

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBIE S. BIRO and DEPARTMENT OF DEFENSE, DEFENSE
COMMISARY AGENCY, PATRICK AIR FORCE BASE, FL

*Docket No. 01-2022; Submitted on the Record;
Issued May 9, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
A. PETER KANJORSKI

The issue is whether appellant's herniated disc at C6-7 and her disability beginning June 10, 1999 are causally related to her employment.

On July 27, 2000 appellant, then a 47-year-old sales store checker, filed a claim for an occupational disease for a herniated disc at C5-6. She stopped work on June 10, 1999 and has not returned. On September 11, 2000 appellant underwent an anterior cervical discectomy for a herniated nucleus pulposus at C6-7 and an anterior cervical fusion of C6 and C7.

By decision dated December 5, 2000, the Office of Workers' Compensation Programs found that appellant had not met the requirements for establishing that her condition was caused by her employment.

By letter dated December 21, 2000, appellant requested reconsideration and submitted additional medical evidence. The Office referred appellant for a second opinion evaluation to Dr. Jack Gresham, who concluded in a May 8, 2001 report that appellant's cervical disc herniation was not caused by her duties as a cash register operator.

By decision dated May 23, 2001, the Office found that the medical evidence failed to support that employment factors caused or contributed to appellant's condition or disability.

The Board finds that the case is not in posture for a decision, as there is an unresolved conflict of medical opinion.

In a May 8, 2001 report, Dr. Gresham, the Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, concluded:

“The patient's cervical herniation, both at C5-6 and C6-7, was not in my opinion caused by any injury described as happening as a cash register operator.¹ I cannot

¹ In addition to her July 27, 2000 claim for an occupational disease, appellant filed claims for traumatic injuries: a pulled back muscle on November 26, 1992; a left arm and shoulder strain on May 27, 1995; and a pull in her right shoulder and neck on May 2, 1997.

say, with any degree of medical certainty, exactly what caused her herniations. In my opinion, they are the result of the natural progression of degenerative disc disease which, also, within every degree of medical probability, was not worsened or aggravated in any permanent measure by injuries that the patient might have suffered while working as a cash register operator.”

In explanation of his opinion, Dr. Gresham stated, “The opinions stated have background substantiation derived from my own clinical experience and a broad-ranging medical education process over 40 years of medical practice that could not be adequately summarized in this report.”

In a report dated December 5, 2000, Dr. Thomas J. Manski, a neurosurgeon, who performed appellant’s surgery on September 11, 2000, stated:

“Based upon the history given to me and my own history and physical of the patient, the objective findings are clearly consistent with a trauma or repetitive trauma due to repetitive lifting, bending and pulling of moderately heavy items as described by [appellant] at her job. As a neurosurgeon, I see these types of injuries on a routine basis and am well aware of how they are caused and/or aggravated by repetitive activities.

“When I see herniated discs such as the one I found in [appellant] and the osteophytes, which may form after several months or several years after an injury, these findings are certainly consistent with the history given and the description of accident of [appellant]. [Appellant] certainly had preexisting conditions in her spine, but were apparently asymptomatic and, at the very minimum, appear to have been aggravated by this employment activity causing the diagnosis that I have found. Causation of these problems does not require [appellant] to have lifted heavy objects, but the twisting, lifting and bending activities of a cashier can and do produce these types of results.”

Appellant’s attending Board-certified neurologist, Dr. Gary M. Weiss, also offered some support for causal relationship in his October 8, 1999 report: “The patient’s injury can be causally related to her job as a cashier due to the kind of injury that she has and the duties that she had to perform. Which included her to lift and carry heavy objects and repetitive motions of her neck and arms.”

Section 8123(a) of the Federal Employees’ Compensation Act² states, 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.” To create a conflict of medical opinion, opposing medical reports must be “of virtually equal weight and rationale.”³ Factors that determine the weight of medical evidence include the thoroughness of examination, the accuracy and completeness of knowledge of the

² 5 U.S.C. § 8123(a).

³ *James P. Roberts*, 31 ECAB 1010 (1980).

facts and medical history, the care of analysis, the appropriateness of the specialties of the physicians, and whether the medical opinion is speculative or equivocal.⁴

Applying these criteria to the reports from Drs. Manski and Gresham, the Board finds that these reports are of virtually equal weight and rationale. Both physicians are specialists in appropriate fields of medicine, and both reviewed the diagnostic testing. While Dr. Gresham was provided with a statement of accepted facts and therefore had a more complete history, Dr. Manski had an accurate history that appellant's problem started in May 1997. As he performed the surgery on appellant's neck, Dr. Manski had the advantage of actually seeing the herniated disc and other changes in appellant's cervical spine. Although Dr. Manski stated at one point that appellant's preexisting spinal conditions "appear to have been aggravated by this employment activity," overall his report is not more speculative than that of Dr. Gresham, who, after stating that he could not say exactly what caused appellant's disc herniations, attributed them to the natural progression of her degenerative disc disease. Neither physician provided much rationale, with both relying on their experience as the basis of their opinions.

To resolve the conflict of medical opinion, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist. After such further development as it deems necessary, the Office should issue an appropriate decision on whether appellant's herniated disc at C6-7 and her disability beginning June 10, 1999 are causally related to her employment.

The May 23, 2001 and December 5, 2000 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
May 9, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member

⁴ These and other factors are discussed in *Melvina Jackson*, 38 ECAB 443 (1987), and in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810 (April 1993).