

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA J. HALL and DEPARTMENT OF JUSTICE,
BORDER PATROL, San Diego, CA

*Docket No. 02-435; Submitted on the Record;
Issued October 11, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant had any disability for work after December 31, 2000 causally related to her December 12, 1994 employment injury; and (2) whether appellant has established that she sustained cervical, shoulder and back conditions, causally related to the December 12, 1994 employment incident.

The Office of Workers' Compensation Programs accepted that on December 12, 1994 appellant, then a 30-year-old border patrol agent trainee, fell from an obstacle course rope while training and sustained right elbow strain. The Office later expanded the claim to include right ulnar neuropathy/cubital tunnel syndrome, for which appellant underwent an ulnar nerve transposition on February 9, 1998.¹ Appellant stopped work and received appropriate compensation benefits; she underwent vocational rehabilitation therapy and returned to work briefly, intermittently as a substitute teacher averaging two hours per month (one or two classes per month) from approximately February 1998 to June 1999.

On the date of injury appellant was diagnosed as having an elbow/forearm/wrist injury due to her obstacle course fall.

In a December 14, 1994 report, Dr. Robert J. Weidemeyer, a Board-certified neurologist, noted appellant's symptoms of right elbow injury, including severe pain, swelling and right hand numbness, some palpable muscle spasms under the right subscapular area and a somewhat painful right side of her neck and he diagnosed an inflamed right elbow with possible ulnar neuropathy.

¹ Appellant also had a congenital fusion at C6-7 and left and right knee tendinitis which were not involved in this claim.

On January 11, 1995 Dr. Phillip R. Zeeck, a Board-certified orthopedic surgeon, examined appellant and diagnosed a severe sprain of the right elbow with a possible occult fracture. He recommended appellant begin exercises.

On January 30, 1995 Dr. James D. Lueke, a general practice physician, diagnosed "bruised right elbow" and indicated that appellant was disabled through March 1, 1995.

On April 23, 1995 appellant underwent a second opinion examination by Dr. Mario Palafox, a Board-certified orthopedic surgeon, who noted appellant's complaints of severe right elbow pain, swelling, stiffness and loss of range of motion, and right hand numbness, weakness and tingling, and diagnosed post-traumatic right elbow strain, possible ulnar neuropathy and mild post-traumatic reflex sympathetic dystrophy. He provided no diagnosis related to her neck, shoulder or back, nor did he report that appellant complained of neck or back pain or that she sustained neck or back injury on December 12, 1994.

Appellant underwent another second opinion examination on December 14, 1995 by Dr. Arsavir Arat, a Board-certified orthopedic surgeon, who noted that appellant's right elbow symptoms and diagnosed a sprain of the medial aspect of the right elbow and myofascial pain syndrome. He based this diagnosis on appellant's severe joint tenderness, found no objective evidence of reflex sympathetic dystrophy, and opined that a considerable portion of her disability was due to extensive muscle spasticity resulting from her anxiety and depression, but he did not indicate any neck-related diagnosis, nor did he indicate that appellant reported neck or back symptoms or injury on December 12, 1994.

Due to her work restrictions, which could not be accommodated by the employing establishment, appellant began vocational rehabilitation for teacher certification in Texas and continued it after she moved to California. However, placement services were ceased after appellant's new treating physician, Dr. Steven A. Orcutt, a Board-certified orthopedic surgeon, opined that she was temporarily totally disabled due to herniated cervical discs at C4-5 and C5-6. Dr. Orcutt opined on April 22 and May 11, 1999 that appellant's herniated cervical discs were causally related to her December 12, 1994 incident because she fell 12 feet on her right arm and torso, and a fall of 12 feet "clearly would have caused further injuries besides her right upper extremity injury." He sought authorization to treat appellant's cervical condition, her shoulders and thoracic spine, and her lumbar spine conditions.

The Office determined that another second opinion examination was required and it referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon. By report dated April 13, 2000, Dr. Dorsey noted appellant's complaints of neck and low back pain, and diagnosed "neck pain, subjective symptoms only," and "status post right ulnar nerve anterior transposition on February 9, 1998 with excellent clinical result." He noted "no examination evidence of cervical spinal pathology," and indicated that appellant had no ongoing diagnosis with respect to the cervical spine. Dr. Dorsey further stated: "There is no evidence of objective findings of nerve root impingement, fracture, dislocation or bony abnormality in the cervical spine beyond her known preexisting congenital fusion at C6-7," and he indicated that appellant was not symptomatic neurologically and that there was only mild tenderness at the medial epicondyle. He opined: "[Appellant] has subjective complaints without evidence of significant

objective findings. This places her recovery in a category of a nonmedical explanation.” Dr. Dorsey further opined:

“With regard to the cervical spine, there is no evidence that [appellant] sustained any significant cervical spine injury. At most, she may have sustained a mild cervical musculoligamentous sprain/strain which has gone on to resolve. There is no objective evidence of ongoing significant diagnosis with regard to the cervical spine. There is no basis on which to believe that her claimed neck condition would result in slow recovery.”

