

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of IRENE Y. FONG and U.S. POSTAL SERVICE,  
POST OFFICE, San Francisco, CA

*Docket No. 03-353; Submitted on the Record;  
Issued May 8, 2003*

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DECISION and ORDER

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

The issue is whether appellant's claimed disability after October 31, 1997 is causally related to her April 20, 1992 employment injury.

On June 24, 1992 appellant, then a 40-year-old clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her employment duties aggravated her degenerative disc disease. The Office of Workers' Compensation Programs accepted appellant's claim for permanent aggravation of degenerative disc disease. On March 8, 1994 appellant underwent surgery at L5-S1 and she returned to part-time, light-duty work in October 1995. She progressed to an eight-hour workday in April 1996; however, she continued to work in a light-duty capacity.

On July 6, 1997 appellant stopped work and later filed a claim for recurrence of disability beginning July 5, 1997. The Office initially denied appellant's claim for recurrence; however, in a decision dated August 14, 2001, the Office modified its prior decision in part and found a recurrence of disability for the period July 6 through October 31, 1997. With respect to the period of disability after October 31, 1997, the Office found that the evidence failed to establish that the claimed disability was causally related to appellant's accepted injury.

Appellant requested reconsideration on August 11, 2002. The Office reviewed appellant's claim on the merits and in a decision dated August 21, 2002, the Office denied modification of the August 14, 2001 decision.

The Board has duly reviewed the case record on appeal and finds that the case is not in posture for a decision.

Relying on the April 20, 1999 second opinion evaluation of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, the Office accepted that appellant sustained a recurrence of disability from July 6 to October 31, 1997. Dr. Swartz diagnosed postoperative syndrome with chronic degenerative disc disease, which he found medically connected to appellant's

employment by way of aggravation. He further indicated that appellant would have been temporarily disabled for a period of three months following her July 1997 recurrence. Additionally, Dr. Swartz stated that appellant was capable of gainful employment beginning October 1997 and he provided a Form OWCP-5 indicating appellant's ability to work eight hours with certain restrictions.

Appellant's current treating physician, Dr. Judy L. Silverman, a Board-certified physiatrist, provided several opinions attesting to appellant's ongoing employment-related disability. In a June 4, 2002 report, Dr. Silverman reviewed her own treatment records as well as various other physicians' reports. She explained that she began treating appellant in September 1999 and at that time appellant was up and out of bed only 20 to 23 minutes per day. Dr. Silverman further noted that she had been working on a progressive conditioning program to increase appellant's uptime and eventually return appellant to physical therapy and exercising. When last seen on May 9, 2002, appellant was reportedly up 25½ minutes each hour. Dr. Silverman attributed appellant's current problem at L4-5 to her prior employment and further stated that it was not uncommon for patients who have undergone spine fusion operations to develop further degenerative changes. She also indicated that appellant's degree of disability was permanent.

Dr. Arthur B. Schuller, a Board-certified psychiatrist specializing in pain management, treated appellant through July 1997 when he referred appellant to Dr. Silverman. In a report dated July 2, 1999, Dr. Schuller stated that he recently saw appellant in follow-up with her orthopedic surgeon, Dr. James F. Zucherman. He characterized appellant as "essentially bedridden," being up approximately 10 to 12 minutes per day. Appellant's chief complaint was continued low back and right buttock pain, which worsened with increased activity. Dr. Schuller diagnosed status postlumbar fusion with exacerbation of symptoms following a July 1997 work injury, which persisted. He also noted that appellant was severely deconditioned because of decreased activity associated with her chronic pain. Additionally, Dr. Silverman stated that appellant probably had a mood and thought disorder that might be affecting her judgment and her ability to follow through with medical recommendations. He advised that without psychiatric or behavioral intervention, appellant's clinical status would essentially remain unchanged.

The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>1</sup>

The Office referral physician, Dr. Swartz, indicated that appellant could resume full-time, limited duty in October 1997. However, he did not specifically address appellant's ability to resume the work she had been performing at the time of her July 5, 1997 recurrence of disability. Furthermore, the limitations identified by Dr. Swartz on April 20, 1999 are somewhat more restrictive than the duties appellant performed at the time of her July 5, 1997 recurrence. For example, whereas Dr. Swartz noted a 5-pound lifting restriction, the employing establishment indicated that appellant had been limited to lifting no more than 10 pounds.

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<sup>1</sup> 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

Appellant's physicians, Drs. Silverman and Schuller, indicated that she was essentially bedridden for an extended period of time. And as of May 2002, Dr. Silverman reported that appellant was up only 25½ minutes each hour. While Drs. Silverman and Schuller have not provided particularly rationalized opinions regarding causal relationship, their respective opinions cannot be ignored.

As Dr. Swartz's opinion is not in accord with the opinions of Drs. Silverman and Schuller, there remains an unresolved conflict of medical opinion.<sup>2</sup> Accordingly, the case is remanded to the Office for additional development of the record.

The August 21, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC  
May 8, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>2</sup> The Board further notes that although the Office has not specifically accepted appellant's March 8, 1994 surgery as related to the April 20, 1992 employment injury, the record includes a May 8, 1995 impartial medical evaluation, which the Office relied upon in accepting that appellant sustained a "permanent" aggravation of her degenerative disc disease. On page 7 of his May 8, 1995 report, the independent medical examiner stated that appellant's "disability and surgery are clearly a result of industrial aggravation of a preexisting degenerative arthritic process involving the lumbar spine."