U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY L. FISHER and U.S. POSTAL SERVICE,
POST OFFICE, Kersey, CO

Docket No. 03-1792; Submitted on the Record;
Issued October 29, 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 met its burden of proof to justify the termination of appellant's compensation benefits effective December 4, 1998 for the accepted muscular strains she sustained on May 22, 1989; and (2) whether appellant has met her burden of proof to establish that her current cervical and lumbar disc conditions, together with her chronic pain and weakness and other diagnosed conditions, are causally related to the incident that occurred at work on May 22, 1989.

On May 22, 1989 appellant, then a 40-year-old rural carrier, sustained an injury in the performance of duty, when a heavily loaded gurney struck her case, which started to fall. "[Appellant] caught the case and held it out of the way until I got through the opening," stated the gurney's operator. The Office accepted appellant's claim for lumbar strain, cervical strain and strain of the right hand.[1] Appellant received compensation for temporary total disability on the periodic compensation rolls.

On October 1, 1996 Dr. Nola A. MacDonald, a Board-certified specialist in family medicine and appellant's osteopath, reported as follows:

> "[Appellant] has been my patient for one year. Prior to that time she was one of my partner's patients for many years. The injury she received while working on May 2, 1989 and June 5, 1989[2] is directly responsible for dis[c] damage and soft tissue injury that has resulted in chronic muscle spasm and pain.

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[1] The Office initially accepted appellant's claim for multiple subluxations but later determined that the medical evidence negated the presence of such. On January 7, 1994 the Board found that the evidence failed to establish that appellant sustained subluxation of the spine.

[2] Although appellant indicated that the same case struck her right shoulder on June 5, 1989 the Office did not accept that she sustained an employment injury that day.

> "[Appellant] was healthy and pain free prior to these injuries. MRI [magnetic resonance imaging] scans taken in 1991 and 1996 reveal dis[c] herniation at C5-6 with mild spondylosis and dis[c] herniation at L5-S1 with mild spondylosis a L4-5. [She] also has chronic headaches, chronic back spasm and tension, right hand and wrist weakness and hip and pelvic problems since the injury. Prior to the injury [appellant] was in good health without any abnormal physical findings.
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> "These objective findings and residual conditions and continuing disability[ies] are causally related to and are a direct result from her employment injuries of May 22 and June 5, 1989. They are not the result of any preexisting congenital, hereditary, arthritic or degenerative conditions or injuries. [Appellant] has not recovered from her injuries. She cannot return to her regular duties as a rural carrier. I do believe [appellant] could return to work in a limited/light-duty job which allows her to sit for short times, stand for short times, walk frequently, stretch and lift 10 pounds or less."

On October 16, 1996 Dr. Donn M. Turner, appellant's neurosurgeon, reported that he completely concurred with Dr. MacDonald's October 1, 1996 report: "It would be my medical opinion that the medical care which [appellant] has sought from me related to her neck and low back problems, is indeed related to her employment injuries of May 22 and June 5, 1989." Dr. Turner stated that appellant could not work at her previous job as a rural carrier, though she could conceivably do light duty or sedentary-type work.

On May 22, 1997 the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Jeffery B. Kleiner, a Board-certified orthopedist, for an opinion on causal relation and work restrictions. On June 11, 1997 he related appellant's history of injury, findings on physical examination and the results of previous MRIs. On June 26, 1997 after reviewing appellant's medical records, Dr. Kleiner reported that objective findings were sparse in relation to her subjective complaints. He stated that appellant was incapable of performing her job as a rural carrier largely due to her subjective concerns and also due to what appeared to be an underlying discontent with her previous work environment. Dr. Kleiner recommended a functional capacity evaluation to determine her precise limitations and capacity to perform work. He observed: "There is a paucity of objective abnormalities present in [appellant]; however, this is not uncommon in patients who have an internal disc disruption process which may present with complaints analogous to those which [appellant] complains of and which are entirely subjective."

The Office advised Dr. Kleiner that appellant had no accepted employment injury on June 5, 1989 and requested that he clarify whether she continued to suffer from strains she sustained eight years earlier. When it received no response, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon, for an opinion on the extent of any residuals of the May 22, 1989 employment injury.

