United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 09-669**
	)	**Issued: October 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Carol Stream, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 8, 2009 appellant filed a timely appeal from a September 26, 2008 merit decision of the Office of Workers' Compensation Programs, denying her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained a cervical or lumbar condition causally related to factors of her federal employment.

FACTUAL HISTORY

On June 15, 2005 appellant, then a 61-year-old supervisor of business mail, filed an occupational disease claim alleging that she sustained a spinal injury due to moving heavy mail volumes and checking on employees at different locations. She stopped work on June 23, 2005. Appellant's supervisor noted that she had been working four hours per day for an extended period.

On June 23, 2005 the employing establishment controverted the claim, noting that appellant had sustained prior injuries. The Office had accepted that she sustained a lumbar sprain, a herniated cervical disc and spondylosis on August 11, 1977, in file number xxxxxx606. On July 26, 1979 appellant sustained a cervical strain in file number xxxxxx790. On April 18, 1990 she sustained a lumbar sprain in file number xxxxxx092. Appellant underwent an anterior cervical fusion at C3-4, C4-5 and C5-6 on March 5, 2003 and surgery for tethered cord syndrome on October 8, 2003.

In a report dated May 19, 2005, Dr. Fraser C. Henderson, a Board-certified neurosurgeon, noted that appellant initially sustained an injury to her neck in 1977. He performed surgery for cervical spondylotic myelopathy and cervical stenosis at C3-4, C4-5 and C5-6 on March 5, 2003 and for tethered cord syndrome on October 8, 2003. Dr. Henderson attributed appellant's herniated cervical discs to her 1977 work injury.

By decision dated September 19, 2005, the Office denied appellant's claim on the grounds that she did not establish a back injury due to her work duties as a mail supervisor. On October 18, 2005 appellant's representative requested a telephonic hearing.

On May 6, 2006 Dr. Henderson discussed appellant's 1977 neck injury at work, which required the removal of a disc at C6-7. Appellant subsequently developed progressive myelopathy following the injury which was aggravated by heavy lifting and other activities that she performed as a supervisor. Dr. Henderson attributed appellant's need for surgery in 2003 to her federal employment. He noted that magnetic resonance imaging (MRI) scan studies of the lumbar and cervical spine revealed degenerative changes at L2-3, L3-4 and L4-5 and herniations and spondylotic degenerative changes at C3-4, C4-5 and C5-6. Dr. Henderson stated, "These bulges and herniations were clearly caused by her original injury and further aggravated by her work-related lifting activities. The findings in the cervical area are identified in my March 5, 2003 operative report."

By decision dated July 10, 2006, an Office hearing representative set aside the September 19, 2005 decision. She found that the May 6, 2006 report from Dr. Henderson was sufficient to require further development of the medical evidence. The Office was directed to refer appellant to a Board-certified neurosurgeon for a second opinion examination.

On September 1, 2006 the Office referred appellant to Dr. Gary S. Skaletsky, a Board-certified neurosurgeon, for a second opinion examination. On September 28, 2006 Dr. Skaletsky diagnosed cervical and lumbar pain due to degenerative disc and joint disease. He found that appellant's C6-7 herniated disc was due to her 1977 work injury but that "none of the subsequent cervical or lumbar conditions, symptoms, diagnoses or treatments were related to that or any other injury." Dr. Skaletsky explained that appellant had normal neurological examinations each year for almost 30 years and that the diagnostic studies showed "only advancing degenerative lumbar and cervical spine conditions." He disagreed with Dr. Henderson's conclusion that appellant had a tethered spinal cord.

By decision dated October 16, 2006, the Office denied appellant's claim finding that the medical evidence was insufficient to establish that she sustained a spinal condition due to her employment. On October 25, 2006, through her attorney, she requested an oral hearing. A

hearing was held on February 12, 2007. By decision dated April 30, 2007, the Office hearing representative affirmed the October 16, 2006 decision.

On April 9, 2008 appellant, through her attorney, requested reconsideration. She submitted a letter dated March 31, 2008, in which Dr. Henderson asserted that Dr. Skaletsky disregarded the results of certain diagnostic studies. Dr. Henderson maintained that appellant's tethered spinal cord surgery was necessary due to her work injury and reiterated that her back condition was due to her work duties.

The Office determined that a conflict in medical opinion arose between Dr. Henderson and Dr. Skaletsky regarding the relationship of appellant's cervical or lumbar conditions to her federal employment. On August 8, 2008 it referred her to Dr. Sean Salehi, a Board-certified neurosurgeon, for an impartial medical examination. The Office requested that Dr. Salehi address whether appellant's March 5 and October 8, 2003 surgeries were due to her employment and whether she had any current medical condition resulting from her work duties or from the authorized surgical procedures.

