United States Department of Labor
Employees' Compensation Appeals Board

BARBARA F. DARWIN, Appellant	)	
and	)	**Docket No. 03-1345**
	)	**Issued: January 21, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, FL, Employer	)	

Appearances:
Barbara F. Darwin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 9, 2003 appellant filed a timely appeal from the August 1, 2002 decision of the Office of Workers' Compensation Programs, which denied her claim for the condition of degenerative spondylolisthesis at L4-5. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim. The Board also has jurisdiction to review the Office's February 6, 2003 decision refusing to reopen her claim for a reconsideration of the merits.

ISSUES

The issues are: (1) whether appellant's degenerative spondylolisthesis at L4-5 is causally related to her accepted employment injury on August 5, 2001; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits.

FACTUAL HISTORY

On August 5, 2001 appellant, then a 66-year-old registered nurse, sustained an injury in the performance of duty: "I slipped on an apple peeling. I caught myself but twisted right leg, back and right arm." She received medical attention that day at the employing establishment medical unit, but did not stop work.

On August 29, 2001 appellant saw her attending physician, Dr. Clinton B. Davis, a Board-certified orthopedic surgeon:

> "[Appellant] is well known to me from previous orthopedic problems. Specifically, she has had a right shoulder rotator cuff repair and has had a problem with her lower back for years with a diagnosis of L4[-]5 degenerative spondylolisthesis.
>
> "She was working on August 5, 2001 when she slipped on a piece of apple and twisted her back, landing up against the wall and she had increased back and shoulder pain following this. This has been several weeks now and she has gotten over most of the acute pain. She is back working again and just wanted to be sure that she had not sustained any severe problem that might continue to cause her difficulties."

Dr. Davis reported that x-rays that day again showed "about the same degree of L4[-]5 degenerative spondylolisthesis that she has had previously." He advised appellant, as he had in the past, that surgical treatment was often done for degenerative L4-5 spondylolisthesis, but this was entirely dependent on her assessment of pain and disability and whether surgery would be justified for that. Dr. Davis continued:

> "Certainly, this is a weak area in her back and is susceptible to increased symptoms when subjected to a stress such as the fall, but once again any specific treatment would be only for severe disabling pain that she is not having at this point. She will let us know if this gets worse to that degree, but otherwise I think she can continue on her light[-]duty work status without any pushing, pulling or lifting with her right arm or repetitive bending activities."

In a medical disposition and treatment report also dated August 29, 2001, Dr. Davis indicated that appellant's diagnosis was "L4-5 spondylolisthesis/lumbar strain."

On January 23, 2002 the Office accepted appellant's claim for lumbar strain: "Your claim is only accepted for a lumbar strain due to the fact that you have a preexisting condition of spondylosis [sic] of L4-5."

On February 25, 2002 Dr. Davis wrote to clarify that appellant's spondylolisthesis was work related:

> "This letter is written in response to a request from [appellant] to clarify her spondylolisthesis in her lumbar spine as being work related. As you will note from review of my office records, with regard to [appellant], she has had

problems with persistent severe back pain for many years that has always been aggravated by her job responsibilities such that they have had to be modified considerably for her to continue working.

"Spondylolisthesis, as you may or may not know, is a degenerative condition that results from a gradual weakening of the facet joints in the lumbar spine and then degenerative changes in the disc eventually resulting in segmental instability. This can notoriously be aggravated by physical stress such as [appellant] has experienced over the years in her employment as a nurse. Thus, although her spondylolisthesis is largely degenerative in its origins, it is not the spondylolisthesis per se but rather the symptoms that have been caused and aggravated by her work duties that now have resulted in the need for surgery.

"Indeed, this is not an uncommon scenario at all. I have done many procedures for the treatment of degenerative spondylolisthesis that was aggravated by work[-]related stress.

"Actually, the unusual thing about [appellant] over the years has been her commitment to keep working although she has an obvious lumbar spinal problem that she knew all along probably eventually require surgical treatment.

"In conclusion, just to be clear, it is my feeling within reasonable medical probability that the symptoms of severe persistent low back pain from job[-]related back stress in combination with the underlying degenerative spondylolisthesis is what has not [sic] made [appellant] a candidate for surgical treatment and thus the need for that surgical treatment is directly work related."

