U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLADYS FUSSELL and U.S. POSTAL SERVICE,
POST OFFICE, Camden, NJ

Docket No. 03-859; Submitted on the Record;
Issued June 12, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly refused to authorize surgery for a herniated disc at L4-5; and (2) whether appellant's condition of the cervical spine is causally related to her August 7, 1998 employment injury.

On August 7, 1998 appellant, then a 51-year-old accounting clerk, filed a claim for a traumatic injury sustained that day, when attempting to move an all-purpose container. She described the nature of the injury as "lower back (bottom) pains are shooting down her legs."

Appellant was seen on August 10, 1998 by Dr William P. Young, Jr., a Board-certified internist, and a lumbosacral strain was diagnosed. A magnetic resonance imaging (MRI) done on August 25, 1998 showed lumbar spondylosis resulting in mild spinal stenosis at L5-S1 and a probable small right paracentral disc herniation at the level of L4-5 resulting in mild spinal stenosis.

In a report dated February 25, 1999, Dr. Martin Swiecicki, a Board-certified neurosurgeon, noted that he had previously performed a lumbar discectomy in 1989 on appellant for a disc herniation at L5-S1 and that she "had not had any specific difficulty until the present problem developed in relation to her L4-5 disc." Dr. Swiecicki stated that appellant "has also noted some difficulty with the last two fingers of the right hand being numb. She does not have any neck pain or pain radiating into the arm." Dr. Swiecicki concluded that appellant's "principal lumbar symptoms are secondary to the lumbar disc herniation at L4-5 and the associated lumbar radiculopathy that is present. Appellant also has spinal stenosis at L5-S1 with degenerative change that has been a long-standing finding, dating back to nearly 1989. She may also have a cervical radiculopathy or ulnar nerve compression syndrome."

Dr. Swiecicki ordered an MRI of the cervical spine and an electromyogram (EMG). The MRI on March 11, 1999 showed a large central focal disc herniation at C3-4 producing moderate to severe spinal cord compression, a very small C5-6 disc herniation, broad based focal disc

protrusions at C6-7 and C7-T1 and mild multi-level degenerative changes elsewhere in the cervical spine. The EMG on March 25, 1999 showed evidence of bilateral C5-6 radiculopathy.

In a report dated April 13, 1999, Dr. Swiecicki reviewed the findings of these studies and noted that appellant wished to proceed with a discectomy for the lumbar spine. He stated: "The etiology of the cervical findings may be problematic insofar as positive proofs. Appellant feels that there is a relationship to her having fallen on several occasions to the difficulty with her lower back and that this in turn is related to the cervical disc herniation."

By letter dated May 29, 1999, the Office advised appellant that it had accepted that she sustained a lumbosacral sprain on August 7, 1998, but that it was unclear how her herniation of a cervical and a lumbar disc were related to this injury.

In a report dated July 5, 1999, Dr. Swiecicki noted that appellant had "fallen several more times because of her right leg giving out" and concluded: "I personally consider [appellant] a candidate for surgery for both her neck and her lower back. I feel that the lower back injury is definitely related to the incident that occurred at work on August 7, 1998 and that her cervical disc herniation is also related within a reasonable degree of medical certainty."

On January 6, 2000 the Office referred appellant, a statement of accepted facts and prior medical reports to Dr. Frederick George, a Board-certified orthopedic surgeon, for a second opinion on appellant's conditions and their relationship to her employment injury. In a report dated January 17, 2000, Dr. George set forth appellant's history, including her statement that she began experiencing neck pain with some radiation to her right arm and some numbness in two fingers of her right hand about a month after the August 7, 1998 injury. After reviewing the MRIs and describing his findings on examination, Dr. George diagnosed "lumbosacral strain with degenerative disc disease, lumbar spine, with mild radiculitis" and "degenerative disc disease, cervical spine, with herniated disc, C3-4." Dr. George stated:

> "[Appellant] continues to have effects of degenerative disc disease of the lumbar spine with some radiculitis.... She continues to suffer from residuals of her previous back problem with degenerative disc disease of the lumbar spine and effects of her previous suction discectomy. For this reason, I feel that [appellant] should continue on her present status with some limited-work duties which would avoid lifting. I cannot, with a degree of medical certainty state that the herniated disc of her cervical spine is related to her injury of August 7, 1998. [Appellant] does have some previous degenerative disc disease of her cervical spine. Regarding her lower back, I do not feel that further lumbar laminectomy would resolve her condition regarding the back. I feel that [appellant] may have to have a combined back fusion in order to try to eradicate her symptoms. The prognosis for surgery on her back would be extremely poor. It is felt that [appellant] has achieved maximum benefits of treatment and has reached maximum medical improvement at this time."

