

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

W.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 08-2411
Issued: September 24, 2009**

Appearances:
Steven E. Brown, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 5, 2008 appellant, through counsel, filed a timely appeal from the September 27, 2007 and August 4, 2008 merit decisions of the Office of Workers' Compensation Programs denying his claim to accept certain medical conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision.

ISSUE

The issue is whether appellant has met his burden of proof to establish that certain medical conditions are causally related to his January 5, 2001 employment injury.

Appellant's attorney contends on appeal that the Board should either accept appellant's claim or find a conflict in medical opinion.

FACTUAL HISTORY

On January 5, 2001 appellant, then a 54-year-old tractor trailer operator, sustained injury in a motor vehicle accident when a car ran a stop sign and hit his postal truck. Dr. Mark Newman, a Board-certified orthopedic surgeon, saw appellant on January 5, 2001, the date of the

accident. Appellant advised that he was driving his employment vehicle when a fast moving car rear-ended his vehicle. He noted that he was wearing his seat belt. Appellant noted that he had no prior back injuries. Dr. Newman noted that, at the time of his visit, appellant was complaining of back pain with spasm and numbness. His examination findings indicated normal gait, not antalgic, no limping, no tenderness to pressure found at the cervical spine with a full range of motion in all directions. Dr. Newman also found minimal tenderness to pressure in the paraspinal region of the low back with full range of motion in all planes. Straight right leg raising was negative. Bilateral upper and lower extremities were negative. Motor and sensory examination intake revealed negative clonus and negative Babinski's. Dr. Newman diagnosed back strain and gave appellant a lumbar support which he instructed him to wear.

Appellant was treated by a physician at U.S. Health Works on that date, who noted objective findings of mild lumbar/muscle sprain/tenderness. The physician diagnosed back strain and advised that appellant could return to work immediately but was limited to a sit down job for three days during which time he had to wear back support. The employing establishment accommodated his work restrictions. On January 18, 2001 Dr. Newman advised that appellant was discharged from care and could work without any permanent work restrictions. By letter dated February 7, 2001, the Office accepted appellant's claim for a minor lumbar strain.

Appellant retired effective December 17, 2003.

Appellant underwent diagnostic evaluations in January and February 2004. On January 29, 2004 Dr. Sean Johnston, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan on appellant's left shoulder. It revealed acromioclavicular arthritis, a partial thickness tear of the supraspinatus tendon and bicipital tenosynovitis. An MRI scan of appellant's cervical spine revealed disc space narrowing at C3-4 and C6-7 with no signal abnormality. On February 10, 2004 Dr. Thomas M. Heric, a Board-certified neurologist, noted progressive atrophy and weakness in both hands with probable C7 radiculopathy versus severe right carpal tunnel syndrome. A nerve conduction study of February 11, 2004 was interpreted by Dr. Heric as suggestive of the presence of right ulnar nerve dysfunction. An electromyographic report of the upper extremities performed on the same date was interpreted by Dr. Heric as evincing some abnormality affecting the right median nerve distribution.

In a February 26, 2004 report, Dr. William Simpson, an attending orthopedic surgeon, noted that appellant initially presented to his office on January 15, 2004. Appellant had symptoms with respect to his neck, left shoulder, right elbow, right wrist and lower back. He informed Dr. Simpson that he sustained these injuries on January 5, 2001 in a work-related motor vehicle accident. Appellant described the impact as so forceful that the engine of the other car was "knocked out of the car." Dr. Simpson listed his impressions as: (1) multilevel cervical disc herniations with associated moderate-to-severe neuroforaminal stenosis; (2) cervical spondylosis; (3) chronic, superimposed cervical musculoligamentous sprain; (4) multilevel lumbar disc herniations with associated moderate-to-severe neuroforaminal stenosis; (5) superimposed thoracolumbar musculoligamentous sprain; (6) lumbar spondylosis; (7) ulnar nerve compression neuropathy at the right elbow; (8) carpal tunnel syndrome of the right wrist; and (9) situational depressive affective disorder. He opined that appellant's evaluation, based on history, clinical examination, radiographs, scans, nerve and muscle examinations, suggests "that the described mechanism-of-injury appears consistent with his history, symptoms and findings."

Dr. Simpson noted that the hyperflexion/extension forces applied to the already twisted neck caused injury. The soft tissues tore resulting in hematoma formation and resulting inflammation. Although Dr. Simpson believed that appellant may have had predisposing soft tissue and bone changes prior to the accident, the force of the collision caused left shoulder stress as he had a grip on the steering wheel during the accident which caused microtears in the soft tissues about the shoulder. This was supported by an MRI scan finding of partial thickness tear of the rotator cuff which precipitated the development of impingement syndrome. Dr. Simpson advised that the force of appellant's accident caused right elbow stress, which precipitated the chronic swelling causing symptomatic compression of the ulnar nerve at the elbow. The soft tissue around the nerve became thickened which caused compression on the nerve. Dr. Simpson noted that, although appellant may have had preexisting work-related repetitive right wrist trauma, the force of the accident caused micro-tearing of soft tissue structures around the median nerve and the transverse carpal ligament. This resulted in hematoma formation and inflammatory changes about the ligament and that the chronic swelling and now-enlarged transverse carpal ligament causes compression about the right median nerve. As to the lower back, pain was associated with inflammatory changes about the fibrotic musculoligamentous and myofascial soft tissues. While some of appellant's lower back pain was associated with chronic irritation of the sciatic nerve, recurrent spinal nerve branches and lumbar disc capsular nerve branches; chronic scar tissue, which resulted from multiple surgeries all associated with changes of the lower back structures, which resulted from his injury. He also noted various behavior changes. Dr. Simpson opined that appellant's disabling medical conditions were incompatible with any gainful employment or retention in his position as a tractor trailer operator. He noted that reasonable accommodations were not an option and that appellant was totally disabled. On April 28, 2004 Dr. Simpson reiterated that appellant remained totally disabled.

