

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LOUIS J. TERRUSO and FEDERAL JUDICIARY,  
MIDDLE DISTRICT COURT, Scranton, Pa.

*Docket No. 97-652; Submitted on the Record;  
Issued December 15, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an occupational injury which caused or aggravated his cervical disc condition.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

In the present case, appellant, a federal court stenographer, initially filed a notice of traumatic injury alleging that he had sustained a cervical injury while moving computer equipment at work on March 29, 1991. The medical evidence appellant submitted in support of this claim, however, only noted a nonemployment incident occurring while he was carrying luggage on or about April 1, 1991 and appellant's continued work duties as the cause of his cervical condition. The Office of Workers' Compensation Programs denied appellant's claim for injury on March 29, 1991 and advised appellant that he should file a claim for occupational injury.

Appellant thereafter filed this occupational disease claim. He alleged that he returned to work for the first time after March 29, 1991 on April 8, 1991. Appellant explained that while sitting over his stenographic machine with his arms in an outstretched position, severe pain in his neck, right arm and right hand suddenly returned and made it impossible to continue working. He stated that he again tried to work on April 9 and April 15, 1991, but on both those days, after a short time performing his stenographic duties, his pain increased to an unbearable degree. Appellant stated that he was unable to work from April 15 until October 15, 1991. The Office denied appellant's claim on June 2, 1994 on the grounds that fact of injury was not established. By decision dated June 19, 1995, an Office hearing representative found that the case was not in posture for decision. The hearing representative found appellant had established that on the days of April 8, 9, and 15, 1991, he sat over his stenographic machine with his arms in an outstretched position for less than one hour each day, and that he had submitted an affirmative, but not sufficiently rationalized opinion from his treating physician, Dr. Joseph E. Cronkey, a Board-certified orthopedic surgeon, that his work aggravated his cervical condition. The hearing representative stated that the Office should prepare a statement of accepted facts and obtain a supplemental report from Dr. Cronkey or obtain a second opinion medical report to clarify the

issue of causal relationship, and after such further development as necessary, issue a *de novo* decision.

On remand the Office requested that Dr. Cronkey clarify his report. As the Office did not receive a timely response from Dr. Cronkey, the Office referred appellant to Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office thereafter denied appellant's claim on the grounds that Dr. Sgarlat's report represented the weight of the medical opinion evidence and established that appellant's preexisting cervical disc condition was not aggravated by the employment activities of April 8, 9 and 15, 1991. In a decision dated May 30, 1996, an Office hearing representative found that the case was not in posture for decision as the medical evidence of record required further development by the Office. The hearing representative found that Dr. Sgarlat's report was ambiguous and unrationalized and was unclear as to whether the physician concluded that appellant's described work activities on April 8, 9 and 15, 1991 had, or had not, aggravated appellant cervical disc condition. The hearing representative remanded the case to the Office for the Office to obtain a supplemental report from Dr. Sgarlat, and after receipt of the supplemental report, for a careful review of the medical evidence to determine whether there was a conflict in the medical opinion evidence. The Office did obtain supplemental reports from Drs. Sgarlat and Cronkey. The Office again denied appellant's claim by decision dated August 21, 1996 on the grounds that Dr. Sgarlat's report constituted the weight of the medical evidence and demonstrated that appellant's medical condition was not causally related to his employment.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion, necessitating referral to an impartial medical specialist pursuant to section 8123(a) of the Federal Employees' Compensation Act.<sup>1</sup>

The Board finds that there is a conflict in the medical evidence of record as to whether appellant's work activities on April 8, 9 and 15, 1991 caused or aggravated his cervical condition.

In the present case, the Office's second opinion physician, Dr. Sgarlat, stated in his July 10, 1996 report, that appellant's performance of his stenographic duties for less than one hour on April 8, 9 and 15, 1991 would not be sufficient trauma to aggravate his preexisting neck condition and prevent him from continuing to work. Dr. Sgarlat explained that "working at a steno machine with the arms outstretched does not really place any unusual strain on the neck." He noted that work which required a lot of twisting and turning of the neck particularly looking overhead, such as, in painting a ceiling, for example, would place a significant strain on the neck.

Appellant's treating physician, Dr. Cronkey, opined in a report dated December 19, 1995 that appellant had a preexisting cervical condition that was aggravated by appellant's transcribing of testimony and editing transcripts on April 8, 9 and 15, 1991. Dr. Cronkey has explained that appellant had a cervical disc condition prior to April 8, 1991. He further explained that appellant's duties as a court stenographer required work over a stenographic machine and over a computer terminal. Dr. Cronkey stated that in this position, the head is tilted forward over the body producing an incredible amount of strain in the cervical spine and this was

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<sup>1</sup> 5 U.S.C. § 8123(a).

the case with appellant, whose symptoms were significantly aggravated by his performance of his duties a federal court reporter. Dr. Cronkey concluded that appellant's preexisting cervical condition was aggravated by his work activities during the question in period.

The Board finds that the reports of Dr. Sgarlat and Dr. Cronkey are of virtual equal weight and rationale and provide conflicting medical opinions as to whether appellant sustained aggravation of his cervical condition due to his employment activities from April 8 to 15, 1991. In situations where there exists opposing medical reports of virtually equal weight and rationale, the Office should refer the case to an impartial medical specialist for the purpose of resolving the conflict.<sup>2</sup> To resolve the conflict in the present case, the Office should refer appellant, the case record, and a statement of accepted facts to an appropriate medical specialist for an impartial evaluation, diagnosis of the condition, and an opinion as to whether diagnosed condition was caused or aggravated by appellant's employment in accordance with 5 U.S.C. § 8123(a).<sup>3</sup> After this and such development as it deems necessary, the Office shall issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated August 21, 1996 is hereby set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
December 15, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>2</sup> *John F. Cain*, 46 ECAB 565 (1995).

<sup>3</sup> If the impartial medical specialist determines that appellant's condition was aggravated by his employment duties, the specialist shall also address whether such aggravation was permanent or temporary, the period of disability caused by such aggravation, and whether appellant's cervical disc surgery was causally related to the employment-related aggravation.