

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANA L. FURE and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Chicago, IL

*Docket No. 03-830; Submitted on the Record;
Issued August 4, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant's request for reconsideration dated September 15, 2002 of the Office of Workers' Compensation Programs' March 13, 2001 decision denying her occupational disease claim was untimely and failed to show clear evidence of error; and (2) whether appellant established that she sustained a back injury on January 22, 2001 while being examined by an impartial medical specialist as part of the process of adjudicating her occupational disease claim.

On October 11, 1996 appellant sustained a back injury at work while entering an elevator which jerked down and then up and the Office accepted her claim for a lumbar strain. On July 27, 1998 appellant sustained another back injury at work when she sat in a nonergonomic chair one morning with only one break. The Office accepted her claim for a lumbar strain for that injury.

On March 5, 2000 appellant, then a 46-year-old "AIMS" Coordinator Aide, filed an occupational disease claim, alleging that when she returned to work on November 12, 1996 she sustained a lumbar strain to her lower back from sitting for long periods and working at her desk. Appellant missed work from January 6 through February 7, 1997. A conflict in the evidence developed between appellant's treating physician, Dr. Robert E. Mutterperl, a Board-certified internist, and the referral physician, Dr. Julie M. Wehner, a Board-certified internist, regarding whether appellant's back condition resulted from her employment. To resolve the conflict, the Office referred appellant to an impartial medical specialist, Dr. Michael D. Kornblatt, a Board-certified orthopedic surgeon, who examined appellant on January 22, 2001. In his report dated February 5, 2001, Dr. Kornblatt considered appellant's history of injury, performed a physical examination, and reviewed x-rays and a magnetic resonance imaging (MRI) scan dated December 12, 1996. He diagnosed chronic mechanical low back pain due to degenerative disc disease and opined that he did not believe that appellant's degenerative disc disease resulted from prolonged sitting but was rather "a condition of being that occurs with or without trauma." Dr. Kornblatt stated that the work-related sprains appellant sustained only temporarily aggravated her preexisting degenerative condition and those temporary aggravations resolved

within three to four months of the dates of injury. He stated that appellant required restrictions due to her nonwork-related degenerative disc disease.

On May 21, 2001 appellant filed a claim for a traumatic injury alleging that during her examination with Dr. Kornblatt she sustained a lumbar strain and sciatica in her left leg. Specifically, appellant stated that, when Dr. Kornblatt did the straight leg raising, while appellant was lying on her stomach and back, she told him that he was hurting her but he continued to do the straight leg raising. Appellant stopped working on January 22, 2001.

By decision dated March 13, 2001, the Office denied appellant's claim for an occupational disease, claim No. 100500516, stating that the opinion of the impartial medical specialist, Dr. Kornblatt, constituted the weight of the evidence. The Office found that appellant did not establish an injury causally related to the identified employment factors.

In support of her traumatic injury claim, appellant submitted two attending physician reports, one dated June 13, 2001 from Dr. Violeta D. Avramov, a Board-certified psychiatrist and neurologist, and another dated June 19, 2001 from Dr. Mutterperl. In her June 13, 2001 report, Dr. Avramov diagnosed left S1 radiculopathy. She stated that according to appellant, her doctor's examination reproduced the lumbar stress. Dr. Avramov checked the "no" box that the condition was not work related. In his June 19, 2001 report, Dr. Mutterperl diagnosed degenerative lumbosacral disc disease, noted that appellant had previous injuries, and checked the "yes" box, stating that appellant had maintained prolonged sitting in poor designed work settings.

By letter dated August 10, 2001, the Office acknowledged receiving appellant's claim for a traumatic injury, and informed her that the claim would be combined with her claim for an occupational disease and treated as a new injury under claim No. 100500516, which encompassed all her claims. The Office also informed appellant that she must submit additional evidence including a narrative report from her treating physician explaining how the incident caused or aggravated the claimed injury.

Appellant submitted additional medical evidence. In a report dated November 9, 1998, Dr. Mutterperl stated that appellant had numerous episodes of acute sciatica and sciatica-like problems secondary to lumbar disc degenerative disease. He stated that the episodes were often precipitated by occurrences related to her employment, the use of nonsupportive seating at her desk and excessive climbing of stairs, as well as occasional elevator malfunctions. Dr. Mutterperl stated that appellant had an epidural steroid injection with questionable results and she continued to have significant pain in her lower back and in the sciatic distribution of her right leg.

