U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN E. VANECEK and U.S. POSTAL SERVICE,
POST OFFICE, Castle Rock, CO

Docket No. 03-1140; Submitted on the Record;
Issued October 9, 2003

DECISION and ORDER

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

The issue is whether appellant has thoracic outlet syndrome that is causally related to factors of her employment.

On June 29, 1992 appellant, a 30-year-old postal carrier, filed a traumatic injury claim alleging that she injured her back when she was involved in an automobile accident on June 25, 1992.[1] The Office of Workers' Compensation Programs accepted the claim for cervical strain.[2]

On April 3, 1996 appellant filed an occupational disease claim alleging that on July 29, 1994 she first realized her carpal tunnel syndrome was employment related.[3] The Office accepted the claim for bilateral carpal tunnel syndrome and authorized surgery.[4] Appellant stopped work on April 3, 1996[5] and returned to part-time limited-duty work on March 31, 1997, stopped work on April 21, 1997 and returned on July 14, 1997.[6]

[1] This was assigned claim number 13-0987051. The claim was closed on December 22, 1994 and reopened on June 7, 2000.

[2] This was assigned claim number A13-0987051.

[3] This was assigned claim number 12-0160775. On October 3, 2000 the Office combined claim number 13-0987051 and 12-0160775 under the master number of 12-0160775.

[4] This was assigned claim number A12-0160775. On October 3, 2000 the Office doubled this claim with claim number A13-0987051 with A12-0160775 assigned as the master number.

[5] Appellant was pregnant at the time she stopped work and delivered her child on May 21, 1996.

[6] On October 22, 2001 the Office of Personnel Management approved appellant's application for disability retirement.

In a June 6, 1997 fitness-for-duty report, Dr. Franklin Shih diagnosed bilateral carpal tunnel syndrome and "Query muscular thoracic outlet symptomatology exacerbating #1."

On January 26, 1999 the Office issued a loss of wage-earning capacity decision finding that her light-duty work 20 hours per week represented her wage-earning capacity and adjusted her compensation accordingly.

Appellant stopped work on July 29, 1999. By letter dated February 15, 2000, the Office informed appellant that it found the modified carrier position suitable for her work capabilities and that it was currently available. Moreover, the Office noted that appellant had been working in this position since March 31, 1997 and a decision was issued on January 26, 1999 finding it to be suitable to her work capabilities. The Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On March 3, 2000 appellant filed a recurrence claim beginning July 29, 1999.

On March 17, 2000 the Office informed appellant that her reason for refusing to return to work was unacceptable. Appellant was afforded an additional 15 days to return to work and advised that the Office would not consider any further reasons for refusal.

On March 25, 2000 appellant filed an occupational disease claim alleging that on June 29, 1994 she first realized her bilateral carpal tunnel syndrome was employment related. Appellant noted that she had previously filed a claim on April 6, 1996.

On April 7, 2000 the Office terminated appellant's compensation for abandoning suitable employment.

By decision dated April 19, 2000, the Office denied appellant's claim for a recurrence of disability.

In a May 10, 2000 report, Dr. Catherine L. Willner, a Board-certified neurologist with a subspecialty in pain medicine, noted "that many people have asymptomatic TOS [thoracic outlet syndrome], which becomes symptomatic after certain injuries or with overuse and hypertrophy of scalene muscles during certain occupations."

In an August 16, 2000 attending physician's report (Form CA-20), Dr. Willner diagnosed thoracic outlet syndrome superimposed on residual carpal tunnel syndrome which she attributed to overuse of upper extremities in appellant's employment.

By decision dated August 21, 2000, the hearing representative vacated the Office's decision dated April 7, 2000, which terminated appellant's compensation on the basis that the Office failed to meet its burden of proof that appellant had abandoned suitable employment. The hearing representative also vacated the April 19, 2000 decision, which denied appellant's claim for a recurrence of disability and remanded for further development.

On September 6, 2000 appellant filed an occupational disease claim alleging that on May 10, 2000 she first realized her thoracic outlet syndrome was employment related.[7]

In reports dated August 25, October 6 and November 8, 2000, Dr. Willner diagnosed thoracic outlet syndrome and offered no opinion as to the cause of this condition.