Regarding appellant’s alleged neck, shoulder and low back injuries, Dr. Dorsey noted that her unilateral lumbar spondylolysis was a developmental condition and opined: “There is no basis on the history, physical examination or review of the medical records, on which to believe that any of these conditions are the result of the events of December 12, 1994.” He indicated that appellant showed no evidence of any residual ulnar nerve compression and at the present time needed no further medical treatment. Dr. Dorsey opined that appellant was precluded from performing her date-of-injury job for prophylactic purposes, but he stated that she had an excellent clinical postoperative recovery and there were no residual neurological findings. He indicated that appellant could work eight hours per day.

The Office then determined that a conflict had arisen between appellant’s treating physician, Dr. Orcutt, and the Office second opinion specialist, Dr. Dorsey, as to whether appellant remained disabled due to the effects of her accepted employment injury, and as to whether she required further medical treatment for residuals of that injury.

On August 7, 2000 the Office referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. William E. Temple, a Board-certified orthopedic surgeon, for an impartial medical examination.

While the impartial medical examination was pending appellant submitted multiple letters and reports to the Office. By facsimile dated August 23, 2000, appellant requested that the Office pick an impartial medical examiner (IME) from a list she provided. This request was reiterated by letters dated August 22 and 23 and September 5 and 25, 2000, and appellant also disagreed with Dr. Dorsey’s findings, asked how many patients referred to Dr. Dorsey had reports which conflicted with their treating physicians’ reports, demanded that her IME be chosen from physicians having no prior dealings with the Department of Labor, and requested that her claims examiner be switched to Oscar Ramirez who had handled prior employing establishment cases.

Also submitted were three reports from Dr. Orcutt dated August 28, September 18 and October 9, 2000, which disagreed with Dr. Dorsey’s findings and conclusions and indicated that appellant was permanent and stationary. He provided appellant’s activity restrictions, opined that she was not capable of returning to her date-of-injury job and opined that, although she had been retrained as a substitute teacher, she was unfit to perform this job on a full-time basis and was “incapable of seeking gainful employment in a competitive marketplace.”

Appellant additionally submitted a packet of medical reports from 1994, 1995, 1996, 1997 and 1998, which were already part of the case record, and some current radiology reports of her shoulder and neck. Further reports from Dr. Orcutt were also submitted.

By letter dated September 11, 2000, the Office advised appellant that she did not meet the requirements for participation in IME selection as she did not provide any evidence that Dr. Temple was biased, as Dr. Temple was a Board-certified orthopedic surgeon.

By report dated September 29, 2000, Dr. Temple noted that appellant sustained a severe sprain of the right elbow, which was corrected by surgery, and was left with minimal objective residuals,² but had pain complaints localized to the right elbow and shoulder which did not conform to a specific nerve root distribution or dermatome.³ He noted that the magnetic resonance imaging scan findings at C4-5 and C5-6 were not clinically reflected in appellant's right upper extremity, that she had no radicular symptoms related to the cervical spine, and that the positive findings upon electrodiagnosis derived from ulnar pathology at the right elbow. He indicated that fall-related sprains of appellant's neck and low back had resolved,⁴ and would have lasted only 8 to 10 weeks post injury, and that the persistence of her complaints to the present time could not be reasonably explained based on the history of injury. Dr. Temple opined that there was no indication that appellant had a shoulder problem or a lumbar spine condition related to the work fall and that her congenital cervical fusion was clinically insignificant and was present at birth. He further noted:

“There is no question that [appellant's] right elbow was injured. However, the first reference to neck complaints is not until two days following the fall. This alone suggests that there was not a significant neck injury in the fall. Note also that, by history, [appellant] did not hit her head when she fell. It would not be unusual for her to have suffered a sprain of her cervical spine during her fall which would become apparent after two to three days. This apparently did occur. The examining physician, however, two days following her fall, found her neck ‘supple.’ He was not impressed enough with her neck complaints to even mention a diagnosis of a neck injury. The possible existence of a local neck problem is not considered until seven months following her fall....”

