

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

K.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
East Grand Forks, MN, Employer**

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**Docket No. 09-392
Issued: August 24, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 24, 2008 appellant filed a timely appeal from March 28 and October 24, 2008 decisions of the Office of Workers' Compensation Programs denying his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant established that he was totally disabled from March 3, 2007 to January 4, 2008 due to his accepted spinal condition.

FACTUAL HISTORY

On November 6, 2003 appellant, then a 42-year-old mail carrier, sustained an employment-related injury when he slipped and fell in the snow. The Office accepted his traumatic injury claim for dislocation of the thoracic and cervical vertebrae.

Appellant was treated by Dr. Paul Fleissner, a Board-certified family practitioner. On November 27, 2006 Dr. Fleissner stated that a November 9, 2006 magnetic resonance imaging

(MRI) scan revealed a C3-4 spinal cord lesion, which he attributed to the November 6, 2003 employment injury. On November 28, 2006 he opined that appellant was unable to work as of November 27, 2006 due to increased and “quite significant symptoms” associated with his neck and upper extremities, which included increased headaches, neck pain and decreased range of motion of the neck. Dr. Fleissner referred appellant to Dr. Kristen Jessen, a neurologist, for an evaluation of his cervical spinal cord lesion.

In a January 2, 2007 report, Dr. Jessen indicated that appellant was experiencing chronic headaches with muscle spasms. Her examination revealed “neck flexors, extensors 5/5 with some bilateral trapezius and cervical paraspinal muscle spasms with trigger points.” Dr. Jessen recommended testing to rule out the possibility of demyelinating disease. She diagnosed polyneuropathy, which she indicated was a small fiber, causing no significant difficulty. On April 2, 2007 Dr. Jessen found no evidence of demyelinating disease. She stated that it was “possible that his cervical lesion [resulted] from his trauma or possibly a congenital abnormality.”

On February 12, 2007 Dr. Fleissner opined that appellant could return to work four hours per day with restrictions. Appellant was precluded from casing or delivering mail or simple grasping. He was limited to lifting or carrying a maximum of 5 pounds continuously or 10 to 20 pounds intermittently; sitting 10 minutes occasionally; standing 5 to 10 minutes occasionally; occasional walking; rarely climbing steps, kneeling, bending, stooping or twisting; reaching above the shoulder a maximum of 30 minutes per day; and pushing or pulling a maximum of 20 pounds. The record contains numerous follow-up reports wherein Dr. Fleissner reiterated appellant’s restrictions.

The Office referred appellant to Dr. James F. Johnson, a Board-certified orthopedic surgeon, for an examination and a second opinion as to whether he had disabling residuals from his accepted injury. In a May 8, 2007 report, Dr. Johnson stated that there were no objective findings to support work-related disability. His examination of the upper extremity revealed excellent strength with abduction, adduction, flexion and extension; good grip and intrinsic strength; intact sensation; no pain on palpation of the cervical musculature; positive Tinels at the wrists and elbows bilaterally; and normal rotation of the cervical spine. Dr. Johnson diagnosed: status postligamentous sprain and muscle strain of the neck, with current symptomology unexplained; paresthesius unexplained; and congenital venous abnormality. He opined that appellant could work full time, provided that he could lift no more than 20 pounds, four hours per day and could reach above the shoulder one hour per day. Dr. Johnson also opined that his current back condition was not causally related to his accepted injury.

Appellant submitted a June 14, 2007 report from Dr. John C. Mullan, a Board-certified neurological surgeon. In reviewing a May 14, 2007 MRI scan report, Dr. Mullan identified an area of T2 signal change in the spinal cord, which he stated could be related to a central cord injury, perhaps from a disc herniation. He opined that “more likely than not, this lesion represents residual from the spinal cord injury.”

On June 19, 2007 Dr. Jessen reported that the May 14, 2007 MRI scan showed that the cervical cord lesion was directly opposed to a protruding cervical disc. He stated that, as there was no evidence that the condition was caused by an acquired anti-immune disorder, (*i.e.*,

demyelinating disease) or a congenital abnormality, the lesion was “most likely secondary to cervical trauma with either hyperextension or hyperflexion.” Dr. Jessen indicated that appellant continued to have disabling residuals “as a result of this cord lesion relating to his work injury of November 6, 2003.”

Appellant submitted claims for compensation for total disability commencing March 3, 2007.¹ The employing establishment indicated that it was unable to accommodate his medical restrictions.

The Office found a conflict in medical opinion between Dr. Jessen and Dr. Johnson as to whether appellant had residuals from and was disabled due to his accepted condition and as to whether his current back condition was causally related to the accepted injury. It referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Richard Galbraith, a Board-certified neurologist, for an impartial medical evaluation. The Office also forwarded a copy of a surveillance digital video disc (DVD) obtained by the employing establishment in the course of an investigation of appellant.

