U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. SHUKER and U.S. POSTAL SERVICE,
POST OFFICE, Providence, RI

Docket No. 01-1964; Submitted on the Record;
Issued April 5, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof to establish that she sustained disability on or after March 13, 1999, or required surgery on May 5, 1999 due to her November 7, 1998 employment injury.

The Board finds that appellant did not meet her burden of proof to establish that she sustained disability on or after March 13, 1999 or required surgery on May 5, 1999 due to her November 7, 1998 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of 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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence.[3]

Section 8103(a) of the Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant; *see Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[4] In order to be entitled to reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[5] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[6]

On November 7, 1998 appellant, then a 34-year-old mail carrier, sustained a cervical strain, when the side mirror of her postal vehicle hit a tree.[7] She worked in a limited-duty position for about a week and then returned to her usual duties before stopping work on March 13, 1999. On May 5, 1999 appellant underwent a spinal fusion, which was carried out with an iliac crest graft and two cables fusing C1-2 posteriorly. The surgery was performed by Dr. Donald S. Pierce, an attending Board-certified orthopedic surgeon. Appellant claimed that she sustained a recurrence of disability on March 13, 1999 and required surgery on May 5, 1999 due to her November 7, 1998 employment injury. By decision dated October 26, 1999, the Office of Workers' Compensation Programs denied appellant's claim for an employment-related recurrence of disability on March 13, 1999. By decision dated and finalized August 10, 2000, an Office hearing representative affirmed the Office's October 26, 1999 decision regarding appellant's recurrence of disability claim. He further determined that appellant's May 5, 1999 surgery was not required by her employment injury. By decision dated July 27, 2001, the Office affirmed its prior decisions.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained disability on or after March 13, 1999 or required surgery on May 5, 1999 due to her November 7, 1998 employment injury.

In a report dated March 18, 1999, Dr. Pierce indicated that appellant had an os odontoideum abnormality and stated: "The fibrous union in the os odontoideum was markedly displaced in the motor vehicle accident, which she suffered while working for the [employing establishment] delivering the mail and this is basically the cause of the problem." In reports dated July 24, 1999 and May 10, 2000, Dr. Pierce indicated that the May 6, 1999 surgery was necessitated by the November 7, 1998 employment injury. In a report dated April 6, 2001, Dr. John Molloy, an attending Board-certified orthopedic surgeon, indicated that appellant was totally disabled and diagnosed, "Congenital os odontoideum, which was destabilized by the injuries which she sustained in the motor vehicle accident of November 7, 1998, which resulted in subsequent fusion of the C1-2 vertebrae."

[4] 5 U.S.C. § 8103.

[5] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[6] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[7] The record reflects that appellant's vehicle was moving a few miles per hour at the time, that the side mirror did not break off and that there was no damage to the body of the vehicle. An official accident report indicates that appellant was traveling less than five miles per hour.

However, these reports of Drs. Pierce and Molloy are of limited probative value on the relevant issue of the present case in that these physicians did not provide adequate medical rationale in support of their conclusions on causal relationship.[8] Appellant's claim has been accepted for cervical strain and Drs. Pierce and Molloy did not explain how the November 7, 1998 employment injury would have been competent to cause disability after March 19, 1999 and require surgery on May 5, 1999.

The record reflects that appellant had a congenital os odontoideum abnormality and Drs. Pierce and Molloy did not adequately describe or otherwise address diagnostic testing findings which suggest that the condition found on November 7, 1998 and thereafter, was essentially congenital in nature.[9] Drs. Pierce and Molloy indicated that the November 7, 1998 incident displaced the fibrous union in the os odontoideum. However, they did not explain how this could have occurred given the minor nature of the accident (traveling less than five miles an hour and no major damage to the vehicle) and the fact that appellant worked her regular position for months after the incident (including lifting up to 70 pounds). They did not adequately explain why appellant's disability after March 19, 1999 and need for surgery on May 5, 1999 would not have been solely due to her congenital os odontoideum abnormality.

The July 27, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 5, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[8] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[9] Dr. Leslie Cohen, an attending Board-certified radiologist, interpreted x-rays taken on the date of injury, November 7, 1998, as showing a congenital os odontoideum abnormality. Dr. Cohen indicated that there was an alignment anomaly at the C1-2 level and that the margins between C1 and C2 appeared to be well corticated. Dr. Cohen noted that there was no evidence of acute fracture or dislocation of the cervical spine and stated, "This represents a congenital anomaly absence of the dens with a large dystrophic os odontoideum. Later diagnostic testing also indicated that appellant's spinal problems were congenital in nature.

Willie T.C. Thomas, Alternate Member, dissenting:

Appellant herein appeals from the decision of the Office denying her authorization for surgery for a congenital condition, os odontoiduem, that was "aggravated to the point that it became a life threatening situation requiring surgery." She contends that the only medical evidence available establishes the causal connection between the accepted employment injury and her disabling condition.

On May 20, 1999 the Office prepared a statement of accepted facts and requested the Office medical adviser, Dr. George L. Cohen, to review the record and answer the following questions: Is the proposed surgery medically indicated? Is it related to the injury on November 7, 1998 or is it congenital in nature? Please discuss.

