

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION FACILITY, New Castle, PA,
Employer**

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**Docket No. 10-519
Issued: September 10, 2010**

Appearances:
Douglas Sughrue, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant, through his attorney, filed a timely appeal from the August 31, 2009 recurrence of disability decision of the Office of Workers' Compensation Programs. 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 sustained a recurrence of disability on July 22, 2008 causally related to her February 24, 2007 employment injury.

FACTUAL HISTORY

On February 24, 2007 appellant, then a 51-year-old clerk, filed a traumatic injury claim for an injury to her back, right leg and elbow when she slipped and fell between a truck and the dock lift. On May 8, 2007 Dr. Elbert Acosta, her attending physician, stated that his diagnosis at the time of the fall and on the May 2007 visit, was pain in her lower back and leg. He noted that a magnetic resonance imaging (MRI) scan revealed degenerative disc disease and disc bulges at

L3 to L5. Dr. Acosta did not indicate that the disc bulges were caused by the February 24, 2007 fall. The Office accepted appellant's claim for a left leg contusion, lower back contusion and right elbow abrasion.

On July 19, 2007 Dr. Parvaz Baghai, an attending Board-certified neurosurgeon, reviewed the medical history and provided findings on physical examination, who diagnosed lumbar stenosis, as revealed in a March 2007 MRI scan, at the L3 to L5 levels, secondary to degenerative changes in the lumbar spine. Dr. Baghai opined that the February 24, 2007 work incident caused the lumbar stenosis to become symptomatic. On April 28, 2008 he noted that appellant could not walk or stand for any length of time.

Appellant underwent back surgery on July 22, 2008 for lumbar stenosis at L3 to L5. She filed a claim for a recurrence of disability on that date.

In an August 8, 2008 memorandum, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, reviewed the medical records including February 25, 2007 x-rays and lumbar spine MRI scans on March 6, 2007 and May 16, 2008 revealing degenerative changes. He reviewed the reports from Dr. Baghai. Dr. Berman opined that appellant's longstanding osteoarthritic and spinal stenotic changes in the lumbar spine caused the need for the July 22, 2008 back surgery, not the February 24, 2007 back contusion.

The Office found a conflict in medical opinion between Dr. Baghai and Dr. Berman. It referred appellant together with the case file and statement of accepted facts, to Dr. Michael J. Jurenovich, a Board-certified osteopathic orthopedic surgeon and an impartial medical specialist, to resolve the conflict.

In an October 21, 2008 report, Dr. Jurenovich reviewed the medical history, including the results of x-rays and MRI scans. He provided findings on physical examination. The history provided by appellant was that she fell backward while loading a truck at work, striking her elbow, right leg and back. Her accepted conditions included a left leg contusion, low back pain and right elbow abrasions. Dr. Jurenovich noted that appellant had a long history of osteoarthritis and lumbar spinal stenosis prior to her 2007 employment injury. On physical examination straight-leg raising was mildly positive in the left leg at 90 degrees and negative in the right leg. There was no atrophy in either lower extremity. Appellant left leg contusions and right elbow abrasions had healed. The July 22, 2008 operative report indicated no evidence of disc herniation. There was no acute injury that required the back surgery. Dr. Jurenovich opined that the July 22, 2008 back surgery was not causally related to appellant's February 24, 2007 employment injury, a lower back contusion.

By decision dated October 29, 2008, the Office found that Dr. Jurenovich's opinion was entitled to special weight. Dr. Jurenovich's opinion established that appellant's July 22, 2008 recurrence of disability was not causally related to her February 24, 2007 employment injury.

Appellant requested reconsideration. In reports dated February 2 and 24, 2009, Dr. Baghai stated that the disc bulges at L3 to L5 revealed in the March 2007 MRI scan contributed to her preexisting lumbar spine stenosis. He opined that the February 24, 2007 employment injury aggravated appellant's preexisting degenerative changes in her lumbar spine

and necessitated the July 22, 2008 back surgery. During appellant's fall on February 24, 2007, there was a loading mechanism of the spine that was likely to result in disc bulging. Bulging of the L3-4 and L4-5 disc was the significant element in causing her lumbar spine condition to become symptomatic. Despite her preexisting degenerative lumbar spine disease, appellant functioned effectively until the fall which resulted in sudden aggravation of the spinal stenosis by the addition of the disc bulging to the preexisting degenerative process.