In a report dated October 12, 1998, Dr. Hrutkay related appellant's history of injury, medical treatment, current complaints, findings on physical examination and result of previous radiographs. He diagnosed history of cervical and lumbar strain/sprain secondary to the May 22,

1989 employment injury; chronic pain in the neck, right upper back, right upper extremity and low back; degenerative disc disease of C5-6 with disc bulge; and disc protrusion of L5-S1 with a disc bulge at L4-5. Dr. Hrutkay reported that appellant had limited range of motion and tenderness of the cervical spine, as well as limited range of motion of the lumbar spine, but no truly objective findings to support ongoing residuals of a cervical, lumbar or right hand strain. He stated that appellant was subjectively unable to perform her duties as a rural carrier, but there were no truly objective findings to preclude her return to work in some capacity.

On October 15, 1998 the Office proposed to terminate appellant's compensation benefits on the grounds that Dr. Hrutkay's opinion represented the current weight of the medical evidence and established that no work-related condition or disability existed as a result of the May 22, 1989 employment injury.

On November 2, 1998 Dr. MacDonald repeated the opinions she expressed on October 1, 1996. She noted that on May 22, 1989 the right wing of appellant's all-metal workstation was struck from behind and fell on her. "To prevent the work station from crushing her and possibly ending her life, [appellant] stopped its complete collapse with her hands and body; she then had to lift the workstation wing, right it, move it and reposition it." Dr. MacDonald related an incident on June 5, 1989 also involving a struck workstation. She reported that these two high-impacts, traumatic physical employment injuries were directly responsible for the following: Injury to the discs at C5-6, L4-5 and L5-S1; widespread soft-tissue injuries, including damage to soft, fibrous tissue throughout appellant's body; fibromyalgia; chronic fatigue syndrome; chronic muscle spasms; tension; pain and weakness. Prior to these injuries Dr. MacDonald stated: appellant was healthy and pain free with no abnormal findings. She cited objective findings to support her opinion:

> "The objective findings established by the cervical and lumbar MRIs taken on May 10, 1991 and the cervical MRIs taken on October 22, 1996, which support my diagnosis and provide proof of employment injury, include: C5-6 herniation/rupture, dehydration/desiccation and protrusion/bulge; loss of lordosis curve; L4-5 protrusion/bulge; and L4-S1 radial tear, herniation/rupture, dehydration/ desiccation and protrusion/bulge. The objective findings are causally related to and are a direct result of [appellant's] traumatic physical employment injuries on May 22 and June 5, 1989 and limited/light[-]duty aggravation from June 15, 1989 to May 5, 1990.
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> "Absolute isometric muscle strength evaluations were performed on October 22, 1998, which support my diagnosis of employment injury, reveal [appellant's] lumbar muscles to be extremely weak -- more than two standard deviations below the norm of an uninjured, healthy patient. Her cervical muscles show an even greater weakness and a profoundly restricted range of motion. These objective findings are causally related to and are a direct result of [appellant's] traumatic physical employment injuries on May 22 and June 5, 1989 and limited/light[-] duty aggravation from June 15, 1989 to May 5, 1990."

Dr. MacDonald diagnosed, among other things, cervical and lumbar strain/sprain and soft tissue injury. She reported that appellant was incapable of returning to her original position as a rural carrier.

On November 10, 1998 the Office received Dr. Kleiner's September 11, 1997 response to its request for clarification. He explained how he tested appellant's cervical range of motion and upper extremity strength. Dr. Kleiner then reported:

> "It is my opinion that [appellant] does not have a strain, which would be a muscular abnormality, which would resolve within three months of her initial injury. I suspect it is more likely that there is an internal disc disruption at the C5-6 area which results in headaches, neck pain and diminished strength in the right upper extremity. It is my opinion that [appellant] sustained an injury to this disc as a result of her industrial injury of May 22, 1989."

In a decision dated November 19, 1998, the Office terminated appellant's compensation effective December 4, 1998 on the grounds that there was no objective evidence of a condition or residual disability resulting from the May 22, 1989 employment injury. The Office found that Dr. Kleiner's opinion was equivocal and unrationalized and was of diminished probative value. The Office found that Dr. MacDonald's opinion was of no probative value, as it was based on a totally inaccurate history of injury, her diagnoses were unsupported by earlier normal objective findings and she offered no rationale explaining how appellant's numerous complaints or abnormal findings, nine years after normal findings, were related to the accepted work injury. The Office found that Dr. Hrutkay's opinion represented the weight of the medical evidence. He expressed his opinion within the framework of the statement of accepted facts, noted an indication of symptom magnification and functional overlay, which was previously reported and provided a well-rationalized report.

