U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS A. REED and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MO

Docket No. 00-35; Oral Argument Held December 20, 2001;
Issued February 4, 2002

Appearances: *Robert A. Lynch, Esq.*, for appellant; *Jim C. Gordon, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,

The issue is whether appellant sustained an injury to one or both upper extremities as a result of the duties she performed in her federal employment from October 1995 to April 1996.

On April 13, 1996 appellant, then a 37-year-old distribution clerk, filed an occupational disease claim asserting that she developed a bilateral upper extremity injury as a result of her federal employment:

> "When I would case mail or throw bundles my hands would hurt and swell. When I would case mail it would get harder and harder to hold the mail or to separate the letters. As my fingers would swell and hurt it became harder to work. I went to the doctor in early March and he gave me more pain pills. I returned to Dr. Presley on the 22nd of March and he sent a note to work to allow me time to do treatment on my hands everyday because of the swelling and pain I would get when I case mail. The first of April I started working on a belt lifting heavy bags and throwing mail in sacks. This motion cause[d] swelling and pain in my hands, wrists and shoulders. I was sent to Dr. [David G.] Paff and he stated that my work is causing the pain."

On April 11, 1996 appellant's attending physician, Dr. Paff, a Board-certified specialist in occupational medicine, diagnosed myofascial pain of the upper extremities. He prescribed medication and reported physical restrictions as follows:

> "No repetitive use of hands and upper extremities (such as she is doing now). If these restrictions are not met, I am very concerned that she will become permanently and totally disabled. Her upper extremity problems are a direct result of the repetitive use of her hands and arms at the [employing establishment]."

On April 13, 1996 the employing establishment advised appellant that it had no light-duty assignments within her physician's restrictions. Appellant stopped work that day, filed her claim and did not return. The employing establishment submitted job descriptions for the positions of Distribution Clerk and Flat Sorting Machine Operator, including basic functions, functional requirements and environmental factors.

On May 4, 1996 Dr. Paff reported that when he saw appellant on April 11, 1996 he felt that she had some fibromyalgia of the upper extremities with some evidence of carpal tunnel syndrome and ulnar irritation. Dr. Paff stated that this was at least in part brought on by the repetitive nature of her work and that less hand-intensive work was necessary. He stated:

> "It remains my opinion that the difficulties that she is having are due to the repetitive nature of her work. At the present time she has myofascial pain and some evidence of beginning neuropathies of the median and ulnar nerve. The problem that she is having now is a continuation of the problem that she was having in 1994. [Appellant] did not fully recover from it, nor is she likely to fully recover from it now due to the long time exposure. Attempts were made by me to get her back into some kind of work so that she could be productive, but the repetitive nature of the work has continued to be a problem and she should not be involved in that now and probably should not have been in 1994, though I think it was reasonable that attempts were made -- at least in part with my permission -- to try on a part-time basis to do repetitive work.
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> "The patient also did sustain another injury at the end of February of 1994 when a fellow employee grabbed her right arm, causing difficulty with her shoulder."

The Office of Workers' Compensation Programs referred appellant, together with the record and a statement of accepted facts, to Dr. Bruce Silverberg, a Board-certified orthopedic surgeon, for a second opinion.

In a report dated February 17, 1998, Dr. Silverberg critiqued the examinations performed by a number of physicians and related appellant's medical course, complaints and findings on examination. He reported that Dr. Paff's evaluation was without corroborative objective documentation:

> "All similar reviewers have failed to assess specific objective findings with an appropriate anatomic, functional and disease oriented perspective. Physical examinations were brief and failed to review specific detail essential to substantiate or rule out any diagnosis, much less a diagnosis by exclusion. As would be recognized, it is impossible to 'prove the negative alternative,' or the certainty that reported difficulties were not work related. Nonetheless, [appellant] continues with remarkable symptomatic difficulty despite an absence of working stress for more than 14 months. Similarly, it is difficult to explain how 3 comprehensive and objective evaluations … failed to appreciate any objective findings which would substantiate her reported pain and disability."