In a December 4, 2000 report, Dr. Dan Guttmann,[8] a second opinion physician, noted "the fact that she exhibits complete hand numbness bilaterally with Phalen's testing and thoracic outlet testing." Dr. Guttmann stated "repetitive activities seem to exacerbate her problem, however, and the patient continued to have recurrent symptoms when doing repetitive activities" and that it appeared that appellant "should have been able to participate in the modified light-duty assignment of four hours a day as of July 1997." As to the cause of appellant's condition, Dr. Guttman concluded it was "obviously difficult to determine whether this patient's disability is due to a work[-]related condition or other nonwork[-] related factors."

In a decision dated December 8, 2000, the Office denied appellant's claim on the basis that the evidence was insufficient to establish a causal relationship between her thoracic outlet syndrome and her employment.

Appellant's counsel requested an oral hearing on the Office's December 8, 2000 decision, in a January 8, 2001 letter.

In a January 8, 2001 report, Dr. Louis H. Winkler, III, a second opinion Board-certified orthopedic surgeon, diagnosed possible mild thoracic outlet syndrome, bilateral carpal tunnel syndrome, moderately severe degenerative spondylosis of the cervical spine and persistent neurologic upper extremity symptoms. Dr. Winkler opined that it was "possible that [appellant's] upper extremity symptoms are indeed the result of mild thoracic outlet syndrome. She does not apparently have a skeletal anomaly to explain these symptoms." The physician then noted "another possibility that has been considered and should continue to be considered is the abnormalities on the magnetic resonance imaging (MRI) scan at the C6-7 invertebral disc level." In concluding, Dr. Winkler opined that appellant's current disability was unrelated to any employment-related condition.

In a March 2, 2001 report, Dr. David C. Bachman, an employing establishment Board-certified orthopedic surgeon, reviewed reports by Dr. Willner and a May 2, 2000 electromyogram report. Dr. Bachman concluded that there was no objective evidence to support a diagnosis of thoracic outlet syndrome. He noted an MRI scan revealed degenerative disc disease and a narrowing at C6-7. Lastly, Dr. Bachman opined that appellant's current symptoms are "probably due to deconditioning."

A hearing was held on May 9, 2001 at which appellant was represented by counsel.

[7] This was assigned claim number 12-0160775.

[8] The Office referred appellant to Dr. James H. Lubowtiz, at the Taos Orthopaedic Institute for a second opinion on the issues of recurrence in her claim A12-0160775. Dr. Guttmann, who is at the Taos Orthopaedic Institute, was the physician who actually performed the second opinion evaluation.

In a decision dated August 2, 2001, a hearing representative found the medical evidence of record insufficient to support a diagnosis of thoracic outlet syndrome. Specifically, the hearing representative found the medical evidence of record failed to contain an opinion supported by objective evidence diagnosing thoracic outlet syndrome. He also found that there was no medical evidence explaining how this condition was related to appellant's employment.

In a July 22, 2002 nerve conduction report, Dr. Marc M. Treihaft, a Board-certified neurologist, reported "no evidence of neurogenic thoracic outlet syndrome" and borderline carpal tunnel conduction.

Appellant's counsel requested reconsideration by letter dated July 27, 2002 and submitted a July 25, 2002 report, by Dr. Richard J. Sanders, a Board-certified surgeon with a subspecialty in vascular surgery, in support of her request.

In a July 25, 2002 report, Dr. Sanders diagnosed bilateral thoracic outlet syndrome, trapezius fibromyalgia, bilateral carpal tunnel syndrome, dorsal and cervical strains and possible pronator, radial and cuboid tunnel syndromes which could be secondary to thoracic outlet syndrome. A physical examination revealed moderate right scalene tenderness, moderate to severe scalene tenderness, positive Tinel's over plexus bilaterally, positive direct positive plexus pressure bilaterally, mild bilateral tenderness in the bicep tendons and reduction in her neck range of motion. Dr. Sanders noted a good response to a left scalene muscle block and concluded: "To a reasonable degree of medical certainty, her thoracic outlet syndrome and her other symptoms are the result of her motor vehicle injury in June 1992. Her symptoms were further aggravated by repetitive-stress injury in the work she continued after 1992 as a mail carrier."

By decision dated October 29, 2002, the Office denied appellant's request for reconsideration. The Office found the medical evidence insufficient as it was unsupported by objective findings. In addition, the Office found Dr. Sanders' July 25, 2002 report failed to provide a detailed explanation of the causal relationship between her condition and her employment.