On November 17, 1999 appellant requested reconsideration. In support thereof, she submitted a November 10, 1999 report from Dr. MacDonald, who related in some detail appellant's medical history and reported that it was her unequivocal opinion that appellant was still disabled, that she was not fully recovered from her employment injuries and that she could not perform all of the duties of a rural carrier. She addressed Office criticism of her earlier reports and stated that because of appellant's prior history of a healthy spine and the absence of additional nonemployment injuries, "I can only diagnose that the objective findings on the 1991 and 1996 MRI scans are the direct result of her physical employment injuries."

In a decision dated December 2, 1999, the Office denied a merit review of appellant's claim. Appellant appealed to the Board.

On February 20, 2002 the Board found that the Office improperly denied appellant's request for reconsideration.[3] The Office did not consider her contention that the reports of Dr. Hrutkay and Dr. MacDonald created a conflict in the medical evidence that would necessitate referral to an impartial medical specialist. Also, as Dr. MacDonald's November 10, 1998 report addressed deficiencies found in her previous reports and as this was new -- not repetitious --

[3] Docket No. 00-2019 (issued February 20, 2002).

evidence, the Board found that the Office should have conducted a merit review of appellant's claim. The Board remanded the case to the Office for an appropriate decision on the merits of appellant's claim.

On remand the Office determined that a conflict in medical opinion existed between Dr. Hrutkay's October 12, 1998 report and Dr. MacDonald's November 2, 1998 and November 10, 1999 reports on whether appellant continued to suffer residuals of her May 22, 1989 employment injury. To resolve this conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Herbert H. Maruyama, a Board-certified orthopedic surgeon. On June 21, 2002 appellant advised the Office to cancel her appointment with Dr. Maruyama. She stated that she was more than willing to go to one of the Office doctors "*once* the Denver [d]istrict [o]ffice reinstates my compensation benefits and pays me the retroactive compensation benefits that they owe me from December 5, 1998 to the present time, *once* the Denver [d]istrict Office pays me the outstanding difference that they owe me in compensation benefits from May 5, 1990 to December 5, 1998 and *once* the Denver [d]istrict [o]ffice has reinstated my health insurance benefits." (Emphasis in the original.) On June 28, 2002 appellant advised the Office that because she was reporting for limited duty on July 1, 2002 her appointment with Dr. Maruyama was no longer required.

In a decision dated July 11, 2002, the Office reviewed the merits of appellant's claim and denied modification of its November 19, 1998 decision, terminating her compensation benefits. The Office noted that it arranged for an impartial medical specialist because the Board indicated that the conflict between Dr. Hrutkay and Dr. MacDonald would necessitate such. As appellant did not appear for the examination, however, and as this examination was needed to determine any further compensation entitlement, the Office found that it could not reinstate appellant's benefits as requested. "It is determined that there is no weight of medical evidence to modify the office's termination of compensation benefits dated November 19, 1998 and request for modification must be denied."

The Board finds that the Office met its burden of proof to justify the termination of appellant's compensation benefits effective December 4, 1998 for the accepted muscular strains she sustained on May 22, 1989.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5]

In this case, the Office accepted that appellant sustained the following medical conditions as a result of the incident that occurred on May 22, 1989: lumbar strain, cervical strain and strain of the right hand. For nine and a half years the Office compensated appellant for medical

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

expenses and lost wages related to these conditions. To justify the December 4, 1998 termination of benefits, the Office must establish that the accepted strains have resolved.

On June 11 and September 11, 1997 Dr. Kleiner, a Board-certified orthopedist and Office referral physician, reported that appellant's objective findings were sparse in relation to her subjective complaints. He opined that appellant did not have a strain, "which would be a muscular abnormality which would resolve within three months of her initial injury." Instead, Dr. Kleiner suspected that there was an internal disc disruption at the C5-6 area, resulting in headaches, neck pain and diminished strength in the right upper extremity. He observed that the paucity of objective abnormalities present in appellant was not uncommon in patients with an internal disc disruption process, who may present with entirely subjective complaints analogous to appellants.

On October 12, 1998 Dr. Hrutkay, a Board-certified orthopedic surgeon and Office referral physician, reported that appellant had no truly objective findings to support ongoing residuals of a cervical, lumbar or right hand strain. He diagnosed degenerative disc disease at the C5-6 level with disc bulge, disc protrusion of L5-S1, a disc bulge at L4-5 and chronic pain in the neck, low back, right upper back and right upper extremity. Appellant was subjectively unable to perform her duties as a rural carrier he stated, but there were no truly objective findings to preclude her return to work in some capacity.

