

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARLYN C. SAUNDERS and U.S. POSTAL SERVICE,  
METRO ANNEX, Media, PA

*Docket No. 03-633; Submitted on the Record;  
Issued June 12, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability causally related to her accepted August 9, 2000 employment injury.

On November 14, 2000 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim alleging that on August 9, 2000 she sustained a left forearm contusion and lumbosacral strain when a large oak tree fell on her mail truck. The Office of Workers' Compensation Programs accepted the claim for lumbar strain and left forearm contusion. Appellant returned to work on August 10, 2000 and stopped work on September 2, 2000.<sup>1</sup> On April 17, 2001 appellant filed a claim for a recurrence of disability beginning September 2, 2000.

In a March 9, 2001 report, Dr. Joseph A. Fabiani, a fitness-for-duty physician and a Board-certified orthopedic surgeon, concluded that appellant was totally disabled for her employment due to multiple degenerative conditions in the hip and back. The physician opined that these disabling conditions were unrelated to her accepted employment injury as they had preexisted the August 9, 2000 employment injury.

In an April 16, 2001 report, Dr. Howard S. Lubin, an osteopath, based upon a physical examination, review of medical evidence and employment injury history, diagnosed preexisting left hip joint pain, which had been aggravated by the August 9, 2000 employment injury, lumbar radiculopathy with low back pain aggravated by the employment injury, post-traumatic bilateral sacroiliac strain, myositis and myofascitis thoracic and lumbar paraspinal muscles and post-traumatic cervical strain with secondary cervical radiculopathy. Dr. Lubin opined that appellant "sustained multiple injuries in her work[-]related accident of August [9,] 2000, superimposed upon preexisting pathology in the low back area and left groin." He further concluded that appellant was currently "suffering from a preexisting pathology in her low back area and left groin, which became significantly worse following her" August 9, 2000 employment injury. He

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<sup>1</sup> The Board notes that appellant filed a claim for compensation (Form CA-7) on March 15, 2001.

concluded that her present disability was attributed to the injuries she sustained in the work-related accident.

In a November 28, 2001 report, Dr. Richard J. Mandel, a second opinion Board-certified orthopedic surgeon, based upon a statement of accepted facts, review of the medical evidence, employment injury history and physical examination, concluded that appellant's current disability was unrelated to her accepted employment injury. The physician diagnosed degenerative disc and degenerative joint disease of the lumbar spine and status postacetabular fracture of the left hip, which were unrelated to the August 9, 2000 employment injury and had preexisted the employment injury. Regarding appellant's current disability, Dr. Mandel opined that "the injuries caused by the accident were mild lumbar strain and abrasion of the left forearm" and that appellant had "fully recovered from both injuries." As to any residuals from the employment injury, the physician concluded that there were none. In support of this conclusion, the physician noted that "The medical records indicate that the symptoms were mild following the injury and that the physical findings were minimal." These findings were "consistent with a mild lumbar strain and abrasion to the left forearm and not to any more severe injuries."

By decision dated December 5, 2001, the Office denied appellant's recurrence of disability claim. The Office found that Dr. Mandel's opinion represented the weight of the evidence based upon his Board-certification and the fact that he had reviewed the statement of accepted facts and medical evidence.

Appellant requested an oral hearing by letter dated January 2, 2002. A hearing was held on July 29, 2002, at which appellant was represented by counsel and allowed to submit evidence. The evidence submitted at the hearing included treatment notes for the period April 27, 2000 through September 19, 2001, reports by Dr. Lubin dated April 16, 2001 and April 18, 2002 and a July 17, 2002 letter, a December 8, 2000 electromyogram (EMG) report, a September 8, 2000 EMG report by Dr. Douglas J. Bunner, a medical director, an August 15, 2000 report by Dr. Stuart L. Gordon, an attending physician, a November 7, 2000 report by Dr. Edward J. Vresilovic, Jr., an attending physician, procedure notes dated November 17 and December 5, 2000, January 3, February 28, March 14, April 11 and 19, 2001 by Dr. Curtis W. Slipman, rehabilitation medicine, progress reports dated December 8, 2000, January 18 and April 3, 2001 by Dr. William S. Whyte, an attending physician, and Dr. Slipman's magnetic resonance imaging scan tests dated September 19, 2000, August 21, 2001 and February 8, 2002.

