

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of, CRAIG R. LEHMANN and DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE GRAND SANDS DUNES NATIONAL  
MONUMENT, Mosca, CO

*Docket No. 03-105; Submitted on the Record;  
Issued April 8, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established entitlement to wage-loss compensation from April 19 through October 12, 2001; and (2) whether the Office of Workers' Compensation Programs properly denied reimbursement of the costs of his back surgeries.

Appellant's claim filed on May 2, 2001 alleged that his ruptured cervical disc resulted from working on a scaffold scraping paint under roof eaves from September 24 to October 12, 2000. Appellant stated that pressure on his C4-5 disc caused myelopathy (weakness in legs) and incontinence.

Appellant submitted a June 25, 2001 report from his treating physician, Dr. David M. Baron, Board-certified in neurological surgery. Dr. Baron first saw him in January 2001 and diagnosed lumbar sciatica with left leg weakness. He stated that the weakness increased and appellant became myelopathic. A magnetic resonance imaging (MRI) scan dated March 28, 2001 revealed a large cervical disc herniation with cord compression and myelomalacia. Dr. Baron did a diagnostic discogram on February 27, 2001 and a disc decompression and fusion on April 5, 2001.

Based on appellant's history of working with his neck in an extended position for long periods while scraping paint, Dr. Baron opined that appellant's work caused the herniation and compression. He repeated this opinion in an October 12, 2001 report, stating that appellant's cervical stenosis with myelopathy was related to his employment, specifically that repetitive scraping caused a large cervical disc herniation.

The Office accepted appellant's claim for temporary aggravation of preexisting lumbar degenerative disc disease and a herniated cervical disc. The Office authorized an MRI scan, a myelogram, x-rays and an orthopedic/neurological referral. On December 11, 2001 the Office informed appellant that it would withhold all wage-loss compensation requests pending a second opinion review to determine whether appellant's surgery was work related.

On March 27, 2002 the Office denied appellant's claim for disability compensation from April 19 through October 12, 2001 and payment of the costs of his back surgeries, based on the second opinion report of Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon. The Office found no evidence to establish that appellant was disabled from work due to his accepted condition.

On March 28, 2002 the Office determined that a conflict in medical opinion existed between Drs. Baron and Hrutkay over whether work caused the cervical disc herniation and the need for the two surgeries. The Office referred appellant to Dr. Louis H. Winkler, a Board-certified orthopedic surgeon, to resolve the conflict.<sup>1</sup>

On July 18, 2002 the Office denied payment for the two surgeries, based on the opinion of Dr. Winkler, that there was no causal relationship between appellant's back problems and his employment. The Office noted that Dr. Winkler found no objective evidence that appellant's need for surgery resulted from the work-related aggravation in September 2000. The Office did not address whether appellant's cervical condition caused disability from work.

The Board finds that this case is not in posture for decision due to a conflict in the medical opinion evidence.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or her claim,<sup>3</sup> including the fact that the individual is an "employee of the United States" within the meaning of the Act,<sup>4</sup> that the claim was timely filed within the applicable limitation period of the Act,<sup>5</sup> that an injury was sustained in the performance of duty as alleged and that any disability or condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These elements must be established regardless of whether the claim is for a traumatic injury or an occupational disease.<sup>7</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition or disease; and (3) medical evidence establishing that the employment factors were the proximate cause of

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<sup>1</sup> 5 U.S.C. § 8123(a) states in pertinent part: "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."

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Irene St. John*, 50 ECAB 521, 522 (1999).

<sup>4</sup> *Barbara L. Riggs*, 50 ECAB 133, 137 (1998).

<sup>5</sup> *Albert K. Tsutsui*, 44 ECAB 1004, 1007 (1993).

<sup>6</sup> *David M. Ibarra*, 48 ECAB 218 (1996); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *Ruth Seuell*, 48 ECAB 188, 192 (1996).

the disease or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.<sup>8</sup>

Causal relationship is a medical issue<sup>9</sup> and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.<sup>10</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>11</sup>

In this case, the Office accepted appellant's claim for a temporary aggravation of his lumbar disc disease and a herniated cervical disc. In its March 27, 2002 decision, the Office stated that the claim had been accepted "for an aggravated back condition" and accorded the weight of the medical evidence to Dr. Hrutkay, the second opinion physician.

In his March 5, 2002 report, Dr. Hrutkay stated that he could not find "any direct medical evidence of an objective nature" to show that appellant's two surgeries were work related. He noted that the cervical disc was not initially diagnosed but that in retrospect appellant's symptoms of cervical myelopathy were due to the herniation. Dr. Hrutkay added that it was "unclear" when the cervical disc herniation actually occurred or worsened because appellant "never experienced any neck pain."