* * *

“The next mention of neck complaints is not until October 25, 1995, 10 1/2 months following [appellant's] fall. Dr. Palafox noted that [appellant] was complaining of pain in her neck, but his examination was of her right elbow only, not of her neck, suggesting that he was not impressed with her neck complaints. He had no reason to ignore them if he felt they were significant. Numerous subsequent records are created without further mention of the neck until

² Identified as loss of hypermobility of the right elbow.

³ Dr. Temple attributed these subjective complaints to arthritis, as noted in the films and opined that they were greater than might be expected following successful surgery.

⁴ Dr. Temple noted that these “sprain” diagnoses were derived from appellant's history only.

December 14, 1995. At that time, Dr. Arat indicated that [appellant] reported that her pain had extended to the right side of her neck. His diagnoses did not include any related to her neck. There are several subsequent records of symptoms in the right elbow radiating to the neck....

“Dr. Orcutt, in several of his reports, comments that her neck symptoms ‘clearly’ date back to the time of the fall. This review of records does not support that contention.... [Dr. Orcutt], in fact, does not begin to consider neck symptoms related to her fall until after he reviews [an] electrical study of July 14, 1995. He comments on this in his note of July 1, 1998, over three and a half years after [appellant’s] fall. The record then indicates that he becomes more and more certain that her neck complaints are work related. On March [18,] 1999, over four years after her fall, he indicates that she ‘clearly sustained her neck injury while at work....’ Review of the records to this date does not, in fact, clearly suggest this and gives rise to the question of why it took this long for this fact to become clear to him.

“A detailed review of the records, furthermore, does not suggest that she sustained significant injury to, or has significant pathology in, her right shoulder, low back, or right wrist.”

Dr. Temple opined that, based on appellant’s overall condition, there was little objective basis for concluding that she could not return to her date-of-injury job, with the primary excuse being her subjective complaints of pain, which were greater than would be expected based on the objective findings. He opined that appellant could also engage in vocational rehabilitation and light duty, and therefore could pursue teaching as she had been retrained. Dr. Temple concluded that appellant had recovered from her fall with only the right elbow residuals noted earlier, and that further treatment was not indicated. He completed a work capacity evaluation indicating no activity limitations and no reason appellant could not work eight hours per day.

On November 6, 2000 the Office issued appellant a notice of proposed termination of compensation finding that the weight of the medical evidence established that appellant had no further disability for work, causally related to her December 12, 1994 employment-related fall. The Office also found that appellant’s claimed cervical, shoulder and back conditions were not causally related to the December 12, 1994 employment incident. The Office indicated that the extensive and well-rationalized opinion of Dr. Temple was entitled to special weight, such that it constituted the weight of the medical evidence in reaching these determinations. The Office gave appellant 30 days within which to submit further evidence or argument if she disagreed with this proposed action.

On December 14, 2000 appellant disagreed with the proposed action. However, nothing further was submitted.

By decision dated December 21, 2000, the Office finalized the termination of appellant’s benefits effective December 31, 2000, finding that appellant had no further disability for work, causally related to her December 12, 1994 employment-related fall and also found that appellant’s claimed cervical, shoulder and back conditions were not causally related to the

December 12, 1994 employment incident. The Office indicated that Dr. Temple's well-rationalized report constituted the weight of the medical opinion evidence of record. The Office, however, advised that appellant's case would remain open for medical benefits for the effects of her right elbow surgery.

On January 12, 2001 appellant requested an oral hearing before an Office hearing representative.

In support she submitted an April 4, 2001 report from Dr. John B. Dorsey, a Board-certified surgeon,⁵ who reviewed a history as provided by appellant, noted her present complaints, examined her and opined that she had neck and right upper extremity pain attributable to the December 12, 1994 incident. He indicated that appellant's physician had been treating her since 1997 and should be intimately familiar with her condition, so that his diagnosis agreed with appellant's treating physician's diagnosis. Dr. John Dorsey indicated that appellant had no other neck injuries before or after the December 12, 1994 incident, opined that Dr. Temple's report appeared to be biased and not credible, and concluded that Dr. Orcutt was in a better position to make a determination about appellant than Dr. Temple.