Drs. Whyte and Slipman, in their progress reports dated December 8, 2000, January 18 and April 3, 2001, reported that they treated appellant for conditions including left L4 radiculopathy, possible discogenic disease, degenerative joint disease of the left hip and facet joint mediated pain without providing any opinion as to the cause of the conditions.

In a November 7, 2000 report, Dr. Vresilovic concluded that he was unsure as to the cause of appellant's hip pain, but opined that it was "most likely due to some early arthritis following her traumatic dislocation.

In a report dated November 13, 2000, Dr. Slipman stated that appellant had been referred for left groin and left low back pain, which had started three years previously. He diagnosed internal disc disruption and possible pain due to lumbar discogenic disease.

In an April 18, 2002 report, Dr. Lubin noted that appellant sustained multiple injuries on August 9, 2000. Based upon a review of additional medical reports, he concluded that “The information contained in these reports helps to explain the significance of” appellant’s employment injury “and to understand why” she has not been responsive to treatment. He noted that, “Although the exact nature of the pathology has not yet been determined, the fact remains that this lady was performing her” usual employment duties until her August 9, 2000 employment injury. Dr. Lubin concluded that appellant’s current disability is due to her August 9, 2000 employment injury. In support of this conclusion, he stated:

“Although the exact nature of the pathology has not yet been determined, the fact remains that this lady was performing her work driving a vehicle for the postal service until her unfortunate accident of August 9, 2000 occurred. Since that time, she has been unable to return to gainful employment after a brief attempt to do so, and she remains in constant pain as described earlier in this report. There can be no doubt that her present disability is a direct result of the injuries which she sustained in her work-related accident of August 9, 2000. The patient has not been able to resume any gainful employment since September 2, 2000. The reality of the situation is that the patient was performing her duties as a postal employee until her accident of August 9, 2000 occurred, and has been rendered disabled since September 2, 2000.”

Dr. Lubin, in a supplemental report dated July 17, 2002, noted that appellant returned to her work full time delivering mail following her June 28, 1985 automobile accident and continued walking the route until her duty assignment changed more than five years later.

By decision dated October 24, 2002, the hearing representative affirmed the denial of appellant’s recurrence claim. In support of this decision, the hearing representative found that Dr. Mandel’s opinion to represent the weight of the evidence as Dr. Mandel is Board-certified and Dr. Lubin based his opinion on the fact that appellant’s condition had worsened after the injury.

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

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which she claims compensation is causally related to the accepted employment injury.<sup>2</sup> To meet this burden of proof, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is

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<sup>2</sup> *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>3</sup>

In this case, Dr. Mandel, the Office referral physician, concluded that appellant's current disability was unrelated to her accepted employment injury. In contrast, Dr. Lubin opined in an April 18, 2002 report that appellant's disability was directly related to her August 9, 2000 employment injury and that since September 2, 2000 she "has not been able to resume any gainful employment." In a July 17, 2002 supplemental report, Dr. Lubin related that appellant had been able to resume full-duty work following her 1985 automobile accident and that her current disability is due to the injuries sustained on August 9, 2000.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>4</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>5</sup>

In order to resolve the conflict between Dr. Lubin and Dr. Mandel regarding the issue of whether appellant's disability is related to her accepted August 9, 2000 employment injury, the case will be remanded to the Office for further development. The Office should send a statement of accepted facts and relevant evidence to an impartial medical specialist for an opinion on whether appellant sustained a recurrence of disability due to her accepted August 9, 2000 employment injury. After such further development as is necessary, the Office should issue an appropriate decision.

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<sup>3</sup> *Ronald A. Eldridge*, 53 ECAB \_\_\_\_ (Docket No. 01-67, issued November 14, 2001); *Helen K. Holt*, 50 ECAB 279, 282 (1999).

<sup>4</sup> *James M. Frasher*, 53 ECAB \_\_\_\_ (Docket No. 01-362, issued September 25, 2002); *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>5</sup> *Geraldine Foster*, 54 ECAB \_\_\_\_ (Docket No. 02-66, issued February 28, 2003); *William C. Bush*, 40 ECAB 1064 (1989).

The October 24, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further proceedings consistent with the above opinion.

Dated, Washington, DC  
June 12, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member