In response to the Office's questions, Dr. Hrutkay concluded:

"[I]t is difficult to know exactly when this disc herniation occurred, but it does not appear to be specifically related to his work activities.... I cannot determine that any causal relationship to his employment exists with regard to the cervical disc herniation and cervical myelopathy. I do not feel that [appellant] is totally disabled, nor does the accepted condition of cervical injury appear to be related to his employment.... A herniation of cervical disc at C5-6 did occur at some point resulting in cervical myelopathy, but this does not appear to be specifically related to his work activities."

The Board finds that Dr. Hrutkay's opinion conflicts with that of Dr. Baron regarding appellant's disability during the period claimed and the causal relationship of his accepted cervical disc condition to work factors. Dr. Baron concluded that, based on appellant's work history, his disc herniation and cord compression were causally related to his painting and

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<sup>8</sup> *Arturo Adame*, 49 ECAB 421, 424 (1998).

<sup>9</sup> *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

<sup>10</sup> *Duane B. Harris*, 49 ECAB 170, 173 (1997).

<sup>11</sup> *Gary L. Fowler*, 45 ECAB 365 (1994).

scraping duties and he was totally disabled until October 2001. He disagreed, finding that neither the herniation nor the myelopathy were related to work activities.

Because of this conflict, the Board will set aside the March 27, 2002 decision and remand the case for the Office to resolve the issue.

After issuing its March 27, 2002 decision, the Office referred appellant to Dr. Winkler to resolve the conflict, posing the same questions asked of Dr. Hrutkay.

Dr. Winkler examined appellant on May 6, 2002 and stated that no specific injury causing the herniated disc had been identified. He concluded:

“Spontaneous disc herniations are rare, if they ever occur. In this case, however, it [i]s really quite difficult to positively identify the stresses placed upon [appellant’s] neck that would result in such a major herniation. He associates it with his work scraping paint from overhead eaves of a building at the Sand Dunes National Monument. Other than the fact that there is probably a temporal relationship between this work and development of symptoms, there is no other evidence to support that theory. It would be my opinion that such a mechanism might possibly result in herniation of a cervical intervertebral disc but it would not be probable. Pressures of prolonged extension of the neck on a previously degenerative disc could be a plausible explanation for the herniation. On the other hand, I have no other explanation for the occurrence of the disc herniation.”

Dr. Winkler added that he could find no causal relationship between appellant’s “back problems” and his employment. In response to whether he was totally disabled due to the accepted condition, Dr. Winkler stated:

“If inability to perform the duties of the job for which the person was hired is used as a definition for total disability, [appellant] became totally disabled from being a maintenance worker ... with the development of his symptoms in the fall of 2000. He remains totally disabled using that definition.

“If the definition of total disability is inability to do any kind of work, [appellant’s] total disability began with his surgery on April 5, 2001 and extended about six weeks following that surgery. Prior to that time and since that time, he has been capable of sedentary to light work. Thus, it would be my opinion that he is now permanently disabled.”

The Board finds that Dr. Winkler’s opinion is insufficiently rationalized to resolve the conflict between Drs. Hrutkay and Baron over whether appellant’s cervical condition is work related. Dr. Baron found a causal relationship based on appellant’s work history and objective testing which revealed the cause of the myelopathy in March 2001. Dr. Hrutkay concluded that there was no causal relationship because he could find no objective medical evidence linking the herniated disc to appellant’s work.

Dr. Winkler does not resolve this conflict. He discusses the disc herniation as possibly but not probably occurring simultaneously or perhaps being precipitated by the stresses of neck

extension in scraping paint from under eaves. His general comment that he could find no causal relationship between appellant's back problems and his work is followed by his conclusion that appellant was either totally or partially disabled due to his cervical condition, depending on which definition of total disability is applied.

The Office accepted this condition as work related. It correctly recognized a conflict in the medical opinion evidence following its denial of appellant's claim for compensation and referred appellant to Dr. Winkler. But his report does not conclude unequivocally that appellant's cervical condition is not disabling or that the two back surgeries were not work related.

While Dr. Winkler noted evidence of preexisting cervical disc degeneration, the herniated disc was not diagnosed until the March 2001 MRI scan. Because a conflict over the causal relationship of the herniated disc and the subsequent surgeries remains in the record, the Board will set aside the July 18, 2002 decision and remand the case for the Office to resolve the conflict in medical opinion evidence.

The July 18 and March 27, 2002 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
April 8, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member