On February 29, 2000 the Office sent Dr. George's report to Dr. Swiecicki and asked him if he disagreed with its conclusions. In a report dated April 4, 2000, Dr. Swiecicki noted that appellant was "recovering from an anterior cervical discectomy and fusion with an allograft that

she underwent on November 8, 1999" and recommended a "discogram at L4-5 and if positive an automated percutaneous lumbar discectomy at L4-5 similar to the procedure that she had in 1989."

On May 11, 2000 the Office referred appellant, a statement of accepted facts and the case record to Dr. Lawrence Barr, an osteopath, to resolve the conflict of medical opinion between Drs. Swiecicki and George on the relationship between her lumbar and cervical spine conditions and her August 7, 1998 employment injury.

In a report dated May 23, 2000, Dr. Barr set forth appellant's history, noting that she stated "two to three weeks after the [August 7, 1998] incident she started developing numbness in the last three fingers of her right hand. [Appellant] also noticed that sometime in October, 1998, her right leg started giving out and she was falling." Dr. Barr reviewed the prior medical reports, including the MRIs and the EMG and described appellant's findings on examination, noting that she exhibited abnormal illness behavior "with the inconsistencies of the examination in trying to perform straight leg raising and having her bending over as well as moving her hips with the complaints of pain in the low back." Dr. Barr diagnosed a herniated disc at C3-4, degenerative disc disease of the lumbar spine and C5-6 radiculopathy. He concluded:

> "With regards to causal relationship, I find causal relationship between the low back sprain. This was reported in a timely fashion. The mechanism stated is consistent with the injury suffered. I do not find causal relationship between the cervical herniation or the cervical sprain and [appellant's] work-related incident of August 7, 1998. … The mechanism of injury is not consistent with the injury suffered. She has a long-standing history of chronic low back problems. Certainly these predated the August 7, 1998 incident. At this point I do not feel that [appellant] is a surgical candidate, nor would she benefit from surgical intervention to the lumbar spine."

By decision dated October 3, 2000, the Office found that the weight of the medical evidence, represented by the report of Dr. Barr, the impartial medical specialist resolving a conflict of medical opinion, failed to demonstrate that a lumbar laminectomy was necessary and related to the August 7, 1998 employment injury.

Appellant requested a hearing, which was held on March 2, 2001. Reports regarding her low back condition from 1974 to 1981 were submitted. In a January 25, 2001 report, Dr. Swiecicki stated that appellant had no back difficulty after her 1989 discectomy "until the problem developed in August 1998, when she developed the L4-5 disc herniation. This was a new disc herniation and although she had been treated through this office previously for the L5-S1 disc herniation she did not have any evidence of the L4-5 disc herniation nor any symptomatology referable to it. [Appellant] also had no symptomatology referable to the large focal disc herniation at C3-4 during that period of time so that the origin of the problems occurred following the injuries on August 7, 1998 as documented in her studies."

By decision dated September 12, 2001, an Office hearing representative found that Dr. Barr's report was insufficient to resolve the conflict of medical opinion, as Dr. Barr "provided essentially no rationale in support of his opinion, other than to observe that [appellant]

had a long-standing history of low back problems," did not discuss a 1973 employment injury and did not explain why he believed appellant sustained only a low back sprain on August 7, 1998 given that an August 25, 1998 MRI showed a disc herniation at L4-5.

On October 1, 2001 the Office requested that Dr. Barr submit a supplemental report addressing the effect of appellant's December 21, 1973 employment injury to her low back and explaining why he believed she suffered only a low back sprain on August 7, 1998, why he believed lumbar surgery was not warranted and, why he believed her cervical spine condition was not related to her employment injury.

In a report dated October 12, 2001, Dr. Barr reviewed the medical reports from 1974 to 1981 and stated that they showed that appellant sustained a low back sprain in 1973 that "would normally resolve within a reasonable amount of time and would not have been involved in the 1998 incident." Dr. Barr stated:

> "However, it should be noted that [appellant] has been diagnosed with degenerative disc disease, spinal stenosis and a herniated disc of her lumbar spine. The spondylosis and the stenosis I believe are simply from a degenerative process and certainly these conditions can get flared up, but it was not my opinion that it was in her case, since the mechanism of injury certainly would not cause the spinal stenosis or degenerative disc disease. [Appellant] did have a low back sprain.
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> "It is my opinion that the herniation was also degenerative, from the degenerative changes noted about it by the radiologist. The herniation I believe was present and appears to stem from a long-standing history of degenerative disc problems. I do not believe a discogram and percutaneous discectomy are in order, especially since she does have, first of all, spinal stenosis and spondylosis and degenerative disc disease are not amenable to percutaneous discectomy. Second of all, after my examination of [appellant], it was my clinical opinion that [she] would not benefit from surgical intervention."