The Office provided Dr. Kleiner and Dr. Hrutkay with appellant's medical record and a statement of accepted facts. The Board finds that they based their opinions on an accurate factual and medical history. Further, the Board finds that their opinions are sufficiently well reasoned to establish that appellant no longer suffers from the muscular strains she sustained on May 22, 1989. Dr. Hrutkay found no truly objective findings to support ongoing residuals of those strains and Dr. Kleiner explained that such muscular abnormalities would have resolved within months of the injury. Also, Dr. Kleiner offered a sound, alternative explanation for appellant's subjective complaints and the paucity of objective findings, an explanation that is consistent with the resolution of muscular strains sustained in 1989. Appellant was suffering from an internal disc disruption.

With respect to the accepted muscular strains, the opinions of Dr. Kleiner and Dr. Hrutkay represent the weight of the medical evidence and justify the termination of compensation benefits for those particular medical conditions. The Office met its burden of proof. The Board will affirm the Office's July 11, 2002 decision.

The Board also finds that appellant has not met her burden of proof to establish that her current cervical and lumbar disc conditions, together with her chronic pain and weakness and other diagnosed conditions are causally related to the incident that occurred at work on May 22, 1989.

A claimant seeking benefits under the Federal Employees' Compensation Act[6] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[7]

[6] 5 U.S.C. §§ 8101-8193.

[7] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[8]

The Office accepted that appellant sustained muscular strains on May 22, 1989 while in the performance of her duties. The Office did not accept her claim for cervical or lumbar disc conditions or for chronic pain and weakness or other diagnosed conditions. The burden of proof remains with appellant to establish by the weight of the medical evidence that her currently diagnosed conditions are causally related to the incident that occurred on May 22, 1989.

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the accepted employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[9]

Although the medical opinions submitted in this case are supportive of causal relationship, they are insufficient to discharge appellant's burden of proof. Dr. MacDonald, a Board-certified specialist in family medicine and appellant's osteopath, reported as early as October 1, 1996 that appellant sustained disc damage and soft-tissue injury resulting in chronic muscle spasm and pain as a result of work injuries on May 22 and June 5, 1989. Later she reported that limited or light duty from June 15, 1989 to May 5, 1990 aggravated these conditions. As the Office advised Dr. Kleiner that, appellant has no accepted employment injury on June 5, 1989, nor is there an accepted aggravation from June 15, 1989 to May 5, 1990. Regardless of whether appellant was prevented from filing claims for these injuries, the record establishes no accepted employment injury on June 5, 1989 or subsequent employment-related aggravation. To the extent that Dr. MacDonald reached her conclusion on the existence of such injuries, she did not base her conclusion on the established facts in this case and thereby diminished the probative or evidentiary value of her opinion.[10]

Although Dr. MacDonald asserted her opinion with certainty, she offered no real medical discussion to explain the cause-and-effect relationship between the incident that occurred on May 22, 1989 and conditions diagnosed in 1998 and 1999. She noted that appellant "was healthy and pain free prior to these injuries" and that she was "in good health without any

[8] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *see Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

[9] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[10] Medical conclusions based on inaccurate or incomplete histories are of little probative value. *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

abnormal physical findings," but these observations do little more than support a temporal relationship. The Board has held that, when a physician concludes that a condition is causally related to an employment because the employee was asymptomatic before the employment injury, the opinion is insufficient, without supporting medical rationale, to establish causal relationship.[11] Appellant denied nonemployment injury and Dr. MacDonald used this to infer that appellant's current diagnoses must be related to the May 22, 1989 incident. She offered no medical explanation, however, of how this incident damaged appellant's intervertebral discs or caused her eventual chronic pain and weakness or other conditions. For this reason, her opinion holds as little weight as the opinion given by Dr. Turner, appellant's neurosurgeon. He reported on October 16, 1996: "It would be my medical opinion that the medical care which [appellant] has sought from me related to her neck and low back problems is indeed related to her employment injuries of May 22 and June 5, 1989." This opinion clearly supports causal relationship, but it has little probative value to discharge appellant's burden of proof because it does not explain the medical basis for the opinion offered.[12] It is not necessary that the opinion be so conclusive as to suggest causal connection beyond all possible doubt. The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical.[13]

At best, Dr. MacDonald suggested that the nature of the incident on May 22, 1989 was medically sufficient to cause appellant's currently diagnosed conditions. Her description of the incident, however, raises doubt about the accuracy of the history appellant related to her. On November 2, 1998 Dr. MacDonald reported that the right wing of appellant's all-metal workstation was struck from behind on May 22, 1989 and fell on her. Further, "to prevent the workstation from crushing her and possibly ending her life, [appellant] stopped its complete collapse with her hands and body; she then had to lift the workstation wing, right it, move it and reposition it." The record establishes that a heavily loaded gurney did indeed strike appellant's case, but there is nothing in the evidence contemporaneous to this incident to support that the case actually fell on her, that it struck her with great impact, that it was on the verge of complete collapse or that it created a life-threatened situation. The account given by the gurney's operator is not so dramatic:

> "I was bringing the mail into the workroom in a gurney, heavily loaded; the opening I was to go through wasn't wide enough; my gurney hit the carrier's case; it started to fall over. [Appellant] caught the case and held it out of the way until I got through the opening."

