

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Portland, OR, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-665
Issued: July 19, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 2, 2006. The record also contains an April 18, 2006 decision denying appellant's request for a hearing and a November 27, 2006 decision denying further merit review of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has any employment-related disability on or after June 28, 1999; (2) whether the Office properly denied appellant's request for a hearing; and (3) whether the Office properly refused to reopen the claim for merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On October 18, 1993 appellant filed an occupational disease claim alleging that she sustained a neck injury as a result of her federal employment. She had been working in a light-

duty position as a result of prior employment injuries. The Office accepted a thoracic muscle strain, cervical strain and right impingement syndrome. Appellant underwent C3-4 surgery in October 1998 and the Office accepted a C3-4 herniated disc. She returned to her light-duty position and stopped working on June 28, 1999.

The Office referred appellant for a second opinion examination by Dr. Paul Williams, a neurosurgeon. In a report dated March 20, 2001, Dr. Williams provided a history and results on examination. He noted chronic pain in appellant's neck, right shoulder and forearm, preexisting degenerative changes at C5-6 and C6-7, with a prior discectomy and fusion at C3-4. Dr. Williams opined that appellant's condition was the direct result of the natural aging process, unrelated to her former work activities. He opined that appellant was totally disabled four to six weeks after the C3-4 surgery, but otherwise was not totally disabled. With respect to any proposed surgery at C5-6 and C6-7, Dr. Williams opined that the surgery was not reasonable and necessary regarding the 1993 employment injury.

In a report dated May 9, 2001, Dr. Jon McKellar, a family practitioner, stated that he could not disagree with Dr. Williams' conclusion that the symptoms were related to degenerative changes of the cervical spine.

By decision dated December 3, 2001, the Office determined that appellant was not entitled to compensation for wage loss from November 27, 1999. The Office also denied authorization for C5-6 and C6-7 surgery.

Appellant requested a hearing before an Office hearing representative, which was held on November 21, 2002. By decision dated February 6, 2003, the hearing representative found that appellant was not entitled to compensation from June 28, 1999. The hearing representative also affirmed the denial of authorization for surgery.

Following a request for reconsideration, the Office reviewed the case on its merits and denied modification by decision dated November 21, 2003. The Office noted that appellant had undergone C5-6 and C6-7 surgery on November 3, 2003 performed by Dr. Darrel C. Brett, a neurosurgeon.

Appellant again requested reconsideration of her claim. She submitted a February 3, 2004 medical report from Dr. Brett who found spondylotic disease and neck osteoarthritis and disc protrusion at C5-6 and C6-7. Dr. Brett opined that appellant's work activities for some 35 years had resulted in the majority of her degenerative changes and then nerve impingement, which led to the need for surgery. He stated that appellant's employment activities, as identified in her job description as a postal clerk, resulted in total disability from June 28, 1999 through December 15, 2003, when she was released to light-duty work.

In a November 9, 2004 report, Dr. Brett stated that appellant's work activities included repetitive exertion with her neck and upper extremities. He stated that these activities resulted in wear and tear of the cervical spine and "the accumulative effect over 35 years results in degenerative change with increased dehydration of the disc and formation of micro-fissures and tears within the annulus of the intervertebral discs. This leads to the development of osteophyte, disc protrusion, eventual nerve impingement and the development of radicular arm pain...."

Dr. Brett opined that appellant's work as a postal clerk for over 35 years was a major contributing factor to the development of preoperative complaints and need for surgery.

The Office found that a conflict existed between Dr. Brett and Dr. Williams. The Office referred appellant to Dr. David Silver, a Board-certified neurosurgeon, for a referee examination. In a report dated October 24, 2005, Dr. Silver provided a history and results on examination. He opined that appellant's cervical spondylosis was a degenerative condition that was not related to her work activities. With respect to the November 3, 2003 surgery, Dr. Silver opined that it was not medically warranted or related to appellant's employment factors. While appellant did have cervical spondylosis requiring surgery, this was not employment related. Dr. Silver also found that appellant was not disabled at the present time. He stated, "If she had not retired, she would be able to work without restriction, or work at the duty that she returned to after surgery in January 1996."

By letter dated November 17, 2005, the Office issued a notice of proposed termination of medical and compensation benefits. The Office stated that the evidence established that appellant had no continuing injury-related disability based on the report of Dr. Silver. By decision dated February 2, 2006, the Office finalized the proposed termination of benefits. Appellant requested an oral hearing by letter postmarked March 14, 2006. He submitted a February 27, 2006 report from Dr. Brett, who stated that he disagreed with Dr. Silver's conclusions. In a decision dated April 18, 2006, the Office's Branch of Hearings and Review determined that the request for an oral hearing was untimely. The Branch of Hearings and Review further denied the request on the grounds that the issue could be equally well addressed by requesting reconsideration.

Appellant requested reconsideration on October 31, 2006. By decision dated November 27, 2006, the Office found that the evidence was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT – ISSUE 1

When the Office undertakes to develop the evidence of record, it has the responsibility to secure evidence that resolves the issues presented in the case.¹ With respect to a final decision, it is a well-established principle that the Office must make proper findings of fact and a statement of reasons in its final decisions.²

ANALYSIS – ISSUE 1

The February 2, 2006 decision stated that it was finalizing a notice of proposed termination of benefits. The issues, however, were whether appellant was entitled to compensation for wage loss on or after June 28, 1999, and whether the cervical surgery in November 2003 was reimbursable pursuant to 5 U.S.C. § 8103. The notice of proposed termination and the February 2, 2006 final decision do not make adequate findings on the issues

¹ See *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

² See *Arietta K. Cooper*, 5 ECAB 11 (1952); 20 C.F.R. § 10.126.

presented. The Office quotes from Dr. Silver and then makes a general finding on continuing employment-related disability. There is no indication in the record that the case was in a posture for termination of benefits, as the Office had denied compensation since appellant stopped working on June 28, 1999, and the Office made no findings that appellant was entitled to any claimed compensation. The February 2, 2006 decision does not adequately identify or address the issues presented.

The Board also notes that in developing the claim the Office purported to find a conflict under 5 U.S.C. § 8123(a) between appellant's physician, Dr. Brett, and a second opinion physician, Dr. Williams.³ There was, however, no existing conflict between these physicians. Dr. Williams' report was dated March 20, 2001, three years earlier than the 2004 reports from Dr. Brett. Appellant underwent surgery in November 2003, which would not be reflected in the history provided by Dr. Williams. Moreover, Dr. Williams did not discuss in detail the relevant issues regarding disability for work on and after June 28, 1999.

The referral to Dr. Silver, therefore, is as a second opinion examiner.⁴ Dr. Silver did provide a complete factual and medical background. He opined that appellant was not disabled due to an employment-related condition as of June 28, 1999, as she would have been able to continue working had she not retired. Dr. Silver also opined that the November 2003 surgery was not necessary to treat an employment-related condition. On the other hand, Dr. Brett opined that appellant was disabled as of June 28, 1999 to December 15, 2003 as a result of her employment injuries. He also found the surgery he performed on November 3, 2003 was employment related.

A conflict in the medical evidence therefore exists between Dr. Brett and Dr. Silver. The case will be remanded to the Office for referral to a referee examiner and proper resolution of the conflict. After such further development as the Office deems necessary, it should issue an appropriate decision that properly addresses the issues presented. In view of the Board's findings, it will not address the remaining issues.

CONCLUSION

The Board finds that the February 2, 2006 decision failed to properly identify the issues and make adequate findings. There remains an unresolved conflict in the medical evidence and the case is remanded for resolution of the conflict.

³ The Federal Employees' Compensation Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 19, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board