

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL SWENSON and U.S. POSTAL SERVICE,
RED WING POST OFFICE, Red Wing, MN

*Docket No. 01-01; Submitted on the Record;
Issued September 10, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's disability is causally related to her November 2, 1991 employment injury or to factors of her employment.

On October 2, 1995 appellant, then a 46-year-old letter carrier, filed a claim for fibromyalgia. She stated that, on November 2, 1992, she was delivering mail in a snowstorm when she slipped and fell on a set of steps, spraining her left ankle and sustaining injuries to her entire body. Appellant subsequently began to have symptoms of fatigue and pain in her back, joints and muscles. Her condition became progressively worse to the point that she was placed on light duty at her physician's recommendation. Appellant stated that the light duty did not help as the muscle fatigue and pain in the head and eyes continued. She claimed that the fall and the stress of doing her job caused fibromyalgia.

In a July 11, 1996 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the fact of an injury had not been established because she had not established the cause of her fibromyalgia. Appellant requested a hearing before an Office hearing representative. In a December 2, 1996 decision, issued without a hearing, an Office hearing representative found that the case was not in posture for decision because appellant had submitted medical evidence that supported her claim that her condition was aggravated by her employment. The hearing representative therefore remanded the case to the Office for referral of appellant to another physician for an examination and second opinion on whether her condition was causally related to her employment. In a February 3, 1997 decision, the Office noted that appellant did not appear for a scheduled examination by an appropriate specialist, claiming she was sick on the date of the examination. The Office denied appellant's claim on the grounds that the evidence of record failed to establish that an injury was sustained as alleged. Appellant again requested a hearing before an Office hearing representative, which was conducted on October 21, 1997. In a February 27, 1998 decision, a second Office hearing representative found that appellant had submitted additional medical evidence, which supported her claim for causal relationship. The hearing representative concluded that the medical

evidence of record remained insufficient to approve appellant's claim but still required further development of the record by the Office.

In a June 24, 1998 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant's claimed condition was causally related to factors of her employment. Appellant once again requested a hearing before an Office hearing representative, which was conducted on March 15, 1999. In a May 15, 1999 decision, a third Office hearing representative found a conflict in the medical evidence. He therefore remanded the case for referral of appellant to an appropriate impartial specialist for an examination and opinion on whether appellant's condition was causally related to her November 2, 1991 employment injury or to other factors of her employment.

In a September 23, 1999 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that the claimed condition was causally related to factors of appellant's employment. In a July 21, 2000 letter, appellant requested reconsideration of the Office's decision. In a September 11, 2000 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence she submitted was repetitious and immaterial and therefore was not sufficient to warrant review of the prior decision.

The Board finds that the evidence of record does not establish that appellant's disability is causally related to her November 2, 1991 employment injury or to other factors of her employment.

In a September 22, 1995 report, Dr. David M. Wilhelm, a Board-certified family practitioner, stated that he had been treating appellant since 1992. Dr. Wilhelm stated that, after the November 2, 1991 fall, appellant experienced persistent musculoskeletal pain, as well as various neurological symptoms, persistent fatigue, headaches, bowel systems, disrupted sleep, and cognitive and memory problems. He indicated that appellant had multiple tender points in the upper trapezius, left parascapular region, lumbosacral area, lateral hip and left lateral epicondyle area. Dr. Wilhelm concurred in the diagnosis of fibromyalgia. He concluded that the condition was aggravated by appellant's employment because her duties as a postal clerk involved changes in body position, fine manipulation and lifting, which impacted on her musculoskeletal condition.

In a November 13, 1995 report, Dr. Conrad S. Butwinick, a Board-certified internist specializing in rheumatology, indicated that he had been treating appellant for 1½ years for severe fibromyalgia. Dr. Butwinick related that appellant felt her work activities were aggravating her condition but he declined to address the issue of whether appellant's work aggravated her condition. He only indicated that appellant's condition was severe, difficult to treat, incapacitating and was inhibiting her from performing her work activities.