By decision dated August 31, 2009, the Office denied modification of the October 29, 2008 decision.¹

LEGAL PRECEDENT

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."² An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for he or she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound reasoning.³ Where no such rationale is present, medical evidence is of diminished probative value.⁴

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.⁵ 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.⁶

¹ Subsequent to the August 31, 2009 Office decision, additional evidence was associated with 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 *R.S.*, 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁴ See *Ronald C. Hand*, 49 ECAB 113 (1957); see also *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁵ 5 U.S.C. § 8123(a); see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁶ See *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

ANALYSIS

Appellant has the burden to provide medical evidence establishing that she sustained a recurrence of disability on July 22, 2008 causally related to her February 24, 2007 accepted left leg and lower back contusions and right elbow abrasions.

Due to the conflict in medical opinion between Dr. Baghai and Dr. Berman, the Office referred the case to Dr. Jurenovich for an independent medical examination.

Dr. Jurenovich, a Board-certified orthopedic surgeon, who was provided with a statement of accepted facts and the case file, conducted an independent review of appellant's lumbar spine condition. He reviewed the medical history, including the results of x-rays and MRI scans. The history provided by appellant was that she fell backward while loading a truck at work, striking her elbow, right leg and back. Her accepted conditions included a left leg contusion, low back pain and right elbow abrasions. Dr. Jurenovich noted that appellant had a long history of osteoarthritis and lumbar spinal stenosis prior to her 2007 employment injury. He provided findings on physical examination including straight-leg raising that was mildly positive in the left leg at 90 degrees and negative in the right leg. There was no atrophy in either lower extremity. The July 22, 2008 operative report indicated no evidence of disc herniation. There was no acute injury that required the back surgery. Dr. Jurenovich opined that the July 22, 2008 back surgery was not causally related to appellant's February 24, 2007 lower back condition, a contusion.

The report of Dr. Jurenovich is based upon a complete and accurate factual and medical background. The Board finds that Dr. Jurenovich's thorough and well-rationalized report established that appellant's July 22, 2008 lumbar surgery and recurrence of disability was not causally related to her February 24, 2007 employment injury. Appellant failed to meet her burden of proof to establish that she sustained a work-related recurrence of disability on July 22, 2008.

In February 2009, Dr. Baghai contended that appellant's February 24, 2007 fall was likely to have caused disc bulging. He stated that the disc bulges at L3 to L5 revealed in the March 2007 MRI scan contributed to appellant's preexisting lumbar spine stenosis, causing her lumbar spine condition to become symptomatic. Despite her preexisting degenerative lumbar spine disease, appellant functioned effectively until the February 24, 2007 fall which resulted in sudden aggravation of the spinal stenosis by the addition of the disc bulging to the preexisting degenerative process. Dr. Baghai opined that the February 24, 2007 employment injury aggravated appellant's preexisting degenerative changes in her lumbar spine and necessitated the July 22, 2008 back surgery. An additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is generally insufficient to overcome the weight accorded to an impartial medical specialist's report where the claimant's physician had been on one side of the conflict in the medical opinion that the impartial medical examiner resolved.⁷ Dr. Baghai was on one side of the conflict which Dr. Jurenovich's opinion was found to resolve. He did not explain how the February 24, 2007 fall caused disc bulges in appellant's lumbar

⁷ See Roger G. Payne, 55 ECAB 535 (2004).

spine. Dr. Baghai did not mention disc bulges in his July 19, 2007 report or July 22, 2008 operative report. His February 2009 reports did not explain why he failed to address appellant's disc bulges in his earlier reports. Such explanation is particularly important in light of the significance Dr. Baghai gave to the disc bulges in his February 2009 reports. The Board finds that Dr. Baghai's February 2009 reports are not sufficient to overcome the weight of Dr. Jurenovich's medical opinion.

On appeal appellant contends that there was no conflict because the Office did not consider Dr. Baghai's opinion. However, the record shows that Dr. Berman reviewed Dr. Baghai's reports. However, he did not agree with Dr. Baghai, a conflict was created. Appellant also contends that the statement of accepted facts provided to Dr. Jurenovich was not accurate in stating that on February 24, 2007 she fell backward while loading a truck, rather than stating that she fell between the truck and the loading dock. However, the description in the statement of accepted facts is the same as the description she provided to Dr. Jurenovich. Appellant's arguments on appeal are insufficient to establish that she sustained a recurrence of disability on July 22, 2008 causally related to her February 24, 2007 employment injury.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she had a recurrence of disability on July 22, 2008 causally related to her February 24, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 31, 2009 is affirmed.

Issued: September 10, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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