

FACTUAL HISTORY

On August 29, 2003 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that the weakness and pain and possible rotator cuff tear in his right shoulder were caused by repetitive casing of mail. He stopped work on August 29, 2003. By letter dated September 19, 2003, the Office accepted appellant's claim for right rotator cuff strain.

Appellant returned to limited-duty work on November 28, 2003. On December 11, 2003 he filed a claim alleging that he sustained a recurrence of disability on December 9, 2003. Appellant stopped work on December 9, 2003.

On January 22, 2004 appellant underwent arthroscopic surgery on his right shoulder.

By decision dated January 29, 2004, the Office accepted appellant's recurrence of disability claim. It also accepted his claim for temporary aggravation of bilateral/lateral epicondylitis. On April 26, 2004 appellant returned to limited-duty work.

In an October 26, 2004 medical report, Dr. Daniel M. Rosenberg, an attending Board-certified internist, stated that appellant's rotator cuff tear and bilateral/lateral epicondylitis and carpal tunnel syndrome were causally related to his August 28, 2003 employment-related injuries. Dr. Rosenberg further stated that he sustained a herniated disc at C4-5, inflammatory arthritis and tendinitis in the right wrist and hand and nerve damage in both arms based on magnetic resonance imaging (MRI) scans.

In a November 29, 2004 report, Dr. David M. Montgomery, a Board-certified orthopedic surgeon, stated that appellant sustained a cervical disc herniation at C4-5. Dr. Montgomery recommended anterior cervical discectomy and fusion at C4-5.

By letter dated January 13, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Charles F. Xeller, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a December 21, 2004 report, Dr. Rosenberg stated that appellant's current injuries were caused, aggravated and/or exacerbated by the change in his work environment that required him to repetitively bend and twist his wrists and elbows, hold his arms at awkward angles, force his mail into smaller compartments and increase the overhead use of his arms. He stated that combinations of repetitive use and use of force were common risk factors for disorders of the neck, shoulders, arms and hands. In a January 28, 2005 report, Dr. Rosenberg stated that appellant's carpal tunnel syndrome and cervical disc bulge were caused by the reconfiguration of his workspace in June 2003.

In a March 15, 2005 report, Dr. Xeller stated that appellant had some disc bulges but, no frank herniation. He recommended an electromyogram/nerve conduction study that included the cervical area. Dr. Xeller opined that appellant's bilateral carpal tunnel syndrome was not causally related to his employment-related right shoulder injury but, it could be related to his work activity. He further opined that his work-related bilateral shoulder impingement condition had resolved. No further treatment was necessary for his shoulders or elbows.

In a supplemental report dated May 10, 2005, Dr. Xeller opined that appellant's cervical condition and bilateral carpal tunnel syndrome were not work related. He stated that the changes in his neck appeared to be degenerative in nature. Dr. Xeller opined that appellant did not sustain a herniated disc at C4-5.

On June 17, 2005 Dr. Rosenberg reviewed Dr. Xeller's May 10, 2005 report. He stated that the biomechanics of casing mail overhead was sufficient to cause a cervical disc injury and that the change in appellant's work environment likely aggravated and/or exacerbated the condition.

The Office found a conflict in the medical opinion evidence between Dr. Xeller and Dr. Rosenberg as to whether appellant sustained a cervical disc bulge and bilateral carpal tunnel syndrome causally related to the reconfiguration of his workstation in June 2003 and whether cervical surgery was warranted. By letter dated August 16, 2005, it referred him, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Milton M. Green, a Board-certified orthopedic surgeon, for an impartial medical examination.

In reports dated September 26 and October 17, 2005, Dr. Green opined that appellant possibly sustained cervical disc herniation with spinal cord compression but, it was not caused, aggravated, exacerbated or precipitated by his work duties or reconfiguration of his workstation. He further opined that his bilateral carpal tunnel syndrome and wrist synovitis were causally related to the August 28, 2003 employment incident.

By letter dated October 28, 2005, the Office accepted appellant's claim for bilateral carpal tunnel syndrome and wrist synovitis. In a decision of the same date, it denied appellant's claim. The Office accorded special weight to Dr. Green's medical opinion as an impartial medical specialist in finding that appellant did not sustain a cervical condition that required surgery as a result of his accepted August 28, 2003 employment injuries. On November 2, 2005 appellant requested a telephonic hearing with an Office hearing representative.

In a decision dated May 31, 2006, an Office hearing representative set aside the October 28, 2005 decision. The hearing representative found that Dr. Green's opinion was not sufficiently rationalized. On remand, she instructed the Office to refer appellant to another impartial medical specialist, together with an updated statement of accepted facts that included the reconfiguration of his workstation in June 2003 and an accurate description of his work duties, to provide a rationalized medical opinion as to whether his cervical disc bulge and proposed surgery were causally related to his employment.

