U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUNG S. SIM and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

Docket No. 03-1108; Submitted on the Record;
Issued September 9, 2003

DECISION and ORDER

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

The issue is whether appellant has established a recurrence of disability causally related to her employment injury.

The case has been before the Board on prior appeals. In a decision dated June 30, 1992, the Board affirmed a decision of the Office of Workers' Compensation Programs finding that residuals of the October 15, 1986 low back strain had ceased by December 5, 1986.[1] In a decision dated August 4, 1995, the Board affirmed that appellant's request for reconsideration was untimely and failed to show clear evidence of error.[2] By decision dated May 10, 2001, the Board remanded the case to the Office for further development.[3] The Board noted that appellant had filed a claim on January 8, 1998 for a recurrence of disability and submitted probative evidence in support of her claim. The history of the case is provided in the Board's prior decisions and is incorporated herein by reference.

On remand the Office referred appellant, medical records and a statement of accepted facts, to Dr. Richard G. McCollum, an orthopedic surgeon. In a report dated April 20, 2002, Dr. McCollum provided a history and results on examination. He diagnosed low back strain, resolved and chronic low back pain, etiology unknown. He opined that there was no disabling lumbar strain on or after January 8, 1998 that was caused by the October 15, 1986 employment injury. Dr. McCollum stated that the examination was unremarkable and included symptom magnification. He concluded that there was no treatable condition and no need for work restrictions.

[1] Docket No. 92-4 (issued June 30, 1992).

[2] Docket No. 94-442 (issued August 4, 1995).

[3] Docket No. 00-1400 (issued May 10, 2001).

By decision dated May 3, 2002, the Office determined that the evidence was not sufficient to establish a recurrence of disability commencing January 8, 1998. The Office found that the weight of the evidence was represented by Dr. McCollum.

Appellant requested a hearing and submitted additional medical evidence from her treating family practitioner, Dr. Gregory Vaughan. In a report dated November 5, 2002, Dr. Vaughan stated that he had followed appellant for many years for an injury to the lumbar spine dating back to 1986. Dr. Vaughan opined that appellant was disabled from the back pain, finding that appellant had recurrent tenderness and induration in the lumbar region.

In a report dated January 6, 2003, Dr. Vaughan stated that he disagreed with the second opinion physician Dr. McCollum. Dr. Vaughan indicated that appellant had consistent pain in the midline lumbosacral area with frequent exacerbations. He opined that appellant was not malingering, that her pain responses were the result of a desire to make examiners understand the pain she was experiencing and he concluded that the low back strain had not resolved.

By decision dated February 11, 2003, an Office hearing representative affirmed the May 3, 2002 Office decision.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

In this case, the second opinion physician, Dr. McCollum, opined that appellant's employment-related lumbar strain had resolved and as of January 8, 1998 appellant did not have a disabling condition. The hearing representative found that Dr. McCollum represented the weight of the evidence, noting that he was an orthopedic surgeon, examined appellant and prior reports and was provided with a statement of accepted facts. As the Board noted in its prior appeal, however, the attending physician, Dr. Vaughan, provided probative medical evidence in support of a continuing employment-related disabling condition. In addition, Dr. Vaughan provided further medical reports reiterating his opinion. In the January 6, 2003 report, Dr. Vaughan indicated that he disagreed with Dr. McCollum and reported his findings on examination with respect to an employment-related condition. The record indicates that Dr. Vaughan was familiar with the employment injury and the medical record and he provided a reasoned medical opinion that conflicts with the opinion of Dr. McCollum.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[4] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[5]

[4] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[5] *William C. Bush*, 40 ECAB 1064 (1989).

The Board finds that there is a conflict in the medical evidence between Drs. Vaughan and McCollum. In accordance with section 8123(a), the case will be remanded to the Office for resolution of the conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated February 11, 2003 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
September 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member