U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN G. BROWN and U.S. POSTAL SERVICE, POST OFFICE, Houston, TX

Docket No. 00-1410; Submitted on the Record; Issued May 10, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant authorization for cervical and lumbar surgery.

On November 8, 1993 appellant, a 36-year-old clerk, filed a Form CA-2, claim for benefits, alleging that she developed a severe shoulder condition as a result of repetitive mail casing, and that she first became aware that this condition was related to her employment on April 8, 1992. The Office accepted appellant's claim for bilateral shoulder sprain on March 3, 1994. Appellant missed work intermittently due to her accepted condition, for which the Office paid her appropriate compensation.[1] Appellant stopped working on January 25, 1999 and was placed on the periodic rolls. The Office subsequently expanded its acceptance to include the conditions of cervical sprain, L3-4 disc bulges, and aggravation of degenerative cervical and lumbar disc disease.

In a report dated August 3, 1999, Dr. James A. Ghadially, a Board-certified orthopedic surgeon and appellant's treating physician, stated:

> "[Appellant] continues to be symptomatic.… She is currently a candidate for cervical decompression and fusion as well as lumbar decompression and fusion. The approval for this procedure is still pending. [Appellant] states that she is also concerned because of the severe pain to her low back.... She also continues to have a lot of problems with activities both in her neck and low back but it is more severe in her low back area."[2]

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[1] By decision dated May 2, 1997, the Office, vacating a previous decision, found that appellant had sustained a recurrence of her employment-related cervical/shoulder disability in June 1996.

[2] Dr. Ghadially reiterated these findings and his recommendation for surgery in reports issued September 1, 8 and 23 and October 6 and 27, 1999.

Appellant was examined by Dr. Walter R. Sassard, a Board-certified orthopedic surgeon, who stated, in a report dated August 19, 1999, that a cervical myelogram performed July 11, 1996 had detected abnormalities at C2-3 and C6-7, and that a magnetic resonance imaging (MRI) scan done on March 23, 1999 revealed a disc bulge at C6-7. Dr. Sassard advised that appellant had multilevel degenerative disc disease of the cervical spine and degenerative disc disease of the lumbosacral spine with evidence of radiculopathy and stenosis. He stated:

> "Based on [appellant's] clinical sign and presentation today, I do not feel that any surgery is justified in either the cervical [or] lumbar area despite the fact that there are some abnormalities which have been demonstrated. She does not appear to be substantially in pain nor incapacitated from all activities at this time."

In a memorandum dated December 9, 1999, Dr. Don W. Vanderpool, an Office medical adviser and a Board-certified orthopedic surgeon, reviewed the medical record and concluded that "[t]here is no indication in the medical records submitted for review that [appellant's] clinical condition has changed and which would warrant surgical intervention."

On January 7, 2000 the Office referred appellant for a second opinion examination with Dr. Bernard Z. Albina, a Board-certified orthopedist, to ascertain appellant's current condition and determine whether the surgery recommended by Dr. Ghadially was appropriate and necessary to treat any work-related residual disability.

In a report dated January 26, 2000, Dr. Albina, after reviewing the medical records and the statement of accepted facts and stating findings on examination, concluded that appellant did not require surgery. Dr. Albina stated that appellant had objective findings of current neck and back conditions; *i.e.*, chronic cervical sprain and chronic degenerative cervical disease at C4-5, C5-6 and C6-7, with chronic lumbar sprain and with superimposed herniated disc at L4-S1 on the left, which was not related to the accepted employment injury. He further advised that appellant was not capable of performing an eight-hour job due to her current medical condition. With regard to Dr. Ghadially's recommendation of fusion surgery to ameliorate her cervical condition, Dr. Albina stated:

> "I do not see any medical indication or necessity for that surgery and I believe [c]onservative [t]reatment ... will be enough in particular and specifically since [appellant] has no neurologically deficit whatsoever in the upper extremities to justify operating on any of those discs."

Dr. Albina advised that, with regard to any chronic cervical sprain residuals stemming from the April 8, 1992 employment injury, surgery was not required.

By decision dated February 9, 2000, the Office denied authorization for cervical fusion surgery.

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, Dr. Sassard and Drs. Albino and Ghadially, regarding whether appellant requires cervical and/or lumbar disc decompression and fusion surgery to ameliorate her degenerative conditions. 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."[3] 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. 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 requires cervical and/or lumbar decompression and fusion surgery to ameliorate her degenerative conditions. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The Office of Workers' Compensation Programs' decision of February 9, 2000 is therefore set aside and the case is remanded to the Office further action consistent with this decision of the Board.

Dated, Washington, DC
May 10, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] 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).