In a November 30, 2007 report, Dr. Galbraith reviewed the medical record, statement of accepted facts and the surveillance DVD. He provided an accurate history of injury and treatment, as well as detailed examination findings. Dr. Galbraith noted that appellant had a normal gait and a straight spine. He found no palpable spasm, tightness or rigidity in the paralumbar, parathoracic, parahomboid, parascapular, paratrapezius or paracervical muscles. Examination of the lumbar spine revealed forward flexion to 80 degrees, lateral bending to 30 degrees and extension to 30 degrees. Forward flexion of the cervical spine was 60 to 65 degrees, with lateral bending to 75 degrees, extension to 50 degrees and side bending to 35 degrees. Examination of the shoulders revealed forward flexion to 180 degrees, abduction to 150 degrees, internal rotation to 80 degrees. Dr. Galbraith stated that all of the above-mentioned measurements were within normal limits. Muscle strength in all four extremities was normal. Reflexes in the extremities were normal, active and equal.

Dr. Galbraith indicated that he had reviewed a surveillance DVD, which showed appellant engaged in various activities during the summer of 2007. On July 20, 2007 appellant was observed lifting suitcases and carrying a five-year-old child with ease; on July 21, 2007 he drove 13½ hours without apparent discomfort; on August 14, 2007 he carried and loaded lumber into a truck with ease; on August 16, 2007 he worked in his driveway for 3½ hours. His activities included bending, sitting, squatting and twisting. Dr. Galbraith stated that appellant showed no signs or evidence of physical disability or symptomatology.

Dr. Galbraith noted no objective findings to support continuing residuals from his accepted injury. He stated that appellant had sustained an injury on November 6, 2003 resulting in cervical and thoracic strains, a right shoulder strain and post-traumatic headaches, which should have resolved within 12 weeks. Dr. Galbraith concluded that he did not have a spinal cord injury. Rather, he stated that appellant’s condition was likely congenital in nature. Dr. Galbraith opined to a reasonable degree of medical certainty that he had no residuals from and no physical limitations related to, the accepted injury.

¹ The record contains CA-7 forms claiming total disability for the period March 3, 2007 through January 4, 2008.

On January 7, 2008 Dr. Fleissner stated that he had reviewed the 2007 surveillance DVD, which depicted appellant engaged in various strenuous activities without discomfort. Appellant informed Dr. Fleissner that the video was taken when he was in Arizona visiting his father and that he had taken pain medication in order to perform the activities shown. Dr. Fleissner stated that he asked him if he could perform his duties at work if he took pain medication, but “he was unable to really answer [him] with that.” He stated:

“In light of the [appellant’s] videos, I do not feel that the previous work restrictions were appropriate. I would allow [him] to return to unrestricted work as a postal mail carrier.”

By decision dated March 28, 2008, the Office denied appellant’s claim, finding that Dr. Galbraith’s November 30, 2007 report represented the weight of the medical evidence. It found that the evidence established that his accepted condition should have resolved within 12 weeks of the November 6, 2003 injury and failed to establish that he was disabled during the period in question. On April 7, 2008 appellant, through his representative, requested an oral hearing.

In a report dated March 17, 2008, Dr. Fleissner stated that appellant asked him to amend his work restrictions. Noting his belief that appellant had been functioning at a “medium to medium heavy” work level, Dr. Fleissner declined to amend the work restrictions.

Appellant submitted a June 13, 2008 report from Dr. Charles R. Justesen, a treating physician, who noted his complaints of chronic neck pain with numbness and tingling in both arms. Dr. Justesen’s examination revealed “a fair amount of deficit in the upper extremities.” His impression was that appellant had good tactile sensation, but that tingling and numbness probably clouded it somewhat. Based on Dr. Justesen’s review of a recent MRI scan, he concluded that appellant had a well-demarcated spinal cord lesion behind C-4, which started immediately posterior to the C3-4 disc and projected inferior from this and that the extension MRI scan revealed disc herniation. He opined that appellant had sustained a spinal cord injury was a result of his original fall. Dr. Justesen recommended cervical fusion, noting that the disc would not improve with time.

At the July 14, 2008 hearing, appellant testified that he stopped working on March 3, 2007 due to cervical pain and remained off work through January 4, 2008. His representative stated that he would be undergoing cervical fusion surgery, which would reveal whether his disabling condition was causally related to the accepted injury. Appellant asked the hearing representative to keep the record open for 30 days for the submission of additional evidence.

Appellant submitted a July 8, 2008 operative report, which reflected that he underwent anterior cervical discectomy and allograft fusion at C3-4 and anterior cervical instrumentation on that date. Postoperative diagnosis was C3-4 spinal cord injury with herniated disc and osteophyte formation and instability on flexion and extension. The record also contains reports of MRI scans of the cervical spine dated July 8 and 14, 2008, August 14 and September 10, 2008 medical notes from a physician’s assistant and a July 10, 2008 pathology report.