The operator of the gurney, which had mailbags hanging over the side, gave no indication that she feared for appellant's life, that she thought appellant might be seriously injured or that she needed to assist her in any way with righting the case. For her part, appellant stated on her claim form that her new case was improperly set up and positioned: "case (1 wing) was falling, I

[11] *Thomas D. Petrylak*, 39 ECAB 276 (1987).

[12] *E.g., Connie Johns*, 44 ECAB 560 (1993) (holding that a physician's opinion on causal relationship must be one of reasonable medical certainty, supported with affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background).

[13] *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein at note 1.

stopped the fall." This contemporaneous matter-of-fact account of what happened on May 22, 1989 tends to belie the rather ominous history of injury given by Dr. MacDonald nine and a half years later.[14] The Board has already discussed how an inaccurate or incomplete history can diminish the probative value of a medical opinion.

In his September 11, 1997 report, Dr. Kleiner negated continuing residuals of a muscular abnormality sustained in 1989 and posited instead that appellant was suffering from an internal disc disruption. He stated: "It is my opinion that the patient sustained an injury to this disc as a result of her industrial injury of May 22, 1989." This is consistent with Dr. MacDonald's opinion but is also of diminished probative value because it represents a mere conclusion unsupported by sound medical reasoning.

Because the medical opinion evidence is insufficient to establish that appellant's current cervical and lumbar disc conditions, together with her chronic pain and weakness and other diagnosed conditions are causally related to the incident that occurred at work on May 22, 1989, she has not met her burden of proof.

In its July 11, 2002 decision, the Office noted that it arranged for a referee medical specialist because the Board indicated that the conflict between Dr. Hrutkay and Dr. MacDonald would necessitate such. The Board made no such finding, nor could it have done so because on the prior appeal the Board's jurisdiction was limited to the nonmerit issue of whether the Office properly denied a request for reconsideration. In finding that the Office improperly denied the request, the Board noted that the Office did not consider appellant's contention that the reports of Dr. Hrutkay and Dr. MacDonald created a conflict in the medical evidence. Advancing a relevant legal argument not previously considered is one of the criteria by which a claimant can obtain a merit review of her case.[15] Appellant raised the argument, but the Office did not address it in denying her request. The Board made no finding that a conflict existed. Now that the Board has jurisdiction over the merits of appellant's claim, the Board finds that no conflict in medical opinion exists between Dr. MacDonald, on the one hand and Dr. Kleiner and Dr. Hrutkay, on the other, as to whether appellant continues to suffer residuals of the muscular strains she sustained on May 22, 1989. Dr. MacDonald's opinion is of diminished probative value and is insufficient to create a conflict necessitating referral to a referee medical specialist.[16] Nor is there a conflict as to whether appellant's current cervical and lumbar disc conditions or other diagnosed conditions are causally related to the incident that occurred at work on May 22, 1989. Dr. Kleiner agreed with Dr. MacDonald on this point as far as a cervical disc disruption was

[14] On duty status reports in 1989 appellant's supervisor described the incident as follows: "Carrier turned to grab a wing on a case when clerk pushed a loaded canvas basket into it. The pouches of mail struck wing." Also: "Clerk was pushing canvas basket loaded with mail into building and struck carrier case. Carrier thought the case was going to fall and tried to catch it, hurting her back. She now has her right hand in a splint. This was not mentioned being hurt before." Finally, "[c]lerk hit the case with a loaded gurney, caused the case to wobble, carrier thought it was going to fall, so she tried to catch it. Back and hand."

[15] 20 C.F.R. § 10.606(b)(2) (1999).

[16] *Melvina Jackson*, 38 ECAB 443 (1987) (whether an Office medical adviser's opinion creates a conflict of medical opinion in a particular case depends, as with other physicians' opinions, on the relative probative value or weight of the Office medical adviser's opinion).

concerned and Dr. Hrutkay confined his opinion to the lack of truly objective findings to support ongoing residuals of the accepted muscular strains.

The July 11, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 29, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member