In a report dated September 4, 2009, Dr. Salehi diagnosed cervical spondylosis and lumbosacral spondylosis. He stated:

> "Based on [appellant's] self provided history and the records review, to the best of my medical certainty, her reported incident of August 11, 1977 resulted in a cervical herniated dis[c] at C6-7, which was appropriately treated with an anterior cervical dis[c]ectomy and fusion. The only concerning note which provides a major discrepancy in the report is that of Dr. Raymond dated October 24, 1978 who states: there is a small left C4-5 herniated disc, but goes on to say that on the cross table lateral myelogram x-ray there is a complete cut off of the dye at C4-5. It is difficult to say based on this statement, if the concentration of the contrast was not high enough for it to pass beyond C4-5 or she had a significant stenosis at this segment causing this condition. The importance of knowing this fact is significant. In other words, if there was a significant disc bulge/herniation at this segment causing the dye not to pass beyond C4-5 then one can argue the herniation could have happened as a result of the reported work incident in 1977 and as a result her ongoing symptoms and the eventual need for a second operation years later on her cervical spine would be related to this initial injury. However, it would be surprising if her surgeon in 1977 knew this fact and did not operate on it. If the actual report of the cervical myelogram dated August 31, 1977 can be available, I can settle this issue."

Dr. Salehi advised that appellant's cervical surgery and tethered cord release were appropriate procedures and causally related to her degenerative condition. He stated:

> "Dr. Henderson's assertions that an injury in 1977 resulted in an ultimate cervical operation in 2003 is not founded unless, as mentioned earlier, the actual cervical myelogram of August 31, 1977 did in fact reveal significant stenosis at C4-5 which was not properly addressed surgically. Same thing can be described for [appellant's] lumbar spine dis[c] disease. Along the way, she [has] also had

multiple injuries, which would have temporarily exacerbated her condition. Once again correlating all her conditions of illness being to an injury in 1977 which is not founded based on the medical documentation provided."

By decision dated September 26, 2008, the Office denied modification of its April 30, 2007 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 filed within the applicable time limitation; that an injury was sustained while 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[4] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[5] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6]

Section 8123(a) 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.[7] 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

[1] 5 U.S.C. §§ 8101-8193.

[2] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[5] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[6] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[7] 5 U.S.C. § 8123(a).

a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8]

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.[9] 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.[10] If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[11]

ANALYSIS

Appellant filed an occupational disease claim alleging that she sustained spinal conditions due to her work as a mail supervisor. The Office previously accepted that she sustained a herniated cervical disc, lumbar sprain and spondylosis as a result of an August 11, 1977 work injury. Appellant also sustained cervical strain on July 26, 1979 and lumbar sprain on April 18, 1990. Dr. Henderson performed an anterior cervical fusion at C3-4, C4-5 and C5-6 on March 5, 2003 and surgery for tethered cord syndrome on October 8, 2003.

The Office properly determined that a conflict arose existed between Dr. Henderson, appellant's attending physician, and Dr. Skaletsky, who provided a second opinion examination, as to whether appellant had a cervical or lumbar condition due to her employment duties or to her prior accepted work injuries. It referred her to Dr. Salehi, a Board-certified neurosurgeon, for resolution of the conflict. 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.[12]

On September 4, 2009 Dr. Salehi found that appellant sustained a herniated disc at C6-7 due to her August 11, 1977 work injury. He related, however, that a physician interpreted an August 31, 1977 myelogram as showing a small herniated disc at C4-5 and a complete dye cut off at that level. Dr. Salehi noted that it was unclear whether the dye was not concentrated enough to go beyond C4-5 or whether her cervical stenosis prevented the dye from passing that level. He stated, "The importance of knowing this fact is significant. In other words, if there

[8] 20 C.F.R. § 10.321.

[9] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Richard R. LeMay*, 56 ECAB 341 (2005).

[10] *See Guiseppe Aversa*, 55 ECAB 164 (2003).

[11] *Id*.

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

was a significant disc bulge/herniation at this segment causing the dye not to pass beyond C4-5 then one can argue the herniation could have happened as a result of the reported work incident in 1977 and as a result appellant's ongoing symptoms and the eventual need for a second operation years later on her cervical spine would be related to this initial injury." Dr. Salehi noted that he could resolve the issue upon review of the August 31, 1977 myelogram. He opined that appellant's low back pain and need for a cervical discectomy, lumbar laminectomy and tethered cord release resulted from a degenerative condition. Dr. Salehi concluded that her need for the 2003 cervical operation was not due to her 1977 work injury unless the August 31, 1977 myelogram "did in fact reveal significant stenosis at C4-5, which was not properly addressed surgically. Same thing can be described for her lumbar dis[c] disease."

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.[13] As the Office referred appellant to Dr. Salehi, it has the duty to obtain a report sufficient to resolve the issues raised and the questions posed to the specialist.[14] The case, consequently, is remanded to the Office to obtain a supplemental report from Dr. Salehi. Upon remand, the Office should combine the case records for all of appellant's cervical and lumbar injuries and refer the evidence from all file numbers, including the August 31, 1977 cervical myelogram, to Dr. Salehi for review. Following this and such further development deemed necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[13] *Guiseppe Aversa*, *supra* note 10.

[14] Once the Office undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case. *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 5, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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