

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SOCORRO M. BURK and DEPARTMENT OF DEFENSE,
McCLELLAN AIR FORCE BASE, CA

*Docket No. 00-2667; Submitted on the Record;
Issued May 2, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained a back condition causally related to factors of her federal employment.

On January 27, 1996 appellant, then a 52-year-old storeworker, filed a notice of traumatic injury alleging that on January 23, 1996 she hurt her back while bending down to pick up merchandise from a pallet. Appellant was treated for back pain at the employing establishment medical center by Dr. Robert H. Lutz, a Board-certified physician in emergency medicine. Dr. Lutz advised appellant to work only light duty with no lifting over 10 pounds and to undergo a course of physical therapy. Appellant remained off duty from January 24 to February 4, 1996, when she returned to light duty. The Office of Workers' Compensation Programs subsequently accepted the claim for a thoracic strain.¹

In a June 11, 1997 report, Dr. Richard McCollum, a Board-certified orthopedist and Office referral physician, noted that appellant's history of a thoracic sprain secondary to her work injury of January 23, 1996. Dr. McCollum reported physical findings and that there was no significant evidence of any condition of the cervical, dorsal or lumbar regions of the spine. He suggested that appellant magnified or embellished her symptoms of back pain. Dr. McCollum opined that appellant's back condition was fixed and stable and that she had no residual disability from her employment injury. He also prepared a work restriction form indicating that appellant could work eight hours per day with no limitations.

On September 18, 1997 appellant filed a notice of occupational disease alleging a work-related back condition. She noted that she first realized her back condition was caused or aggravated by her employment on December 18, 1995.

¹ Appellant was involved in a nonwork-related automobile accident in 1994 and sustained a back injury. The record indicates that appellant also had two prior accepted back strains at work on February 25, 1994 and December 18, 1995. The prior claims were doubled with the instant claim under master file number A14-311564.

On September 30, 1997 appellant filed a Form CA-7 claim for wage loss for the period of December 19, 1995 through August 31, 1997.

The record concludes a voluminous amount of physical therapy records and several attending physician reports signed by Dr. Stephen F. Duncan, a Board-certified family practitioner, which diagnose a thoracic strain and state that appellant is unable to work.

In a February 18, 1998 report, Dr. Duncan stated that he did not understand why appellant's workers' compensation case had been listed as closed in June 1997 since appellant had been seen in his clinic beginning July 14, 1997 and had 13 visits from July 14, 1997 to February 9, 1998 for treatment of trapezius spasms and a rotator cuff injury, both on the right side. Dr. Duncan advised that appellant had been put on a four-hour work restriction plan effective October 22, 1997.

In an April 2, 1998 report, Dr. Duncan indicated that appellant began treatment in his office "in the summer of 1997 for an L&I injury that began in 1995." He noted that his clinical records were self-explanatory and confirmed that appellant experienced upper back and shoulder pain associated with observed spasm on multiple examinations. Dr. Duncan opined that appellant sustained a right trapezoid sprain directly related to her December 18, 1995 work injury.

The Office determined that a conflict existed in the record and referred appellant along with a statement of accepted facts and a copy of the medical record to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated May 18, 1998, Dr. Hubbard discussed appellant's history of injury, her symptoms and the medical evidence. He also recorded physical findings. Dr. Hubbard opined that the objective medical evidence showed that appellant's lumbar strain due to the December 18, 1995 work injury was fixed and stable and that appellant was not disabled due to any work-related back condition. He diagnosed that appellant suffered from nonwork-related osteoarthritis of the cervical and lumbar spine, which explained her continuing complaints of back pain. Dr. Hubbard also opined that appellant's preexisting back condition was not caused or aggravated by work factors.²

In a decision dated June 2, 1999, the Office denied appellant's claim for compensation on the grounds that she failed to establish a causal relationship between her back condition and her employment.

Appellant subsequently requested a hearing, which was held on April 27, 1999. At the hearing, appellant's counsel argued that she was disabled due to pain or functional overlay due to her work injury.

² The record contains treatment notes signed by a physical therapist and a physician's assistant at the Group Health Cooperative of Puget Sound. The Board notes that neither a physician's assistant nor a physical therapist is a "physician" under the Federal Employees' Compensation Act, therefore, the treatment notes have little probative value.

In a decision dated August 3, 1999, an Office hearing representative affirmed the Office's June 2, 1998 decision.

The Board finds that appellant has failed to establish that she sustained a back condition causally related to factors of her employment.

An employee seeking benefits under the Act³ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

In this case, the Office properly determined that a conflict existed in the medical record as to whether appellant had any work-related back condition which caused disability. Section 8103(a) of the Act provides that if 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.⁶ Where opposing medical reports of virtually equal weight and rationale exist and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently rationalized and based on a proper factual background, must be given special weight.⁷

The impartial medical examination was performed by Dr. Hubbard on May 18, 1998. He opined that appellant did not have a work-related back condition and that she had no disability or residuals due to her work injuries. Dr. Hubbard further stated that appellant's employment had not caused a worsening of any of her preexisting medical problems, including osteoarthritis. Because Dr. Hubbard's opinion is reasoned and based on a proper factual and medical background, the Board finds that it is entitled to special weight. Accordingly, the Board concludes that the Office properly denied appellant's claim for compensation.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ 5 U.S.C. § 8123(a); *see Kimper Lee*, 45 ECAB 565 (1994); *Larry B. Guillory*, 45 ECAB 522 (1994).

⁷ *Brady L. Fowler*, 44 ECAB 343 (1992).

The August 3, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 2, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member