United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 10-2298**
	)	**Issued: May 13, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Mountain View, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 13, 2010 appellant, through her representative, filed a timely appeal from the April 12, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of her claim for compensation benefits. Pursuant to the Federal Employees' Compensation Act[1] and 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 an injury in the performance of duty on June 22, 2007.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In the prior appeal,[2] the Board noted that the Office had accepted that the June 22, 2007 incident occurred as alleged.[3] The question was whether this incident caused an injury. The Board found that the August 20, 2007 opinion of Dr. R. Thomas Grotz, appellant's orthopedic surgeon, offered what appeared to be a rational explanation of how the accepted work incident caused an injury or at least aggravated a preexisting cervical condition. As the record raised an uncontroverted inference of causal relationship, the Board remanded the case for further development of the medical evidence. The facts of this case as set out in the Board's prior decision are hereby incorporated by reference.

On August 6, 2009 Dr. Aubrey A. Swartz, an orthopedic surgeon and Office referral physician, noted that there was no evidence of substantial injury when appellant turned to the right to use the telephone on June 22, 2007. He stated that appellant was quite clear that her commute -- from her home in Elk Grove, a suburb of Sacramento, to her job in San Francisco -- was painful and irritating. "I do not find that the episode of reaching for the [tele]phone triggered off the constellation of symptoms, findings and problems as represented by [appellant]." Dr. Swartz found no aggravation of appellant's preexisting cervical condition and found that the episode was not related her work stoppage that date.

On October 22, 2009 the Office denied appellant's claim for compensation benefits. It found that the weight of the medical opinion evidence rested with Dr. Swartz. On April 12, 2010 an Office hearing representative affirmed.

LEGAL PRECEDENT

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] An employee seeking benefits under the Act has the burden of proof to establish the essential elements of her claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.[5]

Causal relationship is a medical issue,[6] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical

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[2] Docket No. 08-1873 (issued January 29, 2009).

[3] Appellant, a 47-year-old postal vision coordinator, filed a traumatic injury claim: "Sitting at desk developed muscle spasm working at computer. Turned to the right to use the phone -- neck snapped pain in neck and right arm."

[4] 5 U.S.C. § 8102(a).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Mary J. Briggs*, 37 ECAB 578 (1986).

opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[7] must be one of reasonable medical certainty,[8] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[9]

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.[10]

ANALYSIS

The Board finds a conflict of medical opinion between appellant's orthopedic surgeon, Dr. Grotz, and the Office referral physician, Dr. Swartz. Dr. Grotz found that appellant stretched a local nerve in the course of her employment on June 22, 2007 when she rotated her head, probably in the context of muscle spasm, further tempting the nerve. He explained that appellant had severe and multiple disc protrusions, extrusions and areas of extremely tight clearance of neural foramina. When appellant rotated her head on her neck, she heard a pop and felt searing pain in her neck radiating to the right greater than the left shoulder and distally. She had aching, burning and stabbing pain over the C6 distribution proximally involving the median and ulnar nerve distributions distally.

Dr. Swartz disagreed. He found no evidence of substantial injury and he noted that appellant was also implicating her commute. Dr. Swartz did not believe that reaching for the telephone on June 22, 2007 triggered the constellation of symptoms, findings and problems described by appellant. He concluded that there was no aggravation of a preexisting cervical condition and stated that he did not believe the incident caused her work stoppage that date.

Appellant's physician and the Office referral physician presented entirely different opinions on whether appellant sustained an injury on June 22, 2007 when, while sitting at a desk, she turned to the right to use the telephone, her neck snapped and she felt pain in her neck and right arm. 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.[11] 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. When such disagreements arise, the Act requires the Office to appoint a third physician, an impartial medical specialist or referee, to resolve the conflict. The Board will set

[7] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[8] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[9] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[10] 5 U.S.C. § 8123(a).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

aside the Office's April 12, 2010 decision and remand the case for the Office to obtain a reasoned opinion from an impartial medical specialist. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for compensation benefits.

CONCLUSION

The Board finds that this case is not in posture for decision. A conflict in medical opinion warrants referral to an impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: May 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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