

**United States Department of Labor
Employees' Compensation Appeals Board**

SHERRY WILLS-ENGLISH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 04-1126
Issued: September 22, 2004**

Appearances:
Sherry Wills-English, 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 March 23, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 17, 2003, finding that she had not established that she sustained an occupational disease causally related to her employment, and a February 13, 2004 decision denying appellant's request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On January 24, 2003 appellant, then a 44-year-old mail handler, filed an occupational disease claim alleging that her left hip arthritis was caused by constant walking and standing while unloading mail. Appellant stated that she first became aware of her condition on

January 4, 2000 and that it was caused or aggravated by her employment on January 2, 2003. The employing establishment noted that appellant had total hip replacement but had not submitted medical evidence indicating that her hip condition was causally related to her work. Appellant stopped work on January 23, 2003.

In a report dated January 23, 2003, Dr. Abraham S. Abdo, appellant's orthopedic surgeon, stated that he first examined her on January 16, 2003 for left hip pain and discomfort that began several months earlier. He noted that x-rays revealed left hip arthritis which he opined was caused by her continuous standing and walking at work. Dr. Abdo scheduled a total hip replacement procedure for January 28, 2003 and placed appellant on total disability from January 22, 2003. By letter dated February 11, 2003, the Office advised appellant that the information submitted in her claim was not sufficient to determine whether appellant was eligible for benefits and advised her regarding the additional medical and factual evidence needed to support her claim. In particular, appellant was directed to provide a comprehensive medical report including a diagnosis and a description of her symptoms, results from any examinations and tests, treatment provided, and her physician's opinion, with medical reasons for such opinion, as to how her employment resulted in the diagnosed condition.

In a report dated January 16, 2003 and received by the Office on March 3, 2003, Dr. Abdo stated that appellant's x-rays revealed severe left hip arthritis. He reported symptoms of left hip pain and discomfort over the past several months. As to objective factors, the physician noted a positive Patrick's test, no external or internal movement, and only about 90 degrees of flexion. Dr. Abdo advised that appellant's condition had been worsening gradually as she had not been able to walk without pain and recommended total left hip replacement surgery.

In an undated narrative received by the Office on March 3, 2003, appellant stated that her job duties as a level 4 mail handler required continuous walking and standing; that during the past five years she walked from dock to dock, opening and closing down dock and trailer doors and made sure mail trailers were unloaded. She also pushed trailers containing rolling stock onto the mail truck. By pushing the mail carts, containers and large gondolas filled with mail, she put extra pressure on her hips which caused pain. In January 2000, as a result of a fall at work, she was seen by an employing establishment's doctor who referred her to an orthopedic surgeon. The doctor advised that she had arthritis and would be helped by physical therapy. However, no therapy was provided at that time and she relied on over-the-counter medication for her pain. Appellant also noted intermittent left ankle swelling and numbness although no pain was associated with these conditions. On January 4, 2003 she awoke with no feeling in her left extremity followed by numbness and acute pain. She was then treated on January 8, 2003 by her attending physician, Dr. Godfrey Chitambo, Board-certified in internal medicine, who advised that her left hip joint was worn out and that she would need replacement surgery. Dr. Chitambo referred her to Dr. Abdo, who, on January 28, 2003, performed left hip replacement surgery. Appellant was released from the hospital on January 31, 2003 and attended physical therapy until February 7, 2003.

On March 31, 2003 appellant submitted a Form CA-7, claim for compensation benefits. Appellant noted that she was on leave without pay from March 1, 2003 and did not receive her night differential compensation during that period. The employing establishment stated that appellant was on intermittent leave without pay from March 1 to 21, 2003, and intermittent sick

leave from March 8 to 11, 2003. The employing establishment included the statement: “temporary total disability for total hip replacement per CA-20 dated January 23, 2003 certifying 104 leave without pay hours.”

By decision dated April 8, 2003, the Office denied appellant’s claim on the grounds that the evidence failed to establish that the medical condition was causally related to her employment.¹ In a letter dated May 6, 2003, appellant requested an oral hearing. On September 23, 2003 the hearing representative set aside the Office’s April 8, 2003 decision and remanded the claim for further development. The hearing representative found that appellant established factors of employment consisting of walking and standing to distribute mail and pushing mail carts onto mail trucks that she believed caused or aggravated her condition. The hearing representative also noted that Dr. Abdo failed to discuss precisely how the accepted work factors caused or aggravated her condition. Nonetheless, the hearing representative found the medical opinions sufficient to require the Office to further develop the evidence including a review of the reports from the physicians appellant noted in her narrative as well as the left hip surgical operative report. The Office was instructed to prepare a statement of accepted facts and to either refer appellant to a second opinion orthopedic surgeon for evaluation or to Dr. Abdo to discuss how he concluded that appellant’s condition was causally related to her work factors. After such development, the Office would then issue a *de novo* decision.

On October 20, 2003, the Office requested appellant to submit medical records from all the physicians discussed in her narrative statement and a copy of the operative report. On November 4, 2003 the Office received an August 13, 2003 report from Dr. Abdo who stated that he had released appellant to light duty with restrictions effective July 8, 2003. On November 17, 2003 the Office again denied appellant’s claim. The Office stated that appellant had not provided the Office with the requested medical reports including a copy of the operative report and thus it could not perform its adjudicatory function of determining whether her condition and subsequent surgery were employment related.