Dr. Silverberg reported that his examinations on October 4 and 10, 1997 were not unremarkable and demonstrated a diagnosis of underlying thoracic outlet compression difficulty. He described the nature of this condition and addressed the questions posed by the Office:

> "In response to specific questions, the present examinations do not demonstrate a bilateral upper extremity condition which has been caused or aggravated by factors of [appellant's] employment with the [employing establishment] beginning March 1996. There is no association nor greater incidence for this condition with diabetes. There was no evidence of cervical radiculopathy or distress specifically attributed to the cervical spine. Finally, the present evaluated condition is a personally responsible condition and would require management with specific supportive therapy modalities and condition, directed by personal physician and domestic health care providers. [Appellant] had demonstrated no work-related condition, which would preclude her return to unrestricted working activities. The inability to perform these activities has not been reviewed as related to work intolerance or repetitive task stress. The inability to perform these activities recognizes an underlying personal condition, with associated functional limitation, likely to preclude chest level and overhead activities. Furthermore, there was no evidence of present or residual carpal tunnel, Guyon's canal ulnar neuritis, or specific tendinitis for either limb, in any location."

In a decision dated February 24, 1999, an Office hearing representative found that a conflict in medical opinion existed between appellant's attending physician, Dr. Paff and the Office referral physician, Dr. Silverberg, necessitating resolution by a referee medical specialist. The hearing representative found that the statement of accepted facts did not provide a complete description of appellant's duties, the position descriptions of which she referenced. She found that the statement of accepted facts mischaracterized appellant's nonwork activities and that the questions posed to the Office referral physician "were not altogether appropriate," as the Office asked the doctor to consider duties only from March 1996 rather than from October 1995 and as the questions appeared to lead the physician. The hearing representative remanded the case for an amended statement of accepted facts accurately depicting the duties appellant's performed from October 1995 to April 1996 and including a simple summary of her prior injury, history and periods of employment. The hearing representative instructed the Office to phrase its questions in a way that did not appear to elicit a particular response.

On remand the Office referred appellant, together with the record and an amended statement of accepted facts, to Dr. Scott R. Luallin, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The Office asked Dr. Luallin, among other things, whether appellant's current examination demonstrated a bilateral upper extremity condition that was caused or aggravated by her federal employment as outlined in the statement of accepted facts.

In a report dated April 29, 1999, Dr. Luallin related appellant's history and medical course. He briefly touched on the findings of a number of physicians who had examined appellant. Dr. Luallin related appellant's present complaints and his findings on physical examination. He then offered the following opinion:

> "I will now attempt to summarize my opinions, which are based on a reasonable degree of medical certainty after exhaustive review of [appellant's] medical records as well as a detailed history taking and physical examination. [Appellant's] subjective complaints of pain and the descriptions of pain are the only consistent findings. Her subjective numbness is not supported by any objective findings of sensory deficit. Her description of weakness is certainly matched by her very poor ability with the Jamar dynamometer. However, with rapid exchange at the third setting she is noted to have significant variability indicating inconsistent effort. Other than poor posture, I do not see specific clinical findings which support a diagnosis of thoracic outlet syndrome today as provocative maneuvers were negative. Typically thoracic outlet syndrome affects the lower truck of the brachial plexus and most commonly would affect the ulnar 2 digits, however, a wide spectrum presentation has been noted in patients and, therefore, this diagnosis is difficult to entirely exclude. Nonetheless, this is not a condition which would have been caused or aggravated by factors of her employment.
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> "With regards to labeling her problem as an 'overuse syndrome' her work-related stress has been absent since April of 1996 and her symptoms, if anything, have progressed by her report so it would be difficult for me to attribute this to an 'overuse syndrome.'
>
> "I will now attempt to answer specific questions which have been posed. I do not believe that the current condition has been caused or aggravated by the patient's [f]ederal employment as outlined in the Statement of Accepted Facts for the above-mentioned reasons. It does state in the questions that the claimant has diabetes, although I am unable to find evidence to support that she does, in fact, have diabetes. I do not believe that her complaints could be attributed to an underlying condition of diabetes even if she does have the diagnosis of diabetes. I do believe that her current complaints have progressed to the current level of severity without having been exposed to [f]ederal employment factors.
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> "I do not believe that the patient's motor vehicle accident resulted in significant cervical radiculopathy as she has no clinical findings of a cervical radiculopathy and her EMG [electromyogram] study was normal. I do believe the patient is capable of returning to her date-of-injury position at the [employing establishment] and I do not find objective reasons why the patient could not return to work without restriction.
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> "In response to the difficult question, number 5, as to whether the patient is malingering or her conditions are self-engendered, I do find inconsistencies in her examination in that she has no objective sensory loss and yet complains of

numbness. She does have significant variability when strength testing indicating that she is not putting forth total effort. These would certainly point in the direction of her attempting to magnify her symptoms."

