

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

P.Z., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, KS, Employer**

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**Docket No. 10-883
Issued: November 12, 2010**

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 17, 2010 appellant, through her attorney, filed a timely appeal from the November 30, 2009 decision of the Office of Workers' Compensation Programs denying authorization for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office abused its discretion in denying authorization for a cervical discectomy.

FACTUAL HISTORY

On September 7, 2006 appellant, then a 47-year-old rural carrier, sustained sprains of her left shoulder and upper arm and a left acromioclavicular joint dislocation when she was delivering telephone books. The Office later accepted aggravation of cervical degenerative disc disease.

In a May 29, 2007 report, Dr. Eric P. Flores, a Board-certified neurosurgeon, reviewed the medical history and provided findings on physical examination. He noted that appellant's neck pain persisted after resolution of her accepted left shoulder condition. Dr. Flores recommended an anterior cervical discectomy.

In a September 18, 2007 report, Dr. Edward J. Prostic, a Board-certified orthopedic surgeon and Office second opinion physician, reviewed the medical history and provided findings on physical examination. He opined that the cervical discectomy recommended by Dr. Flores would not be beneficial to treat her cervical condition.

The Office found a conflict in the medical opinion between Dr. Flores and Dr. Prostic regarding treatment of appellant's cervical neck condition. It referred her, together with copies of medical reports, a statement of accepted facts and a list of questions, to Dr. Dale D. Dalenberg, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a May 26, 2008 report, Dr. Dalenberg reviewed the medical history and provided findings on physical examination. Objective findings included: left shoulder posterior tenderness, intrascapular tenderness, cervical spine tenderness and limited neck range of motion. Radiology and magnetic resonance imaging (MRI) scan studies revealed degenerative disc changes including disc protrusion at C5-6 and C6-7, a C5-6 disc herniation, mild diffuse disc bulge at C6-7 and loss of normal cervical lordosis. He noted that appellant's traumatic injury on September 7, 2006 was accepted for a left shoulder and upper arm strain and aggravation of cervical degenerative disc disease. Dr. Dalenberg noted that she had a left shoulder injury nine years earlier due to a motor vehicle accident, but was off work only three months. He stated that appellant's subjective complaints and objective physical findings regarding her neck and left shoulder were supported by imaging studies. Appellant accepted aggravation of cervical degenerative disc disease was permanent. Dr. Dalenberg could not compare appellant's neck range of motion to her preinjury condition due to lack of preinjury medical reports addressing range of motion. Other than tenderness in the posterior left shoulder and posterior cervical spine, there were no other objective findings on physical examination. There was no way for him to state that she had a material worsening of her cervical condition as a result of the September 7, 2007 aggravation, although the history suggested that the aggravation was permanent based on its duration. Dr. Dalenberg stated that appellant was a potential cervical disc surgery candidate, but "[i]t [was] debatable whether such an operation should be covered under the workers' compensation system, although it is noted that her injury claim ... was later accepted to include aggravation of cervical degenerative disc disease." He stated that she failed to demonstrate why factors unique to her job caused the need for surgery, rather than factors such as her underlying degenerative cervical disc disease, the motor vehicle accident nine years earlier and changes related to aging.

By decision dated September 30, 2008, the Office denied authorization for an anterior cervical discectomy at C5-6 on the grounds that the weight of the medical evidence rested with Dr. Dalenberg, who determined that the surgery was not medically necessary for her accepted aggravation of cervical degenerative disc disease.

On October 3, 2008 Dr. Flores reiterated his recommendation that appellant undergo a cervical discectomy.

On November 18, 2008 appellant requested a review of the written record. By decision dated January 12, 2009, the Office denied her request on the grounds that it was untimely. It exercised its discretion and found that the issue could be addressed equally well by a request for reconsideration and the submission of additional evidence.

On September 22, 2009 appellant requested reconsideration of the September 30, 2008 decision. Through her representative, she argued that it was not clear whether Dr. Dalenberg reviewed the statement of accepted facts. Appellant also asserted that one of the Office's questions was misleading. The question as to whether the September 7, 2006 work injury caused a material change in her preexisting cervical condition should have been phrased as to whether the work injury contributed in anyway to a worsening of the preexisting cervical condition. Appellant submitted new medical evidence from Drs. Stanley A. Bowling, William F. Taylor, Robert M. Beatty and Zhengyu Hu.

By decision dated November 30, 2009, the Office denied modification of the September 30, 2008 decision that denied authorization for a cervical discectomy.¹

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation Act provides that an employee injured in the performance of duty shall be furnished with the services, appliances and supplies prescribed or recommended by a qualified physician which are likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.²

Section 8123(a) of the 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.³ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁴

The Board's case precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the deficiency in his original report. Only when the impartial specialist is unable or unwilling to clarify or elaborate on his original report

¹ Subsequent to the November 30, 2009 Office decision, additional evidence was submitted to the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

² 5 U.S.C. § 8103(a).

³ *Id.* at § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁴ *See* *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

or if his supplemental report is incomplete, vague, speculative or lacking in rationale, should the Office refer the claimant to a second impairment specialist.⁵

ANALYSIS

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

The Office found a conflict in medical opinion between Dr. Flores and Dr. Prostić regarding the necessity of surgical treatment of appellant's cervical neck condition. It referred her to Dr. Dalenberg for an impartial medical evaluation.

Dr. Dalenberg reviewed the medical history and provided findings on physical examination. Objective findings included: left shoulder posterior tenderness, intrascapular tenderness, cervical spine tenderness and limited neck range of motion. He stated that appellant's subjective complaints and objective physical findings regarding her neck and left shoulder were supported by MRI scan studies. Dr. Dalenberg advised that her accepted aggravation of cervical degenerative disc disease was permanent. He stated that appellant was a potential cervical disc surgery candidate, but it was debatable whether such an operation should be covered under federal workers' compensation system as the evidence did not demonstrate why factors unique to her job caused the need for surgery, rather than factors such as her underlying degenerative cervical disc disease, her motor vehicle accident nine years prior and changes related to aging.

The Board finds that Dr. Dalenberg's report is not sufficient to resolve the conflict in medical opinion as to whether the recommended cervical discectomy should be authorized. Dr. Dalenberg stated that appellant's employment injury was not the sole reason for the surgery. He listed other factors not unique to her job as giving rise to the need for surgery; her underlying degenerative cervical disc disease, the nine-year history of a prior motor vehicle accident and changes related to the aging process. As noted, the Act provides that employees injured in the performance of duty shall be furnished with the services, appliances and supplies prescribed or recommended by a qualified physician which are likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation. The question is whether the cervical surgery would be medically beneficial for appellant's accepted aggravation of cervical degenerative disc disease. As noted, Dr. Dalenberg described the aggravation as permanent, not temporary. The fact that she had a preexisting cervical condition does not preclude a need for surgery that is partially due to the aggravation of the cervical condition caused by her employment.

On remand, the Office should prepare a new list of questions for Dr. Dalenberg. It should clarify that appellant's September 7, 2006 employment injury is not required to be the sole reason for the cervical discectomy. The Office should obtain a supplemental report from Dr. Dalenberg on the relationship of her accepted aggravation of cervical degenerative disc disease to the need for surgery.

⁵ See Nancy Keenan, 56 ECAB 687 (2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: November 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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