A hearing was held on May 3, 2001 at which appellant testified. By decision dated August 31, 2001, the hearing representative affirmed the December 21, 2000 Office decision finding that the weight of the medical evidence of record rested with the opinion of Dr. Temple, who found no residual disability for work, causally related to appellant's accepted December 12, 1994 employment injury. The hearing representative further found that appellant had not established that she had sustained cervical, shoulder and back conditions, causally related to the December 12, 1994 employment incident.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁷

The Office has met this burden through the extensive, thorough and well-rationalized report from Dr. Temple.

In this case, appellant's treating physician, Dr. Orcutt, opined that she remained totally disabled due to effects of her December 12, 1994 employment fall and that her disability included symptomatology related to neck, shoulder and low back conditions which he opined were sustained during the December 12, 1994 incident.

⁵ Dr. John B. Dorsey has no professional relationship with Dr. Thomas R. Dorsey, the Office second opinion examiner.

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

⁷ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

However, the Office's second opinion examiner, Dr. Dorsey, opined that appellant had no symptomatology, residual neurologic findings or disability, causally related to her right elbow or ulnar nerve release and transposition, and that she had recovered excellently. He opined that she could work eight hours per day, but should stay away from her date-of-injury job for prophylactic reasons. Dr. Dorsey further opined that there was no basis upon which to believe that appellant's alleged neck, shoulder or low back injuries were the result of the events of December 12, 1994.

The Office therefore, properly determined that a conflict had arisen between Drs. Orcutt and Dorsey.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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."

In this case, the Office properly referred appellant to such an appropriately selected IME for an opinion to resolve the conflict.

Dr. Temple opined, in an extensive report based upon a proper factual and medical background and a thorough medical examination, that appellant's right elbow sprain and ulnar nerve trauma had been surgically corrected and had resolved without disabling residuals. He opined that fall-related sprains of appellant's neck and low back had resolved long ago,⁸ and that the persistence of her neck and low back complaints could not reasonably be explained based on the history of injury. Dr. Temple indicated that appellant's radiologic findings at C4-5, C5-6 and C6-7 had no correlated upper extremity symptomatology and were clinically insignificant, and that the C6-7 fusion was congenital, being present at birth. He further opined that there was no indication that appellant had a shoulder problem or a lumbar spine condition, causally related to her work injury. Dr. Temple concluded, in a well-rationalized opinion, that appellant had recovered from her work-related fall and that she could return to her date-of-injury job. He found her continued subjective complaints of pain were greater than would be expected, based upon objective findings and opined that she could work eight hours per day without activity restrictions.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, is entitled to special weight.⁹ In this case, Dr. Temple's report is based upon a proper factual and medical background and is well

⁸ However, Dr. Temple also noted that the early, more contemporaneous medical reports of record lacked any substantial indication of significant neck or low back injury or complaints, and did not provide any neck or back-connected diagnosis as related to the December 12, 1994 incident. Therefore, he did not rationally explain why he concluded that appellant had sustained neck and low back strain on December 12, 1994, which had resolved within 8 to 10 weeks of the incident. As Dr. Temple has not provided a well-rationalized opinion as to how he reached his conclusion that appellant had sustained neck and low back strain on December 12, 1994, the Board will not now accept these conditions as being employment related.

⁹ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

rationalized on the issues of whether appellant remained disabled due to her accepted employment injury, and on whether she had any injury-related shoulder or lumbar spine condition, and is therefore entitled to that special weight, such that it constitutes the weight of the medical evidence on these issues.

Further medical evidence submitted by Drs. Orcutt and John Dorsey is insufficient to overcome that special weight or to even create a conflict with it. In his subsequent reports, Dr. Orcutt merely criticized Dr. Dorsey's and Dr. Temple's findings, and repeated his previously expressed opinions. The Board has explained that additional reports from appellant's attending physician, who had been on one side of a conflict which was resolved by the IME, are insufficient to overcome the weight accorded the IME's report or to create a new conflict.¹⁰ Therefore, Dr. Orcutt's additional reports are insufficient to overcome that special weight of Dr. Temple's report or to even create a conflict with it.

The Board further finds that appellant has not established that she sustained cervical, shoulder and low back conditions, or had significant pathology in these areas, causally related to the December 12, 1994 employment incident.

Appellant has the burden of establishing by the weight of reliable, probative, and substantial evidence that the injury claimed was caused or aggravated by her federal employment. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and factors of her federal employment.¹¹ Causal relationship is a medical issue that can be established only by medical evidence.¹²

The Board notes that most contemporaneous medical reports of record, those of Drs. Zeeck, Lueke, Palafox and Arat lacked any indication that appellant complained of neck, shoulder or low back injury related to the December 12, 1994 incident and they did not provide any neck, shoulder or back-connected diagnoses as related to the December 12, 1994 incident. Therefore, these reports do not support appellant's contention that the neck, shoulder and low back condition are related to her December 12, 1994 fall and in fact contradict her claim.