By letter dated October 24, 2001, the Office requested that Dr. Barr submit a supplemental report addressing whether appellant's cervical spine condition was related to her August 7, 1998 employment injury. In a report dated November 7, 2001, he stated:

> "In regards to the cervical herniation and degenerative disc changes provided, as one could look at a 50-foot oak tree and know that it was not planted yesterday, one could look at degenerative changes found on the MRI and know that these do not occur acutely. Also, it should be noted from the mechanism [appellant] described and how the injury occurred, lifting a hand truck and not having any neck pain until some numbness two or three weeks later, it is not my opinion that this herniated disc occurred acutely as a result of the mechanism [she] described."

By decision dated December 6, 2001, the Office found that the weight of the medical evidence did not establish the need for a discectomy at L4-5 or that appellant's cervical spine condition was caused by her employment injury.

Appellant requested a hearing, which was held on August 28, 2002.

By decision dated December 4, 2002, an Office hearing representative affirmed the Office's December 6, 2001 decision on the basis that Dr. Barr's reports constituted the weight of the medical evidence.

The Board finds that the case is not in posture for a decision on the issue of whether the Office properly refused to authorize surgery for a herniated disc at L4-5.

With regard to the selection of a referee physician to resolve a conflict of medical opinion, the Office's procedure manual provides:

> "The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. … A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the MMA [medical management assistant] must document the reasons for the selection in the case record."[1]

The Board notes that Dr. Barr, the physician chosen by the Office to resolve a conflict of medical opinion, is an osteopath. The record does not reveal that Dr. Barr is a Board-certified specialist and the case record contains no documentation of any special qualifications he may have. Thus, Dr. Barr may not be considered an impartial medical specialist resolving a conflict of medical opinion in the absence of board certification or documented special qualifications.

The case will be remanded to the Office for resolution of the conflict of medical opinion still existing on the issue of whether the Office properly refused to authorize surgery for a herniated disc at L4-5. Appellant's attending physician, Dr. Swiecicki, has consistently maintained that her herniated disc at L4-5 was caused by her August 7, 1998 injury and recommended a discectomy to correct this condition. The Office's referral physician, Dr. George, stated that a laminectomy would not resolve her back condition and that "she may have to have a combined back fusion in order to try to eradicate her symptoms." While this statement supports back surgery, the next sentence in Dr. George's report -- that the prognosis for surgery was extremely poor -- indicates that surgery should not be performed.

However, even if Dr. George's report did not create a conflict of medical opinion on whether surgery should be performed for appellant's herniated disc at L4-5, Dr. Barr's report creates such a conflict. He concluded that appellant's herniated disc at L4-5 was not related to her August 7, 1998 employment injury, but rather to her degenerative condition. Dr. George also concluded that surgery was not warranted, as appellant would not benefit from it. There clearly now is a conflict of medical opinion on the issue of whether the Office should authorize surgery for appellant's herniated disc at L4-5.

The Board finds that appellant has not established that her condition of the cervical spine is causally related to her August 7, 1998 employment injury.

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[1] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (March 1994).

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment. As part of this burden she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[2]

In a February 25, 1999 report, Dr. Swiecicki noted that appellant had numbness of two fingers of her right hand but did not have any neck pain or pain radiating into her arm. Dr. Swiecicki stated that appellant may have cervical radiculopathy or an ulnar nerve compression. In an April 13, 1999 report, he stated that the "etiology of the cervical findings may be problematic insofar as positive proofs" and that appellant related her cervical spine problem to repeated falls that she attributed to her lumbar problem.

In a July 15, 1999 report, Dr. Swiecicki stated that appellant's cervical disc herniation was related to her August 7, 1998 employment injury within a reasonable medical certainty. He did not provide any explanation of why he had come to believe that the cervical disc herniation was related to the employment injury[3] and no discussion of whether he believed it was directly related or was a consequence of falls appellant allegedly sustained due to her low back condition. Dr. Swiecicki's reports are insufficient to establish that appellant's condition of the cervical spine is causally related to her August 7, 1998 employment injury.

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[2] *Froilan Negron Marrero*, 33 ECAB 796 (1982).

[3] Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

The December 4, 2002 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, as set forth in the above decision of the Board.

Dated, Washington, DC
June 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member