On December 23, 2003 appellant requested an oral hearing. By decision dated February 13, 2004, the Office denied appellant’s request for an oral hearing as untimely. The Office also reviewed her request under its discretionary authority and further denied her request as it was determined that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which establishes that she sustained an injury as alleged.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was

¹ Although the Office did not identify appellant’s claim for compensation filed on March 31, 2003 in its April 8, 2003 decision, that claim has the same claim number, 16-2051435, as appellant’s January 24, 2003 occupational disease claim.

² 5 U.S.C. § 8101-8193.

timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.³

In an occupational disease claim, in order to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

ANALYSIS -- ISSUE 1

In this case, appellant filed a claim alleging that her left hip arthritis was caused by factors of her federal employment. In support of her claim, she noted that in January 2000 an employing establishment's orthopedic surgeon advised that she had left leg arthritis. She also submitted evidence from her attending physician, Dr. Chitambo, who stated in January 2003 that her left hip joint had completely worn out and that she needed a replacement, and January 2003 reports from her orthopedic surgeon, Dr. Abdo, who determined that her left hip arthritis was caused by her continuous standing and walking at work.

An Office hearing representative found that appellant established that walking and standing while delivering mail and pushing mail carts while loading trucks with mail were work factors which could have caused her conditions but that the medical evidence of record was insufficient to establish a causal relationship. She remanded the case to the Office for further development including preparation of a statement of accepted facts and further review of the medical records appellant referred to in her narrative including the operative report as a result of her hip replacement surgery. The hearing representative then required the Office to either refer appellant to a second opinion physician for an evaluation or to Dr. Abdo for a supplemental report regarding how he arrived at his conclusion that her condition was causally related to her employment.

However, the Office merely requested appellant to submit "all medical records from all of the physicians discussed in your narrative statement as well as a copy of the operative report." It did not, for example, prepare a statement of accepted facts which the hearing representative required; nor did it send a copy of its October 20, 2003 letter requesting the operative report to Dr. Abdo, appellant's orthopedic surgeon, who presumably prepared that report and who had

³ Gary J. Watling, 52 ECAB 278 (2001).

⁴ Solomon Polen, 51 ECAB 341 (2000).

previously submitted reports; nor did the Office either refer appellant to a second opinion physician or request directly from Dr. Abdo, after receipt of the statement of accepted facts, an opinion, with medical rationale, regarding the causal relationship between her condition and her employment. Although not specifically required by the remand, Dr. Chitambo, appellant's attending physician, had noted her need for a hip replacement and thus may have been able to provide an opinion of the causal relationship in this instance as well.

Further, the Office did not attempt to elicit any information from the employing establishment regarding its consulting physicians who treated appellant after she fell at work in January 2000, particularly from the orthopedic surgeon who appellant asserted diagnosed her with arthritis and recommended a treatment plan. Such medical evidence was important in developing appellant's claim in that it may have established, at a minimum, a comparison between appellant's condition in January 2000 and January 2003 which would have provided a history regarding the degree to which her arthritis had deteriorated, and whether such deterioration was causally related, given her work requirements during this time frame, to her employment. Instead, the Office merely requested appellant to submit all her medical records in spite of the fact that two of the physicians were consultants to the employing establishment.⁵ The Board thus finds that the Office required appellant to include additional medical evidence without exercising reasonable diligence to conform to the hearing representative's remand instruction.

With respect to Dr. Abdo's reports in which he found that the accepted work factors caused appellant's hip condition, his reports lacked specificity in that neither report described precisely how the condition was either caused or aggravated by her employment. The Board notes that, while neither report is rationalized, they are consistent in indicating that appellant's arthritis was caused by her employment and are not contradicted by any medical or factual evidence of record. Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."⁶ Therefore, while the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between appellant's condition and her employment and are sufficient to require the Office to further develop the medical evidence and the case record.⁷

Thus, the November 17, 2003 decision is set aside and the case remanded to the Office to further develop the medical evidence.

⁵ In her narrative, appellant states that the employing establishment's doctor saw her in January 2000 who then referred her to an orthopedic surgeon. Neither of these doctors necessarily became her attending physician and thus the requirement the Office placed on her to retrieve these records is burdensome. The Office could have determined the identity of these doctors and could have requested their records by writing directly to the employing establishment.

⁶ *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

⁷ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

On remand, the Office should formulate a complete statement of accepted facts in accordance with its own procedures and should undertake the necessary development of the medical evidence including a review of the records established during the course of appellant's treatment by the employing establishment's physicians beginning in January 2000. Further, it should request a supplemental report from Dr. Abdo regarding his opinion on the issue of the causal relationship between appellant's condition to her employment. Lastly, if necessary, it should refer appellant, her medical record, the statement of accepted facts and specific questions to a second opinion physician for an evaluation regarding the issue of causal relationship in this case. After this and such other development as the Office deems necessary, an appropriate decision shall be issued.

CONCLUSION

The Board finds this case is not in posture for decision with regard to whether appellant met her burden of proof to establish that she sustained an injury causally related to factors of employment. In light of this finding, the issue of whether the Office properly denied appellant's request for a hearing is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2003 be set aside and the case remanded for further development consistent with this opinion of the Board.

Issued: September 22, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member