In a November 22, 1995 report, Dr. Thomas C. Jetzer, Board-certified in occupational medicine, indicated that he performed a fitness-for-duty examination and stated that appellant had major inconsistencies, with less than optimal or reasonable participation in the examination. Dr. Jetzer found no trigger points and indicated that appellant appeared to be neurologically intact. He stated that appellant had a history of multiple pains with a presumptive diagnosis of fibromyalgia. Dr. Jetzer indicated that appellant's left ankle sprain from the November 2, 1995

fall had resolved. He concluded that appellant could return to work with restrictions. Dr. Jetzer questioned the accuracy of the diagnosis of fibromyalgia and recommended a second opinion from a rheumatologist. He stated that appellant's condition was not work related because the examination after the initial fall did not mention any problems beyond the sprained ankle.

In a January 11, 1996 report, Dr. Barbara Seizert, a Board-certified physiatrist, stated that appellant's overall course and history seemed consistent with fibromyalgia. Dr. Seizert noted that the onset with an injury is described in many patients with fibromyalgia while others described some sort of antecedent event such as a stressor of a virus or other type of chronic illness. She reported that appellant had no sign of any inflammatory joint disease. Dr. Seizert commented that the tendency to be sore to touch was coincident with appellant's fibromyalgia.

In a January 28, 1997 report, Dr. Butwinick indicated that appellant's problems began seven years previously with foot and heel pain with occasional swelling of the feet. He noted that appellant tolerated the stress until her November 2, 1991 fall. Dr. Butwinick related that appellant, thereafter, felt numbness and tingling in her forearms and a sense of tightness and tingling in her face. He reported that his first examination of appellant in 1994 showed areas of tender point sensitivity in the upper trapezius, right lateral elbow, lumbosacral, lateral hip and right costochondral junction areas. Dr. Butwinick stated that appellant's condition was difficult to assess because the assessment by history and by examination was largely subjective. He indicated, however, that the condition was well defined in the rheumatology literature and appellant's distribution of musculoskeletal pain, activity, intolerance, nonrestorative disruptive sleep, fatigability, headache, dry eyes, dry mouth and irritable bowel syndrome all fit classically with fibromyalgia. Dr. Butwinick reported that even with accommodations in the workplace appellant continued to find her symptoms were accentuated to a substantial degree in the workplace and she was intolerant of continuing. He stated appellant still had ongoing disease when she was not working but was much more comfortable and functional outside of the workplace. Dr. Butwinick indicated that exposure to the workplace accentuated and aggravated the underlying condition. He concluded that appellant would no longer be able to work and was permanently disabled due to fibromyalgia.

In a May 15, 1998 report, Dr. Seizert stated that no one debated the diagnosis of fibromyalgia. She noted that there was some discussion on whether the fibromyalgia was directly a result of the employment injury. Dr. Seizert commented that there was no literature to support that injuries caused fibromyalgia, but added that it was the experience of almost all the physicians in her local group that they saw a great many patients who had an initial injury or disease followed by the onset of fibromyalgia. She reported that 22 percent of patients received a diagnosis of fibromyalgia after an injury. Dr. Seizert stated that the rationale for an injury causing fibromyalgia was that an injury often caused pain and sleep disturbance. These effects would result in additional recovery time, incomplete sleep and, on occasion, fibromyalgia. She admitted that, since the cause of fibromyalgia was unknown, her statement was speculative. Dr. Seizert stated that appellant had chronic neck pain, headaches and irritable bowel syndrome which were seen more frequently in fibromyalgia patients.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Robert J. Tierney, a Board-certified rheumatologist, for the second opinion examination ordered by two Office hearing representatives. In a June 11, 1998 report,