By letter dated September 22, 2006, the Office referred appellant to Dr. Zachary J. Endress, a Board-certified orthopedic surgeon, for an impartial medical examination. In an October 20, 2006 report, Dr. Endress opined that it appeared that appellant suffered from cervical radiculopathy. He further opined that appellant may require anterior cervical discectomy and fusion in order to relieve his symptoms. In a supplemental report dated December 11, 2006, Dr. Endress stated that it was impossible for him to distinguish between his current diagnosis of cervical radiculopathy and appellant's nonwork-related injuries. He opined that appellant sustained a central type disc bulge at C4-5 and that based on the history he

provided and the lack of any information or evidence to the contrary that there was a nonwork-related injury; the diagnosed condition appeared to be caused by his work duties. Dr. Endress stated that an anterior cervical discectomy would be medically necessary as a result of the August 28, 2003 employment injuries. He then recommended alternative treatments, which included epidural injections and/or physical therapy.

On March 1, 2007 the Office determined that Dr. Endress' opinion on causal relation and the proposed surgery was speculative in nature. It referred appellant, by letter dated March 2, 2007, to Dr. Robert S. Levine, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 3, 2007 report, Dr. Levine reviewed the history provided by appellant, which included past evidence of hypertension and insulin dependent diabetes. He reported his essentially normal findings on physical examination with the exception of pain in the extension of the neck, a negative Spurling's test, decreased sensation to pinprick on both hands that went up to the mid-arm on the right with decreased sensation, a negative Tinel's sign at both wrists over the median nerve and at both elbows over the ulnar nerve, slightly decreased internal rotation of the right shoulder, tenderness over the tip of the coracoid process and inability to extend the interphalangeal joint of either thumb. Dr. Levine reviewed appellant's medical records including, objective test results. He stated that appellant sustained multiple neuropathies of the upper extremities including, both radial and ulnar nerves at the elbows and right median nerve at the wrist. Dr. Levine diagnosed a history of diabetes, degenerative disc disease of the cervical spine, depression by history, hypertension and resolved epicondylitis of both elbows. He indicated that appellant was status post rotator cuff repairs of both shoulders, median nerve release of both wrists.

Dr. Levine opined that appellant did not suffer from cervical radiculopathy. He further opined that his neuropathies and diabetes were not work related. Dr. Levine stated that the neuropathies were most likely related to appellant's diabetes which he noted as an endocrine disorder. He stated that appellant's cervical degenerative disc disease was related to normal aging and that bulging discs were not uncommon findings on MRI scans performed on 46-year-old individuals. Dr. Levine stated that he would defer to a psychiatrist for an opinion as to whether appellant's depression was caused by his work-related orthopedic conditions. He further stated that the evaluation of his hypertension was beyond the scope of an orthopedic evaluation but, opined that it was not work related and more likely related to his obesity. Dr. Levine then stated that he would defer to a cardiologist or an internist for a definitive opinion.

By decision dated April 26, 2007, the Office found the medical evidence insufficient to establish that appellant sustained a cervical condition that necessitated surgery as a consequence of his accepted August 28, 2003 employment-related injuries. In a September 10, 2007 letter, he requested an oral hearing before an Office hearing representative.

By decision dated October 22, 2007, the Office denied appellant's request for a hearing as untimely pursuant to 5 U.S.C. § 8124. It stated that the issue in the case could be equally well addressed by requesting reconsideration. In a November 12, 2007 letter, appellant requested reconsideration.

By decision dated December 26, 2007, the Office denied appellant's request for reconsideration on the grounds that it did not contain new or relevant evidence sufficient to warrant a merit review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.¹ The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.² With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.³

Section 8123(a) of the Federal Employees' Compensation Act provides that, 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.⁴ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. 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.⁵

When there exist 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 upon a proper factual background, must be given special weight.⁶ In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate

¹ *Albert F. Ranieri*, 55 ECAB 598 (2004).

² *Id.*; *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

³ *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.321.

⁶ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

on his or her opinion, the case should be referred to another appropriate impartial medical specialist.⁷

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter.⁸ While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision as to whether appellant sustained a cervical condition consequential to his August 28, 2003 employment-related right rotator cuff strain, temporary aggravation of bilateral/lateral epicondylitis and bilateral carpal tunnel syndrome and wrist synovitis.