In a decision dated June 4, 1999, the Office denied appellant's claim. The Office found that the opinion of Dr. Luallin, the impartial medical specialist, represented the weight of the medical opinion evidence and negated a relationship between appellant's claimed condition and factors of her federal employment.

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

The issue raised by appellant's April 13, 1996 claim is whether she sustained an injury to one or both upper extremities as a result of the duties she performed in her federal employment from October 1995 to April 1996. Dr. Paff, her attending physician, reported in the affirmative; Dr. Silverberg, the Office referral physician, in the negative.[1]

It was, therefore, appropriate for the Office to obtain the opinion of a referee medical specialist.[2] The opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight in resolving an outstanding conflict.[3] Appellant argues that the opinion of the referee medical specialist is not entitled to special weight in this case because the Office failed to remedy the errors or irregularities found in the statement of accepted facts and the questions to be resolved. The Board finds that Dr. Luallin's opinion is insufficient to resolve the conflict between Drs. Paff and Silverberg because Dr. Luallin did not address whether appellant sustained an injury to one or both upper extremities as a result of the duties she performed in her federal employment from October 1995 to April 1996. Dr. Luallin reported that appellant's "current" condition, that is, the condition he evaluated in April 1999, was not caused or aggravated by her federal employment. While appellant's condition in April 1999 and its relationship to her federal employment might be relevant to the issue of continuing compensation benefits, it fails to resolve whether appellant sustained an injury while in the performance of her duties three years earlier.

The Board will set aside the Office's June 4, 1999 decision and remand the case for referral to a different referee medical specialist. Because the statement of accepted facts and the questions to be resolved have become an issue in this case the Office shall take additional steps to ensure that the statement of accepted facts is full, fair and accurate and that the questions to be resolved are neutral and relevant.

A statement of accepted facts is one of the most important documents a claims examiner prepares. The outcome of a claim and, ultimately, justice for the claimant may hinge on the completeness, conciseness and accuracy of the statement of accepted facts. The claims examiner

[1] Dr. Silverberg's opinion was limited to duties appellant performed from March 1996.

[2] 5 U.S.C. § 8123(a) ("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").

[3] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

thus has the responsibility to assure that the statement adequately covers the relevant points of information in a fair and clear presentation.[4]

In this case, the statement of accepted facts should reflect appellant's claim that she sustained an injury to her upper extremities as a result of the duties she performed in her federal employment from October 1995 to April 1996, not since March 1996. Because this is the focus of appellant's claim, the statement of accepted facts should describe these duties, including appellant's duties casing and sorting mail. The Office should strike the prejudicial modifier "only" when describing the number of hours appellant performed certain activities. To avoid confusion, the Office should consolidate position descriptions, including the acceptance of repetitive movement of the hands and arms, rather than simply appending additional material, out of sequence, at the end of the latest statement of accepted facts. The current description of nonwork activities is inadequate because it leaves the reader to guess which activities have been modified and which are no longer performed. The statement of accepted facts shall reflect the 1993 acceptance of appellant's carpal tunnel release, should reconsider the relevance of appellant's weight gain from 1989 to 1993 and shall avoid labeling any condition as a concurrent disability "not due to the current claimed injury." The Office shall follow its procedures in determining what information should not be included in the statement of accepted facts.[5]

The questions to be resolved should address whether appellant sustained an injury to her upper extremities during the period October 1995 to April 1996 as a result of the duties she performed in her federal employment. If so, it then becomes relevant whether her current examination demonstrates continuing residuals or disability. The Office should strike question 5, which raises the issue of malingering and secondary gain. A referee medical specialist is expected to report any inconsistencies found on physical examination and to express freely any opinion on the significance of such when discussing the claimant's diagnosis.

After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.0809.2 (June 1984).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.0809.2 (June 1984).

The June 4, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.[6]

Dated, Washington, DC
February 4, 2002

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] The Board notes that Bradley T. Knott who participated in the hearing held on December 20, 2001 was not an Alternate Member after January 25, 2002 and he did not participate in the preparation of this decision and order.