In a report dated August 31, 2001, Dr. Mutterperl stated that appellant told him that while being examined by Dr. Kornblatt she was "literally thrown off the exam[ination] table." He stated that he had the impression of degenerative disc disease and recommended that she obtain a neurological consultation with Dr. Avramov. Dr. Mutterperl stated that appellant's "continued chronic low back problem goes back a number of years and ha[d] been aggravated by her occupation, by the lack of proper office equipment, and by activities of daily living [as] well as other incidents (*i.e.*, elevator accident, trauma secondary to a crime in a store in which she was

shopping, as well as other incidents that have occurred over time).” He stated that appellant missed work in the time period “in question” and that was “secondary to a severe condition that has in part a strong occupational link.”

In a report dated May 2, 2001, Dr. Avramov considered appellant’s history of injury, and referred to the October 11, 1996 and July 27, 1998 employment injuries. She stated that appellant developed a lumbar strain when she went to a training session in another building and stayed there for a long time without standing up. Dr. Avramov stated that appellant went to see her primary doctor after her back locked in January 2001 and after the examination her lumbar strain “was present again.” She stated that appellant had findings consistent with left sciatica or S1 radiculopathy. Dr. Avramov stated that, since appellant had a history of low back pain and strains, the S1 radiculopathy “is quite possible.” She recommended that appellant obtain a magnetic resonance imaging (MRI) scan.

The MRI scan dated January 6, 1997 showed a disc herniation at L4-5. The MRI scan dated May 11, 2001 showed a disc protrusion at L4-5.

In a report dated June 28, 2001, Dr. David L. Spencer, a Board-certified orthopedic surgeon, stated that he treated appellant for persistent incapacitating sciatic pain due to a large disc herniation, and after discussion with appellant, they agreed that she would be a good candidate for an outpatient microdiscectomy.

In a report dated August 28, 2001, Dr. Spencer noted that appellant was diagnosed with a large left side L5-S1 disc herniation on the May 11, 2001 MRI scan. He stated that appellant underwent a microdiscectomy on July 6, 2001 and made an excellent recovery. Dr. Spencer concluded that appellant suffered an injury on January 22, 2001 which “evolved into an incapacitating case of sciatica due to a disc herniation which required the period of disability that she currently is experiencing as well as the surgery which was performed on July 6, 2001.

By decision dated September 20, 2001, the Office denied appellant’s claim, stating that the evidence of record was insufficient to support that a consequential condition was caused by her examination with Dr. Kornblatt on January 22, 2001.

By letter dated September 15, 2002, appellant requested reconsideration of “the above claims.”¹ Appellant submitted a 21-page statement chronicling her history of back pain since the October 11, 1996 employment injury. Appellant described how her appointment with Dr. Kornblatt brought back her lumbar strain and sciatica and how she continued to suffer pain and discomfort through the present. Appellant stated that, since Dr. Kornblatt aggravated her sciatic nerve, she was unable to do household chores such as mowing grass, shoveling snow, taking out the garbage, vacuuming, grooming her dogs and carrying groceries.

Appellant submitted several reports from Dr. Mutterperl dated approximately from February 10, 1998 through September 18, 2000. In a report dated July 27, 2000, Dr. Mutterperl explained how appellant’s inability to use an ergonomic chair on July 27, 1998 contributed to her

¹ Although a portion of the heading is blacked out and it is unknown whether appellant or the Office blacked out the portion, the claim number appellant listed she is appealing is No. 100500516.

back problem. He stated that sitting in a usual stock chair aggravated a preexisting condition of lumbosacral spine disease and degenerative joint disease.

In a report dated July 23, 2002, Dr. Spencer stated that appellant underwent two microdiscectomy procedures due to a herniated disc. He stated that the first operation was July 6, 2001 and appellant made a good recovery, and then she developed another disc herniation on the left at L5-S1 requiring a repeat microdiscectomy on March 29, 2002. Dr. Spencer stated that appellant recuperated and did not have any serious sciatic pain, and he did not recommend further surgical procedures. He stated, however, that on July 16, 2002 appellant had a variety of pain complaints and he recommended disability for another six weeks.

In a report dated August 19, 2002, Dr. Avramov diagnosed low back pain and left leg pain mostly in the S1 distribution with decreased sensation in that area. She recommended that an electromyogram be performed on appellant.

