

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STAN REPA and U.S. POSTAL SERVICE,  
POST OFFICE, Naples, FL

*Docket No. 02-769; Submitted on the Record;  
Issued August 6, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained one or more herniated discs in the performance of duty.

The Board has duly reviewed the case record on appeal and finds that this case is not in posture for a determination of whether appellant sustained one or more herniated discs in the performance of duty. Further development of the medical evidence is required due to an unresolved conflict in the medical opinion evidence.

This is the second appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed the April 11, 2000 decision in which the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the record contained no well-rationalized medical evidence to establish that he had sustained an employment-related back injury, as alleged. By decision dated May 24, 2001, the Board found that the case was not in posture for a decision as the May 6, 1999 deposition of Dr. Kandel, appellant's treating Board-certified neurologist, taken together with the remaining medical evidence of record, raised an inference of causal relationship, either direct or by aggravation, sufficient to require further development of the case record by the Office.<sup>2</sup> The Board, therefore, set aside the Office's April 11, 2000 decision and directed the Office to refer appellant to an appropriate medical specialist for a second opinion. The complete facts of this case are set forth in the Board's May 24, 2001 decision and are herein incorporated by reference.

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<sup>1</sup> Docket No. 00-2192 (issued May 24, 2001).

<sup>2</sup> See *John J. Carlone*, 41 ECAB 354 (1989) (finding that the medical evidence was not sufficient to discharge appellant's burden of proof but remanding the case for further development of the medical evidence given the uncontroverted inference of causal relationship raised).

By letter dated June 29, 2001, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts to Dr. Jack L. Gresham, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In his August 8, 2001 medical report, Dr. Gresham provided a history of appellant's back injury and medical treatment. He also provided his findings on physical examination, noting that appellant stood erect with normal posture, walked with a normal gait and presented a normal clinical alignment of the spinal axis. Dr. Gresham also noted that appellant could bend forward at the waist to 80 degrees before complaining of back pain without radiation in either leg. In addition, Dr. Gresham found appellant's leg lengths to be equal, with normal symmetrical development of the musculature of the lower extremities. Appellant was able to stand on his toes without difficulty, and exhibited no evidence of muscle spasm or localized tenderness of the paraspinal muscles. Straight leg raising was also noted to be normal, and no evident neurologic deficit in either lower extremity. Dr. Gresham further noted that he had reviewed all available medical records and that three views of the lumbar spine revealed extensive degenerative changes without any evident other active process. Based on his findings and his review of the medical evidence of record, Dr. Gresham diagnosed lumbar spondylosis with subclinical left sciatica. With respect to the causal relationship, if any, between the diagnosed conditions and appellant's December 5, 1997 employment injury, Dr. Gresham stated:

"I cannot, with any degree of medical certainty ascribe this patient's present back and left leg pain to the work-related accident of December 5, 1997. It did not, in my opinion, to any measurable degree permanently aggravate or accelerate the degenerative process of his low back. The clinical picture as well as past and present diagnostic studies of the lumbar spine does not suggest the possibility of any injury or process, other than the natural progression of degenerative disease that could be contributing to this patient's present symptoms.... Any aggravation of a preexisting condition was, in my opinion, temporary in nature and was resolved by the time the patient was allowed to return to regular duty after his shoulder surgery."

By decision dated September 5, 2001, the Office found that the weight of the medical evidence rested with Dr. Gresham's opinion. Accordingly, the Office accepted that appellant sustained an employment-related temporary aggravation of his preexisting lumbar spondylosis which ceased by April 28, 1998, but declined to accept appellant's additional diagnosed back conditions as employment related.

In the present case, appellant has alleged that he suffers from several herniated discs and additional back complaints which were either caused or permanently aggravated by his December 5, 1997 employment injury. As part of appellant's burden of proof, he must submit rationalized medical evidence based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and his federal employment.<sup>3</sup> To support his claim, appellant submitted medical evidence, including a May 6, 1999 deposition from Dr. Kandel, appellant's treating Board-certified neurologist, in which the

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<sup>3</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Steven R. Piper*, 39 ECAB 312 (1987).

physician diagnosed L4-5 disc herniation with L5 radiculopathy, as confirmed by magnetic resonance imaging, and stated that appellant's back complaints were directly related to the December 5, 1997 incident. Dr. Kandel explained that the history of the incident was consistent with the mechanism of injury,<sup>4</sup> that a twisting and a traction trauma to the nerve root commonly produced disc changes, and that appellant's clinical examination was consistent with this and showed no signs of symptom magnification, embellishment or misdirection. Dr. Kandel further stated that, while appellant's preexisting joint changes would cause appellant occasional back strain, his current nerve root irritation, disc protrusion and disc herniation were a "very different process." Dr. Gresham, the second opinion physician and a Board-certified orthopedic surgeon, diagnosed only lumbar spondylosis with subclinical left sciatica and found that the clinical picture as well as past and present diagnostic studies of the lumbar spine do not suggest the possibility of any injury process, other than the natural progression of preexisting degenerative disease. Dr. Gresham further stated that any employment-related aggravation of appellant's preexisting condition would have long since ceased.

Section 8123(a) of the Federal Employees' Compensation Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, and these reports are 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>5</sup> Due to the conflict between Dr. Kandel's and Dr. Gresham's opinions as to whether appellant's current back condition is causally related to his December 5, 1997 employment incident, the case must be remanded for referral of the case, including the case file and the statement of accepted facts, to an appropriate medical specialist to resolve this conflict.<sup>6</sup> After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

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<sup>4</sup> Appellant stated that his injury occurred while he was getting into a car driven by another mail carrier. He explained that after he was seated in the car but still in the process of pulling his legs up into the vehicle, the car rolled forward trapping his foot under the tire, wrenching and twisting his back and pulling him from the vehicle.

<sup>5</sup> *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

<sup>6</sup> *Kathryn Haggerty*, *supra* note 3.

The decision of the Office of Workers' Compensation Programs dated September 5, 2001 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
August 6, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member