The Office referred appellant's case to its district medical adviser, who reported on March 22, 2002: "In my opinion the intensity of this patient's complaints secondary to spondylosis does not rise to the level of the proposed surgery. Surgery denied." On June 24, 2002 another district medical adviser reported that spondylolisthesis should not be added to the accepted conditions in appellant's case:

"Treating physician, Dr. Clinton B. Davis, has alleged that claimant's lumbar spondylolisthesis has been aggravated by her long-term employment and is, therefore, a work-related condition.

"As a matter of fact the spondylolisthesis is a congenital abnormality and there is no objective evidence of aggravation by job activities.

"Would her condition be the same if she had never worked? Yes."

On July 22, 2002 Dr. Davis reported that appellant's condition continued to deteriorate with increasing low back and radiating leg pain. He stated: "It is still my opinion that this problem is directly related to her work injury."

In a decision dated August 1, 2002, the Office found that the medical evidence was insufficient to establish that appellant's disabling spondylolisthesis was related to the work injury

of August 5, 2001. In a decision dated February 6, 2003, the Office refused to reopen appellant's case for a reconsideration of the merits.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act[1] ("Act") has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[2] 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.[3]

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 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.[4]

ANALYSIS

The opinion of appellant's attending Board-certified orthopedic surgeon, Dr. Davis, supports a causal connection between her degenerative spondylolisthesis at L4-5 and her accepted employment injury on August 5, 2001. Appellant, who for years had a problem with L4-5 degenerative spondylolisthesis, was well known to Dr. Davis. In his August 29, 2001 report, Dr. Davis related an accurate history of the August 5, 2001 employment injury. He noted that appellant experienced increased back pain following that episode, though she had gotten over most of the acute pain by the time of her appointment. Although x-rays showed about the same degree of L4-5 degenerative spondylolisthesis as in the past, Dr. Davis explained from a medical perspective that this was a weak area in her back and was susceptible to increased symptoms when subjected to a stress such as appellant had experienced. He thereby offered medical rationale to support that the August 5, 2001 employment injury caused at least a temporary aggravation of appellant's preexisting spondylolisthesis.

Dr. Davis provided more medical reasoning on February 25, 2002. He discussed the nature of spondylolisthesis and reported that it was not at all uncommon for work-related stress to aggravate the condition. He stated that spondylolisthesis "can notoriously be aggravated" by physical stress such as appellant had experienced at work. Though he broadly addressed the physical stress that appellant had experienced over the years, the medical reasoning he provided reinforces a causal connection between appellant's preexisting spondylolisthesis and the physical

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

stress she experienced on August 5, 2001. Dr. Davis made clear, within reasonable medical probability, that appellant's symptoms of severe persistent low back pain from job-related back stress made her a candidate for surgery and that the need for surgery was thus directly work related.

The record, however, contains medical opinion evidence to the contrary. On March 22, 2002 a district medical adviser reported that the intensity of appellant's complaints secondary to spondylosis did not, in his opinion, rise to the level of the proposed surgery. He advised that surgery be denied. On June 24, 2002 a district medical adviser reported that spondylolisthesis should not be added to the accepted conditions in appellant's case because it was a congenital abnormality and because there was no objective evidence of aggravation by job activities. This medical adviser indicated that appellant's condition would have been the same had she never worked.

A conflict in medical opinion, therefore, exists between appellant's attending physician and the Office medical advisers on whether appellant's employment injury on August 5, 2001 aggravated her preexisting degenerative spondylolisthesis at L4-5, resulting in the need for surgery. Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5]

Therefore, to resolve the disagreement between Dr. Davis and the Office medical advisers, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate referee medical specialist for a well-reasoned opinion on whether appellant's employment injury on August 5, 2001 aggravated her preexisting degenerative spondylolisthesis at L4-5 and if so, whether the aggravation was temporary or permanent and resulted in the need for surgery. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for spondylolisthesis.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant's degenerative spondylolisthesis at L4-5 is causally related to her accepted employment injury of August 5, 2001. The Board will set aside the Office's August 1, 2002 decision denying her claim for spondylolisthesis and remand the case for further development of the medical evidence and a final decision on the merits of her claim. As a result of the Board's disposition of the first issue on appeal, the second issue, raised by the Office's February 6, 2003 decision to deny a merit review of appellant's claim, has become moot.

[5] 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member