

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN L. RICE and U.S. POSTAL SERVICE,  
RIVER OAKS STATION, Houston, TX

*Docket No. 99-2393; Submitted on the Record;  
Issued May 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof to establish that she sustained a recurrence of disability causally related to her accepted June 6, 1990 employment injury.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

On June 7, 1990 appellant, then a 35-year-old clerk, filed a traumatic injury claim (Form CA-1) assigned number 16-0175427 alleging that on June 6, 1990 she hit her head on a bar on the "OTR." Appellant stated that she hurt her head and jammed her neck.

The Office of Workers' Compensation Programs accepted appellant's claim for a cervical strain.

Appellant stopped work on June 9, 1990 and returned to a limited-duty clerk position on June 25, 1990. She stopped work on July 14, 1990. Appellant accepted the employing establishment's April 21, 1993 job offer for a limited-duty clerk position. Appellant returned to work on July 12, 1993 for four hours per day.

By decision dated November 23, 1994, the Office found that the limited-duty clerk position fairly and reasonably represented appellant's wage-earning capacity.

On May 28, 1998 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on January 1, 1998 causally related to her June 6, 1990 employment injury. She stopped work on January 7, 1998.

In a June 2, 1998 letter, the Office advised appellant to submit medical evidence supportive of her claim.

By letter dated June 15, 1998, the Office advised Dr. Hal Boone, a Board-certified family practitioner and appellant's treating physician, to submit a medical report regarding appellant's alleged recurrence of disability. Dr. Boone submitted a July 14, 1998 medical report finding that appellant was unable to work.

By decision dated July 29, 1998, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning January 1, 1998 due to her June 6, 1990 employment injury. In an undated letter, appellant requested an oral hearing before an Office representative.

In a summary decision contained in the transcript of the February 24, 1999 hearing, the hearing representative vacated the Office's decision and remanded the case for further development of the record. The hearing representative found that appellant had submitted sufficient medical evidence indicating a change in her employment-related condition. The hearing representative instructed the Office to prepare a statement of accepted facts and refer appellant to a Board-certified specialist for a second opinion evaluation to determine whether appellant had sustained a recurrence of disability beginning January 7, 1998 causally related to her June 6, 1990 employment injury.

On remand, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. George Cox, a Board-certified orthopedic surgeon, for a second opinion examination by letter dated April 27, 1999. By letter of the same date, the Office advised Dr. Cox of the referral.

Dr. Cox submitted a May 19, 1999 medical report finding that appellant could perform the duties of her limited-duty position.

By decision dated May 27, 1999, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning January 1, 1998 due to her June 6, 1990 employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides 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."<sup>1</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>2</sup>

The hearing representative found the medical reports of Dr. Boone and Dr. Triet Huynh, a physiatrist, sufficient to remand the case to the Office for further development of the record. In a July 14, 1998 report, Dr. Boone stated that appellant sustained head and neck injuries in 1990, which required surgery in 1991. He further stated that appellant was pain-free for six years, but that her pain was back and that she was unable to work due to the pain. In a February 23, 1999

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<sup>1</sup> 5 U.S.C. § 8123(a).

<sup>2</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

report, Dr. Boone stated, “[I]n my opinion, [appellant’s] inability to work is due to the accident on June 6, 1990.”

Dr. Huynh’s February 23, 1999 report indicated that appellant sustained a work-related injury on January 1, 1997. He stated:

“As a result of the above injury [appellant] sustained neck injury, cervical strain, C5-C6 disc herniation, cervical radiculopathy. She also developed degenerative changes and facet arthropathy as a result of the above injury. She ha[s] not been able to work as a result of this injury. She is still under active treatments for this injury.”

In a May 19, 1999 medical report, Dr. Cox, the Office second opinion physician, provided a history of appellant’s June 6, 1990 employment injury and medical treatment. Dr. Cox also provided his findings on physical examination. He opined that appellant had a 10 percent permanent impairment of the whole body as a result of her 1990 employment injury, but that appellant was not disabled from returning to her limited-duty job as a clerk for four hours per day at the employing establishment.

The Board finds that there is a conflict in the medical evidence between appellant’s treating physicians, Drs. Boone and Huynh, and the Office physician, Dr. Cox, on the issue of whether appellant sustained a recurrence of disability commencing January 1, 1998 causally related to her June 6, 1990 employment injury. Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence. On remand, the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on whether appellant sustained a recurrence of disability commencing January 1, 1998 causally related to her June 6, 1990 employment injury. After such further development as the Office deems necessary, the Office should issue a *de novo* decision regarding appellant’s claim.

The May 27 and February 24, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC  
May 2, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member