By decision dated October 24, 2008, an Office hearing representative affirmed the March 28, 2008 decision, based on Dr. Galbraith's well-reasoned report.² The representative found that there was no medical evidence of record supporting work-related disability during the claimed period.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act³ the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.⁵ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the probative and reliable medical evidence.⁶

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷ It is well established that medical conclusions unsupported by rationale are of limited probative value⁸ and when a claimant stops working at the employing establishment for reasons unrelated to his or her employment-related physical condition, the claimant has no disability with the meaning of the Act.⁹

When there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁰

² The Board notes that the Office had not issued a decision on appellant's request for authorization of cervical fusion surgery at the time it issued its October 27, 2008 decision. Therefore, the matter is not before the Board.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Robert A. Flint*, 57 ECAB 369 (2006).

⁵ *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007).

⁶ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁷ *Id.*

⁸ See *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006).

⁹ See *Richard A. Neidert*, 57 ECAB 474 (2006).

¹⁰ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

ANALYSIS

The Office determined that a conflict in medical opinion arose between Dr. Jessen, appellant's attending physician, and Dr. Johnson, who provided a second opinion evaluation for the Office. It properly referred appellant to Dr. Galbraith for an impartial evaluation.¹¹ Dr. Galbraith extensively reviewed the medical record and provided detailed examination findings. He concluded that there were no objective findings to support continuing residuals from appellant's accepted injury. Dr. Galbraith stated that his accepted cervical and thoracic strains, right shoulder strain and post-traumatic headaches should have resolved within 12 weeks of the November 6, 2003 injury. Therefore, appellant was not disabled as a result of his accepted condition during the period in question. Dr. Galbraith opined that he did not have a spinal cord injury, but rather that his current condition was likely congenital in nature. He noted that he had reviewed a video, which showed appellant engaging in various strenuous activities during the summer 2007, such as lifting suitcases, carrying children, making long car trips, carrying and loading lumber into a truck and working in his driveway. Appellant showed no signs of physical disability or symptomatology while performing these activities, which included bending, sitting, squatting and twisting. Dr. Galbraith opined to a reasonable degree of medical certainty that he had no residuals from and no physical limitations related to, the accepted injury. The Board finds that Dr. Galbraith's impartial medical opinion that appellant had no residuals resulting from his accepted condition is sufficiently probative, rationalized and based upon a proper factual background. For this reason, Dr. Galbraith's opinion represents the weight of the medical evidence.

The medical evidence submitted by appellant is insufficient to overcome the special weight accorded to the opinion of the impartial medical specialist. The Board notes that his own treating physician, whose earlier reports created a conflict with the Office's second opinion physician, opined that appellant was not disabled during the claimed period, after reviewing the employing establishment's surveillance video. Dr. Fleissner stated that his previous work restrictions were not appropriate and that appellant was able to return to unrestricted work as a postal mail carrier.

In reviewing a May 14, 2007 MRI scan report, Dr. Mullan identified an area of T2 signal change in the spinal cord, which he stated could be related to a central cord injury, perhaps from a disc herniation. He opined that "more likely than not, this lesion represents residual from the spinal cord injury." Dr. Mullan's report is speculative and unsupported by rationalized medical evidence explaining the nature of the relationship between appellant's cervical condition and the accepted injury.¹² Moreover, he did not address the issue of disability. Therefore, Dr. Mullan's report is of limited probative value.

Dr. Justesen opined that appellant had sustained a spinal cord injury as a result of his original fall and that he had "a fair amount of deficit in the upper extremities. Based on his review of a recent MRI scan, he concluded that appellant had a well-demarcated spinal cord lesion behind C-4, which started immediately posterior to the C3-4 disc and projected inferior

¹¹ See *Richard A. Neidert*, *supra* note 9.

¹² *Leslie C. Moore*, 52 ECAB 132 (2000).

from this and that the extension MRI scan revealed disc herniation. However, Dr. Justesen did not address the relevant issue, namely, whether appellant was disabled due to his accepted condition during the period in question. Therefore, his report is of limited probative value and is insufficient to establish appellant's claim or to create a new conflict. Operative reports, reports of MRI scans, medical notes and pathology reports, which do not contain an opinion on causal relationship or on the issue of disability, also lack probative value.

The Board notes that appellant's representative contended that the existence of a herniated disc, which was revealed during the cervical fusion surgery, would establish appellant's claim. However, the issue in this case is not whether appellant had a herniated disc, but rather whether he was disabled from March 3, 2007 to January 4, 2008 due to his accepted injury. There is no narrative medical report of record which contains a rationalized opinion in support of appellant's employment-related disability during the applicable period.

On appeal, appellant's representative contends, without explanation, that the Office's decisions are contrary to fact and law. For reasons stated above, the Board finds the representative's argument to be without merit.

CONCLUSION

The Board finds that appellant failed to establish that he was totally disabled from March 3, 2007 to January 4, 2008 due to his accepted spinal condition.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 24 and March 28, 2008 are affirmed.

Issued: August 24, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board