On December 30, 2002 appellant's counsel requested reconsideration and submitted a November 8, 2002 report from Dr. Sanders in support of her request.

In his November 8, 2002 report, Dr. Sanders noted a diagnosis of thoracic outlet syndrome is "made on the basis of a typical history and a group of physical findings that support the diagnosis," that "a good response to a scalene-muscle block helps confirm the diagnosis and that "the diagnosis of thoracic outlet syndrome is not made with objective data. This is a clinical diagnosis." He based appellant's diagnosis of thoracic outlet syndrome on her history and the physical findings that he found in his July 25, 2002 examination, stating they were "typical of those that I have seen in many patients with thoracic outlet syndrome."

In a merit decision dated February 14, 2003, the Office denied appellant's request for modification. The Office found Dr. Sanders' opinion insufficient as the opinion was based upon a clinical diagnosis with no supporting objective evidence.

The Board finds that this case is not in posture for a decision.

An employee seeking benefits under the Federal Employees' Compensation Act[9] has the burden of establishing the essential elements of her claim.[10] The claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment.[11] As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[12] However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[13] The Office has an obligation to see that justice is done.[14]

In this case, appellant submitted a November 8, 2002 report from Dr. Sanders, which stated that appellant's thoracic outlet syndrome was related to her 1992 employment injury and appellant's symptoms were subsequently aggravated by her employment duties. Although Dr. Sanders' report is insufficient to completely discharge appellant's burden of establishing by the weight of the reliable, substantial and probative medical evidence that her thoracic outlet syndrome is causally related to factors of her employment or her 1992 employment injury, it constitutes sufficient evidence in support of appellant's claim to require further development of the record by the Office.[15]

The Office erred in finding that appellant did not have thoracic outlet syndrome as Dr. Sanders diagnosed. He explained in his November 8, 2002 report that thoracic outlet syndrome was a clinical diagnosis not made with objective data and provided rationale for his opinion that appellant had this condition, including a good response to a scalene muscle block he administered. In addition, the record contains reports from Dr. Willner, an attending physician and Dr. Guttmann, a second opinion physician, who both reported a diagnosis of thoracic outlet syndrome and Dr. Winkler, a second opinion Board-certified orthopedic surgeon, who noted a diagnosis of possible mild thoracic outlet syndrome. The opinions of Drs. Willner and Guttmann support Dr. Sanders' diagnosis of thoracic outlet syndrome. Lastly, Dr. Bachman's opinion is insufficient to cause a conflict in the medical opinion evidence as he performed a fitness-for-duty examination for the employing establishment and cannot be considered a second opinion

[9] 5 U.S.C. §§ 8101-8193

[10] *Charles E. Colquitt*, 54 ECAB ___ (Docket No. 02-1009, issued February 5, 2003); *Ruthie M. Evans*, 41 ECAB 416, 423-24 (1990); *Donald R. Vanlehn*, 40 ECAB 1237, 1238 (1989).

[11] *Derrick C. Miller*, 54 ECAB ___ (Docket No. 02-140, issued December 23, 2002).

[12] *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[13] *Udella Billups*, 41 ECAB 260, 269 (1989); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[14] *John J. Carlone*, 41 ECAB 354, 360 (1989).

[15] *Cheryl A. Monnell*, 40 ECAB 545, 551 (1989); *see also Horace Langhorne*, 29 ECAB 820, 821 (1978) (when the attending physician provided no rationale for his conclusion that appellant's hearing loss was causally related to his occupational noise exposure and the Office medical adviser provided no rationale for his conclusion that appellant's hearing loss was not so related, the medical evidence was insufficient to establish appellant's claim but was sufficient in support thereof to require further development of the record by the Office).

physician.[16] Moreover, the Office procedure manual states that when a report from a fitness-for-duty physician's findings or conclusions differ materially from those of the treating physician, the claims examiner should make a second opinion referral.[17]

Therefore, upon remand the Office should refer appellant, together with a statement of accepted facts, questions to be answered and the complete case record, to an appropriate medical specialist for an evaluation and rationalized medical opinion on whether appellant's thoracic outlet syndrome is causally related to her accepted 1992 employment injury or aggravated by factors of her employment. After such further development as it may deem necessary, the Office shall issue a *de novo* decision.

The February 14, 2003 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
October 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(b) (March 1995).

[17] *Id.*