In a report dated September 10, 2002, Dr. Spencer stated that he had been treating appellant for disc herniation and sciatica resulting from the July 6, 2001 employment injury. He stated that appellant had surgery on July 6, 2001 and had a recurrent disc herniation requiring repeat surgery on March 29, 2002. Dr. Spencer stated that appellant was disabled from her occupational activities although he was going to release her the following week.

In a report dated September 18, 2002, Dr. Mutterperl considered appellant's history of injury, noting that appellant injured herself at work in October 1996 in an elevator incident, in July 1998 using a nonergonomic chair, and in January 2001 after seeing Dr. Kornblatt when her sciatic pain returned. He stated that, until her visit with Dr. Kornblatt, most of her symptomatology had improved. Dr. Mutterperl stated that, after the visit, appellant was prescribed drugs, and underwent physical therapy, traction and an epidural injection which did not relieve her pain. He stated that some of appellant's symptomatology improved after her surgeries but she continued to have a sensation of weakness and pain on the left side. Dr. Mutterperl diagnosed chronic radiculopathy of the left lower extremity secondary to multiple discogenic degenerative disc disease. He stated that her prognosis "at best, is fair" and her treatment would include continued use of physical therapy and pain medications as her disease required. Dr. Mutterperl stated that appellant should be restricted from active exercise, lifting or excessive bending or trunk twisting.

By decision dated December 4, 2002, the Office stated that it interpreted appellant's September 15, 2002 request for reconsideration as requesting reconsideration of the Office's decisions dated March 13 and September 20, 2001. The Office stated that the decision was a response only to the request for reconsideration of the March 13, 2001 decision. The Office stated that appellant's request for reconsideration dated September 15, 2002 which was filed more than a year after the March 13, 2001 decision was untimely and did not show clear evidence of error. The Office therefore denied appellant's request for reconsideration.

By decision dated January 10, 2003, the Office stated that its decision was "an amended reconsideration decision" that superseded its December 4, 2002 decision.² The Office stated that

² The Office had issued a second decision dated December 4, 2002 with respect to a request for reconsideration of the September 20, 2001 decision.

appellant had requested that the Office address Dr. Mutterperl's November 9, 1998 and July 27, 2000 reports even though they were written prior to the January 22, 2001 injury. The Office denied appellant's request for modification, stating that the medical reports appellant submitted did not contain a well-rationalized medical opinion of causal relationship based upon a specific and accurate history of injury or incident resulting from the January 22, 2001 examination with Dr. Kornblatt.³

The Board finds that the September 15, 2002 request for reconsideration was untimely and did not establish clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed the appeal with the Board on February 7, 2003, the only decisions before the Board are the Office's December 4, 2002 and January 10, 2003 decisions, denying appellant's requests for reconsideration and modification, respectively.

Section 8128(a) of the Federal Employees' Compensation Act⁵ does not entitle a claimant to a review of an Office decision as a matter of right.⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁷ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁹

In this case appellant's request for reconsideration was dated September 15, 2002. Since this is more than one year after the March 13, 2001 Office decision, it is untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was

³ The Office's January 10, 2003 decision is verbatim the same as the December 4, 2002 decision except for the third paragraph on page three of the decision which specifically addresses Dr. Mutterperl's November 9 and July 27, 2000 reports.

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁵ 5 U.S.C. § 8128(a).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁸ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁹ 20 C.F.R. § 10.607(a).

erroneous.¹⁰ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁶

In this case, in her claim for an occupational disease dated March 5, 2000 appellant stated that, after returning to work on November 12, 1996, she sustained a lumbar strain to her lower back from sitting for long periods and working at her desk. In its March 13, 2001 decision, denying appellant's occupational claim, the Office relied on the opinion of the impartial medical specialist, Dr. Kornblatt, who opined that appellant's work-related lumbar strains had resolved. Medical reports submitted in support of her request for reconsideration from Dr. Mutterperl dated from February 10, 1998 through September 18, 2002, some of which were contained in the record, either attributed appellant's back condition to the October 11, 1996 and July 27, 1998 employment injuries or do not provide any medical rationale on how appellant's activities at work resulted in her current back condition. They therefore do not establish that the Office erred in relying on Dr. Kornblatt's opinion. For instance, in his November 9, 1998 report, Dr. Mutterperl stated that appellant had episodes of acute sciatica secondary to lumbar disc disease which were often precipitated by occurrences at her employment as in nonsupportive seating at her desk, excessive climbing of stairs and elevator malfunctions. In his July 27, 2000 report, he attributed appellant's back problem to the July 27, 1998 employment injury. In his August 31, 2001 report, Dr. Mutterperl stated that appellant's low back problem was aggravated by her occupation, the lack of proper office equipment and by activities of daily living as well as other incidents. He stated that appellant missed work in the time period in question secondary to a severe condition that "has a strong occupational link." Dr. Mutterperl's opinion, however, contained no rationale on how appellant's back problem resulted from her occupation and fails to show clear evidence of error in the Office's decision. In his September 18, 2002 report,

