

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNIFER M. RUBIO and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

*Docket No. 00-541; Submitted on the Record;
Issued June 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof in establishing that her left shoulder condition was causally related to the accepted employment injury of January 17, 1996.

On January 17, 1996 appellant, a 39-year-old letter carrier, experienced pain and stiffness in the left side of her neck and left shoulder. She filed a Form CA-1 claim for benefits on January 18, 1996, which the Office of Workers' Compensation Programs accepted for cervical strain on February 7, 1996. Appellant attempted to return to work, but stopped working on March 3, 1996 and has not returned. The Office paid appropriate compensation benefits for total disability and placed appellant on the periodic rolls.

The Office referred appellant to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 13, 1996, Dr. Dorsey stated findings on examination, reviewed the medical history and the statement of accepted facts, and advised that appellant had no appropriate injury-related factors of disability. He stated that there were no significant diagnosable conditions in this case, noting that appellant had a normal examination, a normal magnetic resonance imaging (MRI) scan and normal electrodiagnostic studies. Dr. Dorsey concluded that appellant had no appropriate physical limitations resulting from any work-related disability or any restrictions attributable to preexisting conditions and should be able to return to full duty.

On December 19, 1997 the Office issued a proposed notice of termination based on Dr. Dorsey's opinion that appellant had no residuals or continuing disability causally related to the January 17, 1996 employment injury. The Office informed appellant that she had 30 days in which to submit additional legal argument or medical evidence in opposition to the proposed termination.

By decision dated January 21, 1998, the Office terminated appellant's compensation, effective January 31, 1998.

By letter dated February 18, 1998, appellant requested an oral hearing, which was held on September 23, 1998. In support of her request, appellant submitted reports from Dr. Clarence L.

Shields, a Board-certified orthopedic surgeon. In his April 28, 1998 report, Dr. Shields advised that appellant complained of persistent pain since her January 17, 1996 employment injury, with severe neck pain with radiation into the left trapezial region, left shoulder and down into the left upper extremity. He noted that appellant felt as if she could not support her head for long periods of time and had difficulty with walking and activity in a prolonged upright position. Dr. Shields stated that a computerized axial tomography (CAT) scan of her neck showed a mild disc bulge at C4-5, some foraminal stenosis on the right at C6-7 and on the left at C3-4, and advised that she was unable to perform her usual work. In his April 30, 1998 report, he diagnosed impingement syndrome of the left shoulder.

In his October 26, 1998 report, Dr. Shields advised that appellant had a large amount of cervical spasm and radicular symptoms radiating to the left upper extremity. He stated:

“I have reviewed the report of Dr. Dorsey dated November 3, 1997. This examiner does disagree with his findings in that this lady **DID** have significant symptoms and was disabled during the referenced period of time. The patient, during the examination, was markedly apprehensive, as noted by Dr. Dorsey and that could explain the significant limitation of her motion. (Emphasis in the original.)

“After review of the medical records supplied for this patient, this examiner is in agreement that her symptom complex began in the course of her job as mail carrier where she experienced a cervical strain and the impingement syndrome.... [Appellant] subsequently had a surgical procedure on her left shoulder, ... an arthroscopic decompression.... This examiner feels that [appellant] should be entitled to disability benefits during the period of time from January 1996, up to the present time, except for the time when she was at work[;] one week in January 1996 and a few days in March 1996. Also, [appellant] should be entitled to physical therapy for another few months post surgery and the disability should continue during that period of time.”

By decision dated December 18, 1998, an Office hearing representative set aside the January 21, 1998 decision. The hearing representative found that although the January 21, 1998 decision was based on the weight of the evidence contained in the record at the time it was issued, appellant had subsequently submitted medical evidence sufficient to warrant further development of the medical evidence. The hearing representative instructed the district office to refer appellant to a second opinion physician to determine whether appellant had sustained a left shoulder condition causally related to the accepted January 17, 1996 employment injury and was therefore entitled to compensation subsequent to January 21, 1998.

The Office referred appellant to Dr. Dorsey to determine whether appellant's claimed left shoulder condition was causally related to his January 17, 1996 employment injury. In a report

dated March 8, 1999, Dr. Dorsey advised that he saw no ongoing diagnosis medically connected to [appellant's] work injury either by direct cause, aggravation, precipitation or acceleration. He stated:

“In my opinion, at most, that patient would have suffered a cervical musculoligamentous sprain/strain as a result of the January 17, 1996, episode. This diagnosis implies that there is no permanent material change to the cervical spine.... There is no basis on which to believe that [appellant] sustained any material aggravation to her left shoulder impingement syndrome as a result of the events of January 17, 1996.”