Dr. Cohen responded in a medical report dated May 24, 1999. In pertinent part, he stated:

> "[Computerized tomography] scan of the cervical spine demonstrated a large dystrophic odontoid with absence of the dens portion and malformation of the anterior arch of C1. There was no evidence of acute fracture or dislocation. These findings were consistent with a congenital abnormality.
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> "[Appellant] continued to have neck and upper back pain. In a report dated March 31, 1999, [appellant's] doctor reported that she was not having numbness and tingling in her arms. [Appellant] was seen by two orthopedic surgeons. It was advised that she avoid any 'unusual activity that would place her at risk for serious head or neck injury.' Follow-up in six months was advised to check for instability.
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> "The second orthopedist apparently has suggested surgery this time. There is no report in the medical record.
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> "The available medical evidence is very limited. Surgery should not be approved as related to a work injury at this time. We need to have reports from one or both orthopedic surgeons who evaluated [appellant]. We need to discover what surgery is planned and in what way the incident of November 7, 1998 caused a problem other than cervical sprain. How is the congenital abnormality in the cervical spine related to the work incident?
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> "Of course, if the physicians feel that surgery is required on an urgent basis, it should be performed at their discretion and a retroactive review can be done."

Dr. Donald S. Pierce, Associate Clinical Professor of Orthopedic Surgery at Harvard Medical School and visiting orthopedic surgeon at Massachusetts General Hospital, submitted a report dated July 24, 1999 to claims examiner Peter Markey. He stated in pertinent part:

> "[Appellant] has been under my care for an injury to her cervical spine from a motor vehicle accident. This occurred in the line of work [on] November 7, 1998 when she was delivering the mail. [Appellant] suffered an injury to her cervical spine at that time and called her [s]upervisor who told her to continue running her route, which she did. She subsequently developed an onset of severe pain at the base of her skull and in the upper muscles of her neck with severe muscle spasm. Initially [appellant] consulted Dr. Norman Beesaw who [x]-rayed her neck and told her she had an [o]s [o]dontoidium and raised the question of a spinal fusion for it, should the pain continue. The pain did indeed continue and she subsequently saw me on March 18, 1999. At that time I did flexion extension views which Dr. Beesaw had not previously done and noted *that there was a very marked displacement of the [o]s [o]d[o]ntoidium forward and backward on the base of the [o]dontoid process of C2 which imperiled her spinal cord at a lethal level*. (Emphasis added.)
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> "[Appellant] wished to go ahead with the surgery. Her pain was increasingly severe at that time and in my opinion for good reason. *i.e.* The [o]s [o]dontoidium had been displaced from its normal fibrous union with the base of the [o]dontoid process and was allowing her cervical spine excessive motion at the C1-2 level, with narrowing of the distance between the [o]dontoid and the ring of C1. Normally, this distance would be maintained by the fibrous unit between the [o]s [o]dontoidium and the [o]dontoid process, *this having been torn apart at the time of the injury at work caused [appellant's] spinal cord to be in danger*." (Emphasis added.)
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> "Odontiodium from the [o]dontoid process, requiring surgery with fusion of C1-2 posteriorly was the direct result of the accident which occurred at work while delivering the mail."

The foregoing report was stamped received by the Office on October 25, 1999, however, senior claims examiner Michele Ellion denied the claim on October 26, 1999.

The record also contains a medical report dated May 10, 2000 by Dr. Pierce wherein he repeated the history of injury, the type of surgery performed and how he became involved in this case. Of particular significance is his characterization of appellant as being asymptomatic before the employment injury. In pertinent part, he stated:

> "Dr. Beesaw had raised a question as to whether she should have a fusion or not. He had been equivocal with her. She was continuing to have symptoms with pain in her neck, at the base of her skull and headaches. For this reason I felt that she

> should go ahead with a fusion. It was my opinion with a reasonable degree of medical certainty at that time that the fibrous union in the os odontoideum was markedly displaced when she struck the tree head on, while delivering mail. This makes very good sense in the particular mechanism of injury. This is particularly true as she had absolutely no symptoms prior to this…."

Despite a hearing held by the Office hearing representative on August 10, 2000 and subsequent review of a request for modification of the prior merit decision by claims examiner Raymond M. Evers, rejecting the recurrence of disability and authorization for surgery, neither the hearing representative nor the claims examiner submitted the reports of Dr. Pierce or the surgical record from Massachusetts General Hospital to the Office medical adviser, Dr. Cohen, who specifically requested the records to ascertain what surgery was planned, what way the incident caused a problem other than cervical sprain and how the congenital abnormality in the cervical spine was related to the work incident. Moreover, he anticipated a retroactive review of this claim.

Because of the opaqueness of the hearing representative and claims examiner's analysis of the medical reports of Dr. Pierce and the surgical medical reports from Massachusetts General Hospital, I find that the Office erred in not referring the medical record back to Dr. Cohen for his medical opinion on whether the surgery was necessitated by the work incident. I would remand this case for such a referral to ascertain whether Dr. Cohen's questions had been answered to his satisfaction to warrant his approval of the requested authorization for surgery.

As the record now stands, Dr. Pierce's opinion supporting causal relation and the necessity for surgery conflicts with the opinion of the Office medical adviser, Dr. Cohen, who initially disapproved the requested surgery pursuant to section 8103 of the Act.

This being the case I would set aside the Office's decision dated July 27, 2001 and remand this case for resolution of the conflict pursuant to section 8123 of the Federal Employees' Compensation Act, which provides: "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]

For the foregoing reasons, I feel compelled to record this dissent.

Willie T.C. Thomas
Alternate Member

[10] 5 U.S.C. § 8123.