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *Leona N. Travis*, *supra* note 13.

¹⁶ *John Crawford*, 52 ECAB 395 (2001).

Dr. Mutterperl diagnosed chronic radiculopathy of the left lower extremity secondary to multiple discogenic degenerative disc disease but provided no opinion on causation.

Similarly, in her reports dated May 2, 2001 and August 19, 2002, Dr. Avramov did not address causation. She merely summarized appellant's history of injury, provided diagnoses and prescribed treatment. In his reports dated from June 28, 2001 through September 2002, Dr. Spencer did not address causation relative to appellant's occupational claim. In his August 28, 2001 report, he stated that appellant's injury on January 22, 2001 resulted in her disc herniation, need for surgery, and disability. Dr. Spencer's reports document that appellant developed a disc herniation and that she underwent two microdiscectomies but they do not explain how the disc herniation or her back condition in general resulted from her employment. None of the evidence appellant submitted raises a substantial question as to the correctness of the Office's March 13, 2001 decision and therefore fails to demonstrate clear evidence of error.

The Board further finds that appellant failed to establish that she sustained a back injury on January 22, 2001 while being examined by Dr. Kornblatt.

An employee seeking benefits under the Act 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 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.¹⁷ The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes 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. 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.¹⁸

When an injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹⁹

None of the evidence appellant submitted establishes the requisite causal connection between her examination by Dr. Kornblatt on January 22, 2001 and her current back condition. As stated above, Dr. Avramov's reports dated May 2, 2001 and August 19, 2002 do not address

¹⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁸ *Gary L. Fowler*, 45 ECAB 365, 371 (1994); *Ern Reynolds*, 45 ECAB 690, 695 (1994).

¹⁹ *Carlos A. Marrero*, 50 ECAB 117, 119-20 (1998).

causation. With the exception of Dr. Spencer's August 28, 2001 report, his reports dated from June 28, 2001 through September 10, 2002 do not address causation. In his August 28, 2001 report, he stated that appellant suffered an injury on January 22, 2001 which evolved into incapacitating sciatica due to a disc herniation which required a period of disability and the microdiscectomy. Dr. Spencer, however, did not specifically describe the nature of the injury nor provide a medical rationale explaining how the specific injury resulted in appellant's current back problem. His opinion is therefore of diminished probative value.²⁰

The only relevant reports appellant submitted from Dr. Mutterperl are those dated August 31, 2001 and September 18, 2002, which were written after the January 22, 2001 incident. In his August 31, 2001 report, Dr. Mutterperl noted that appellant was "literally thrown off the exam[ination] table" by Dr. Kornblatt. As stated, Dr. Mutterperl stated that appellant's back was aggravated by her occupation, lack of proper office equipment and activities of daily living. His opinion is not probative because his history of the January 22, 2001 incident is inaccurate inasmuch as appellant stated that she felt pain during the straight leg raising part of the examination and Dr. Mutterperl does not attribute appellant's back condition to that incident.²¹ Dr. Mutterperl's September 18, 2002 report does not address causation. The Board has held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.²² Appellant has therefore failed to establish that she sustained a consequential injury on January 22, 2001 due to her examination by Dr. Kornblatt.

²⁰ See *Vaheh Mokhtarians*, 51 ECAB 190, 195 n.8 (1999); *Caroline Thomas*, 51 ECAB 451, 456 n.10 (2000).

²¹ See *Kathleen M. Fava*, 49 ECAB 519, 523 (1998); *Jospeh M. Popp*, 48 ECAB 624, 626 n.10 (1997).

²² *Michael E. Smith*, 50 ECAB 313, 316 (1999).

The January 10, 2003 and December 4, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member