Dr. Dorsey opined that he saw no ongoing injury-related factors of disability, with no objective findings or subjective complaints related to her work status. He concluded:

“I see no basis on which [appellant] would be considered to suffer residuals of the episode of January 17, 1996.... The MRI findings are consistent with those seen in patients with no neck pain. There is no basis on which to believe the patient had any changes in the cervical spine as a result of the incident of January 17, 1996. There is also no basis on which to believe that [appellant] had any material permanent change or left shoulder residual due to the events of January 17, 1996.”

On April 5, 1999 the Office found based on Dr. Dorsey's opinion that appellant failed to establish that her claimed left shoulder condition was causally related to the January 17, 1996 employment injury and therefore denied her disability compensation subsequent to January 21, 1998.

On July 26, 1999 appellant's attorney requested a review of the written record. In support of her request, appellant submitted a September 8, 1999 report from Dr. Michael S. Sinel, Board-certified in physical medicine and rehabilitation, who took issue with Dr. Dorsey's opinion negating a causal relationship between the claimed shoulder condition and the January 1996 employment injury. Dr. Sinel stated:

“[Appellant] did have documented complaints through May 1996 which were also supported by therapy with pain and stiffness in her neck, and shooting pain into her left shoulder and down to the arm. She is noted to have persistent pain through August with difficulty in holding her head up and paraesthesia of the upper extremity.... Despite her normal [electromyogram] EMG, she clearly had symptoms consistent with a cervical radiculitis as well as cervical impingement and subsequently developed diffuse cervical myofascial pain. She also underwent a shoulder MRI which did suggest the shoulder impingement on the left, consistent with her clinical presentation.

“[Appellant] has since gone on to clearly develop a full chronic pain syndrome with postoperative adhesive capsulitis in the shoulder, persistent shoulder pain, chronic myofascial neck pain and likely cervical radiculitis. It is quite clear that Dr. Dorsey's review of the medical records does not adequately describe her situation in early 1996 immediately following the accident which is clearly the most important issue in determining causation in this case. Furthermore, it is

apparent that she had significant limitations on flexion and abduction of the shoulder in Dr. Dorsey's own examination reports in November 1997 and March 1998. This clearly contradicts the lack of findings by Dr. Dorsey wherein he reported on orthopedic abnormality on examination. In fact, his [November 3, 1997] examination reported a limited range of motion with diffuse tenderness anteriorly and posteriorly in the left shoulder, along with quite dramatic limitations to 20/180 degrees in abduction and flexion on the left. This was supported by multiple other examinations.

"Overall, it is clear that Dr. Dorsey's opinion that [appellant's] shoulder impingement, subsequent decompressive surgery, and chronic neck problems are not related to the [January 17, 1996] incident is quite unsupported, and in direct contradiction to the medical records, history, and objective findings in this case, as described above. Furthermore, his statement that the results of the subacromial decompression are satisfactory, and that she has no ongoing medical diagnosis connected with the work injury, is totally erroneous and in contrast to my findings on examination. I have specifically found that there are objective findings on examination of the neck and shoulder which support the subjective complaints of [appellant]."

Dr. Sinel concluded that appellant should be considered temporarily totally disabled and advised that further determinations of future disability should be deferred until she has completed her appropriate rehabilitation and pain management program.

In a decision dated November 3, 1999, an Office hearing representative affirmed the April 5, 1999 decision.

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

In this case, the Office found in its April 5, 1999 decision that appellant failed to establish that her claimed left shoulder condition was causally related to the January 17, 1996 employment injury based on Dr. Dorsey's referral opinion. This finding was proper, as Dr. Dorsey's opinion represented the weight of medical opinion at the time of the April 5, 1999 Office decision.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who submitted Dr. Sinel's September 8, 1999 medical report. Dr. Sinel's report contains probative, countervailing evidence that appellant's claimed shoulder condition was causally related to the January 1996 employment injury. He noted that the record contained numerous reports of appellant's continued complaints of pain in the months following her work injury, with pain and stiffness in her neck radiating into her left shoulder and down to the arm. Dr. Sinel also stated that appellant had symptoms consistent with cervical radiculitis, cervical impingement and that she subsequently developed diffuse cervical myofascial pain.

Finally, Dr. Sinel noted that appellant's shoulder MRI scan indicated shoulder impingement on the left, consistent with her clinical presentation, and that she has subsequently developed a full chronic pain syndrome with postoperative adhesive capsulitis in the shoulder, persistent shoulder pain, chronic myofascial neck pain and likely cervical radiculitis. Therefore, his opinion created a conflict in the medical evidence with that of Dr. Dorsey.

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.”¹ 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 back for a properly selected impartial medical examiner, there remains an unresolved conflict in medical opinion.²

In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion as to whether appellant’s claimed left shoulder condition was causally related to the January 17, 1996 employment injury. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.³ After such development as it deems necessary, the Office shall issue a *de novo* decision.

Accordingly, the November 3, 1999 decision is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
June 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹ 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).

² *See Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

³ *Aubrey Belnavis*, 37 ECAB 206 (1985).