Dr. Tierney stated that appellant had diffuse body pain, marked fatigability, significant gastrointestinal problems, cognitive dysfunction and a variety of other features. He noted that appellant not only had the 18 tender points of fibromyalgia but had diffuse body tenderness in areas not typically tender in fibromyalgia. Dr. Tierney found no objective synovitis, and no signs of an underlying connective tissue disease or inflammatory arthritis. He concluded that appellant filled the criteria for a diagnosis of fibromyalgia as she had more than 11 of the 18 tender points. Dr. Tierney also noted that appellant had no other underlying rheumatologic condition that might confuse the issue. He also indicated that appellant had an abnormal sleep disturbance and did not have restorative sleep on a continual basis. Dr. Tierney, however, stated that he could not relate appellant's November 2, 1991 employment injury to her fibromyalgia in any way. He indicated that fibromyalgia was a common disorder. Dr. Tierney pointed out that appellant's initial treatment was for a sprained ankle. He indicated that leg fractures had no increased risk for developing fibromyalgia on a long-term basis, let alone a soft tissue injury to a localized area. Dr. Tierney found no mention of diffuse body pain until November 1993 when Dr. Butwinick found appellant had vascular headaches, dry mouth, cognitive impairment, diminished short term memory, nonrestorative sleep and diffuse areas of tenderness. He stated that it would be difficult to relate these symptoms in any way to the localized November 2, 1991 employment injury. Dr. Tierney related that appellant claimed her symptoms were aggravated by her work duties. He pointed out that appellant had been unemployed since December 1996 but her symptoms had persisted and become worse. Dr. Tierney stated that the dramatic worsening of appellant's symptoms in the 1½ year prior to the examination would be inconsistent with an aggravation of the symptoms by work. He commented that appellant's employment activities were significant aggravating factors and did not cause any permanent aggravation of her fibromyalgia. Dr. Tierney stated that appellant was capable of light clerical work, with a gradual work hardening program. He concluded appellant was not totally, permanently disabled from any type of employment.

As directed by the third Office hearing representative, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. David W. Florence, a Board-certified orthopedic surgeon, for an examination to resolve the conflict in the medical evidence between Dr. Tierney and appellant's physicians. In a July 8, 1999 report, Dr. Florence diagnosed fibromyalgia by history, prior left ankle sprain, chronic pain disorder, sleep disorder by history and irritable bowel syndrome by history. He stated that appellant did not demonstrate the typical musculoskeletal characteristics of fibromyalgia in his examination. Dr. Florence indicated appellant's symptoms appeared to be primarily subjective. He commented that fibromyalgia, if present and documented, was rarely of a work-related origin. Dr. Florence pointed out that appellant's November 2, 1991 employment injury was not major, as reflected by the medical reports at that time. He added that, even if appellant had significant musculoskeletal findings thereafter, such findings were not apparent in his examination. Dr. Florence concluded that appellant's current condition was not related to the November 2, 1991 incident, which had been classified as a work-related accident. He stated that he could not say whether appellant's condition was aggravated by her employment activities in that she did not have significant musculoskeletal physical findings at the time of his examination.

In situations where there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a

proper factual background, must be given special weight.¹ In this case, Dr. Florence served as an impartial medical specialist. He concluded that appellant did not have fibromyalgia because his findings on examination did not support the diagnosis. Dr. Florence pointed out that, even if appellant had fibromyalgia, the condition was rarely caused by an employment injury. He noted that appellant's employment injury was not major. Dr. Florence reported that appellant had no apparent significant musculoskeletal findings on examination. He therefore concluded that appellant's disability was not causally related to the November 2, 1991 employment injury. Dr. Florence's report was based on an accurate medical history and was supported by rationale. His report, therefore, is entitled to special weight and, in the context of this case, constitutes the weight of the medical evidence. The Office therefore properly found that the evidence of record does not establish a causal relationship between appellant's November 2, 1991 employment injury or the factors of her employment and her subsequent disability.

The decisions of the Office of Workers' Compensation Programs dated September 11, 2000 and September 23, 1999 are hereby affirmed.

Dated, Washington, DC
September 10, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

¹ *James P. Roberts*, 31 ECAB 1010 (1980).