The Board notes that a conflict in medical opinion arose between Dr. Rosenberg, an attending physician, and Dr. Xeller, an Office referral physician, as to whether appellant sustained a cervical condition that required surgery as a result of his accepted employment-related injuries. Dr. Rosenberg opined that appellant's cervical condition that required surgery was causally related to his employment-related injuries and work duties. Dr. Xeller opined that appellant did not sustain a cervical condition due to his employment-related injuries or work duties.

The Office initially referred appellant to Dr. Green for an impartial medical examination. However, it found, in its October 28, 2005 decision, that his opinion that appellant's cervical condition was causally related to his federal employment was not sufficiently rationalized. The Office referred appellant to Dr. Endress for a second impartial medical examination. In a May 31, 2006 decision, the Office hearing representative found that his opinion that appellant appeared to have sustained a cervical condition that may require surgical intervention was equivocal.¹¹ The Office properly referred appellant to Dr. Levine, for a third impartial medical examination.

In an April 3, 2007 report, Dr. Levine reviewed the medical history provided by appellant, which included hypertension and insulin dependent diabetes. After reviewing appellant's medical records and reporting essentially normal findings on physical examination, he stated that appellant sustained multiple neuropathies of the upper extremities including, both

⁷ See *Phillip H. Conte*, 56 ECAB 213 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003); *Talmadge Miller*, 47 ECAB 673 (1996).

⁸ *Vanessa Young*, 55 ECAB 575 (2004).

⁹ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁰ *Melvin James*, 55 ECAB 406 (2004).

¹¹ *L.R. (E.R.)*, 58 ECAB ____ (Docket No. 06-1942, issued February 20, 2007); *Kathy A. Kelley*, 55 ECAB 206 (2004).

radial and ulnar nerves at the elbows and right median nerve at the wrist. Dr. Levine also diagnosed diabetes, degenerative disc disease of the cervical spine, depression by history, hypertension and resolved epicondylitis of both elbows. He stated that appellant was status post rotator cuff repairs of both shoulders and median nerve release of both wrists. Dr. Levine opined that he did not suffer from cervical radiculopathy. He stated that his neuropathies and diabetes were not work related. Dr. Levine stated that the neuropathies were most likely related to appellant's diabetes which was an endocrine disorder. He further stated that his cervical degenerative disc disease was related to normal aging and that bulging discs were not uncommon findings on MRI scans performed on 46-year-old individuals. Dr. Levine related that he would defer to an opinion from a psychiatrist as to whether appellant's depression was caused by his work-related orthopedic conditions. Although he stated that the evaluation of his hypertension was beyond the scope of an orthopedic evaluation, Dr. Levine opined that it was not work related and more likely related to his obesity. He then stated that he would defer to a cardiologist or an internist for a definitive opinion.

The Board finds that this case is not in posture for a decision. The Office properly accorded special weight to Dr. Levine's impartial medical opinion on the orthopedic conditions, but, as he noted, he is not qualified to render an opinion on the causal relationship between appellant's cervical condition and his diabetes. Diabetes is an endocrine disorder. This case is being remanded to further determine whether the neuropathy appellant experienced was causally related to his work injury. For these reasons, the Board finds that an unresolved conflict of medical opinion remains between Dr. Xeller, the Office referral physician, and Dr. Rosenberg, appellant's attending physician, regarding the issue of whether there is a causal relationship between appellant's cervical condition and his accepted employment-related injuries and federal employment.

Once the Office undertakes development of the record, it has the responsibility to do so in a proper manner.¹² Given the deficiency in Dr. Levine's report, it should not have denied appellant's claim for a consequential injury.¹³ Accordingly, the Board will remand the case to the Office for appropriate further medical development. On remand, the Office should refer appellant to a third impartial medical examiner to resolve the question of whether he has sustained a neck injury as a consequence of his accepted August 28, 2003 employment-related bilateral/lateral epicondylitis and bilateral carpal tunnel syndrome and wrist synovitis and federal

¹² *Melvin James, supra* note 10.

¹³ The Board notes that the Office can only exercise its discretion to determine whether medical treatment for the cervical condition is warranted after it determines that appellant's cervical condition was a consequence of his accepted August 28, 2003 employment injuries. *See* 5 U.S.C. § 8103(a) (“[t]he United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies, prescribed or recommended by a qualified physician, that the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of any monthly compensation”). To be entitled to reimbursement of medical expenses, the employee must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. *John R. Benton*, 15 ECAB 48 (1963).

employment. After further development as deemed necessary, it should issue an appropriate merit decision on appellant's claim.¹⁴

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained a cervical injury as a consequence of his accepted August 28, 2003 employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the December 26, October 22 and April 26, 2007 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: May 11, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ In view of the Board's disposition of the first issue, the issues of whether the Office properly denied appellant's request for an oral hearing and a merit review of his claim are moot.