records and appellant's history on examination indicated that her clinical course was consistent with a relationship to the employment injury. He stated that, while a rational explanation for appellant's ongoing symptoms would be lumbar and cervical disruption, he could not make that statement with any certainty without further testing. Dr. Nagelberg noted that additional testing, consisting of discography, was not appropriate. He concluded that he could not determine with a high degree of confidence that appellant sustained a significant injury on August 27, 1997, which limited her ability to perform her job duties. Dr. Nagelberg estimated that the employment injury would probably contribute no more than 10 percent to her current disability. He stated that he could not state with any degree of certainty that appellant was incapable of performing

her job duties based on any objective findings. Dr. Nagelberg commented that it was medically probable that there was an aggravation by the employment injury.

In a March 15, 2000 report, Dr. Nagelberg indicated that he had reviewed additional medical records. He stated that the employment injury was of sufficient force to require bilateral arm surgery. Dr. Nagelberg concluded that the employment injury was sufficient to aggravate appellant's preexisting spinal condition and, therefore, was a significant contributing factor to her current orthopedic condition.

Dr. Mudiyam stated that appellant's preexisting cervical condition was aggravated by the August 27, 1997 employment injury. He initially indicated that he could not determine whether appellant's employment injury caused an aggravation of the cervical condition. In his second report, Dr. Nagelberg stated that the employment injury caused an aggravation of the preexisting cervical condition. Dr. DeFeo also reported that appellant's employment injury aggravated her cervical condition. Dr. Dorsey, on the other hand, found after a full examination that appellant had no ongoing problems in the cervical or lumbar area due to the employment injury. He indicated that appellant's examination was normal except for the ulnar neuropathies and the preexisting cervical condition. Dr. Dorsey related the ulnar neuropathies to the employment injury. He stated that any strain sustained by appellant would have ceased within 30 days. Dr. Dorsey, therefore, concluded appellant's employment injury caused no aggravation of the preexisting cervical condition and that any strain would have ceased shortly after the employment injury. There exists, therefore, a conflict between Drs. Mudiyam, Nagelburg and DeFeo on the one hand and Dr. Dorsey on the other hand on whether appellant's cervical condition remained causally related to the employment injury and whether appellant remained disabled due to the effects of the employment injury. As there is a conflict in the medical evidence, the Office has not met its burden of proof in concluding that appellant's employment-related disability ceased as of August 1, 1998

The decisions of the Office of Workers' Compensation Programs, dated April 26 and March 6, 2000, are hereby reversed.

Dated, Washington, DC
July 13, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member