The December 14, 1994 report of Dr. Weidemeyer did mention that appellant complained of some muscle spasms under the right subscapular area and a "somewhat painful" right side of her neck. He, however, did not provide any injury-related diagnoses connected with these complaints, nor did he provide any opinion as to causal relation. Therefore, his report is without sufficient rationale to establish any injury relationship. Further, these complaints disappeared in subsequent examinations, and did not reappear as being injury related until 1998 when Dr. Orcutt concluded that they were injury related.¹³

¹⁰ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹¹ *Steven R. Piper*, 39 ECAB 312 (1987); see 20 C.F.R. § 10.110(a).

¹² *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

¹³ Earlier reports did refer to pain which radiated from the injured elbow up to the shoulder and neck, but did not support pain originating in the shoulder or neck due to original injury to that area.

Dr. Orcutt concluded in multiple reports that appellant's neck, shoulder and low back conditions were "clearly" causally related to the December 12, 1994 employment injury because she fell 12 feet on her right arm and torso, which would have "clearly" caused "further injuries besides her right upper extremity injury." The Board has held that mere conclusions, such as these, without supporting rationale are of little probative value.¹⁴ As Dr. Orcutt failed to provide any detailed medical rationale, based on an accurate factual and medical history, including the absence of these problems in earlier, more contemporaneous medical reports, explaining how he reached these conclusions, his opinions are purely conclusory and of little probative value, and are therefore insufficient to establish appellant's claim of further, more extensive December 12, 1994 related injury.

Likewise, Dr. John Dorsey's April 4, 2001 opinion, rendered on the basis of a one-time examination seven years after the incident, that appellant's present complaints were causally related to the December 12, 1994 incident, because her treating physician said so, is unrationalized and, as noted above, expresses the unacceptable opinion that appellant's treating physician had been treating appellant for years, as opposed to the IME who examined appellant only once, and therefore was in a better position to evaluate her conditions and disability. As this argument does not now constitute valid medical rationale, it does not support his contentions of causality. Further, Dr. John Dorsey also argued that appellant was asymptomatic before the December 12, 1994 incident and had no further injuries afterwards, such that her ongoing complaints must be related to the incident. Again, as noted above, the Board has explained that an opinion on causal relation which states that the condition(s) were related because appellant was asymptomatic prior to the incident, is unrationalized and insufficient to establish causal relation.¹⁵ Therefore, this explanation is also insufficient to establish either continued disability or causal relation.

As discussed previously, Dr. Temple's conclusion that appellant sustained cervical and low back muscular strain injuries on December 12, 1994, which resolved 8 to 10 weeks later without residuals, is also unrationalized, as he also points out that the contemporaneous medical evidence in the case lacks any substantial identification or mention of such injuries or complaints, fails to provide any injury-related diagnoses for these alleged conditions and fails to provide any opinions establishing causal relation with the December 12, 1994 incident. Consequently, Dr. Temple's conclusion that appellant did sustain December 12, 1994 injury-related neck and low back muscular sprains is unrationalized and unsupported by the record, such that it does not now establish that such injuries actually occurred as alleged. However, the weight of Dr. Temple's impartial medical examination report is not diminished by this unrationalized comment, as his conclusions that appellant has no further injury-related disability for work is well rationalized and is supported by the record, as is his opinion that appellant also had no injury-related shoulder involvement or lumbar spinal problem¹⁶

¹⁴ See *Richard Giordano*, 36 ECAB 134 (1984).

¹⁵ See *supra* note 12.

¹⁶ Based on spinal cord, spinal nerve or spinal vertebral pathology, as opposed to a low back soft tissue muscular strain injury.

It is appellant's burden of proof to establish her allegations of neck and low back employment-related injury; however, she cannot rely on Dr. Temple's unrationalized comment on cervical and lower back muscular strains to establish her claim, as this part of his report is internally inconsistent with his observations of contemporaneous medical conclusions in the same report, and therefore is not a rationalized comment and does not satisfy her burden.

As no further rationalized medical evidence, based upon an accurate medical and factual history, has been submitted, appellant has failed to meet her burden of proof to establish that she sustained cervical, shoulder and back conditions, causally related to the December 12, 1994 employment incident.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 31, 2001 is hereby affirmed.

Dated, Washington, DC
October 11, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member