Appellant filed a claim for a schedule award on January 11, 2005. By decision dated June 2, 2005, the Office denied his claim finding that his claim was accepted for a lumbar strain.

On March 6, 2005 appellant submitted the December 19, 2002 report of Dr. Henry S. Johnson, a Board-certified internist, who first treated him on that date. Dr. Johnson listed appellant's chief complaints as lumbar pain with radiation, neck pain with headaches, shoulder pain with stiffness, bilateral wrist/hand pain with chronic swelling of the right hand, depression and insomnia. He listed impressions of cervical spondylosis, chronic causalgia secondary to herniated lumbar disc, degenerative arthritis of the lumbar spine, cervical radiculopathy and muscle contraction headaches, degenerative cervical disc disease, bilateral carpal tunnel syndrome, tenosynovitis of right forearm, bilateral capsulitis of the shoulder, left shoulder impingement syndrome and general anxiety disorder. Dr. Johnson stated that appellant suffered from "an overwhelming degree of physical impairment, which definitely limits his ability to engage in any substantial gainful activity." He had symptoms of chronic pain which persisted from the motor vehicle accidents. Dr. Johnson noted that appellant had physical and psychological impairments which would preclude him from functioning in a gainful capacity or maintain employment. He opined that appellant's prognosis for recovery was poor.

On April 15, 2005 appellant submitted copies of accident reports pertaining to the January 5, 2001 incident. On that date, at approximately 14:20 p.m. appellant, a tractor/trailer operator, was traveling north on Alavon in the second lane. The private driver was traveling east bound on 68th Street. The private driver failed to stop at the stop sign and collided with the left

side of the postal vehicle causing damage to the left side of the bumper and step. It noted that the private driver left the scene of the accident. Another report from the accident indicated that appellant was driving a 1990 "Mack" and that the damage to the employing establishment vehicle was estimated to be around \$600.00. Appellant estimated his speed at the time of the accident as between 5 to 10 miles an hour. The damage to the other vehicle, a 1984 Pontiac Trans Am Firebird, was estimated to be \$2,000.00. This report also noted that the hood of the other vehicle was pushed into engine. The report noted that appellant was wearing his seatbelt at the time of the accident. In a February 8, 2001 accident review, the chairperson of the Accident Review Board for the employer noted that on January 5, 2001 appellant was headed northbound on Avalon in heavy traffic. A private vehicle was traveling eastbound on 68th Street, ran the stop sign, hit two vehicles, crossed three lanes and hit appellant's vehicle. The other driver told appellant that he did not have a driver's license or insurance and was getting ready to run but his vehicle would not start. The other driver then left the scene on foot prior to the Los Angeles Police arriving on the scene.

By letter dated June 10, 2005, appellant's attorney asked that the Office expand appellant's claim to include the additional conditions noted in the reports of Dr. Johnson and Dr. Simpson.

By decision dated August 3, 2005, the Office denied appellant's request to expand his claim. It found that the medical evidence of record was not sufficient to establish that the additional lumbar cervical, right upper extremity conditions or depression were due to the accepted motor vehicle accident.

On May 9, 2006 appellant, through counsel, requested reconsideration.

By letter dated May 31, 2006, the Office referred appellant to Dr. Joseph Pierce Conaty, a Board-certified orthopedic surgeon, for a second opinion. In a report dated June 15, 2006, Dr. Conaty disagreed with Dr. Johnson, advising that there were currently no injury-related conditions or disability, either objective or subjective. Although appellant's lumbosacral strain resulted in an aggravation of the preexisting degenerative disc disease, temporary and lasted only some six months as a result of the soft tissue injury. After six months, any ongoing symptoms would be attributed solely to the preexisting degenerative changes of the cervical and lumbar spine. Dr. Conaty believed that all of appellant's present complaints were attributable to preexisting conditions. He agreed that appellant was not able to perform his usual employment secondary to change referable to the cervical spine. However, appellant was capable of working eight hours a day with physical restrictions. In a July 15, 2006 supplemental report, Dr. Conaty reiterated that the soft tissue injuries appellant sustained in the January 5, 2001 motor vehicle accident temporarily aggravated the preexisting degenerative condition, which healed within six months. Any symptomatology following this was attributed to degenerative changes. Dr. Conaty reiterated that appellant's carpal tunnel and ulnar conditions were not related to the motor vehicle accident, stating that it was hard to imagine that a motor vehicle accident resulting in \$600.00 worth of damage to his vehicle played any role in his carpal tunnel or ulnar nerve injuries.

By decision dated August 3, 2006, the Office found that the weight of medical opinion rested with Dr. Conaty. It noted that, both physicians provided complete reports and rationale

but that the factual history of the motor vehicle accident described by Dr. Simpson, “does not appear to be entirely accurate.” The Office also noted that Dr. Simpson did not address the possibility that appellant’s conditions were related to aging or other factors. Dr. Conaty’s conclusion that the soft tissue injuries resolved in six months was more convincing.

By letter dated May 14, 2007, appellant, through his attorney, requested reconsideration. In a March 9, 2007 report, Dr. Simpson reviewed additional medical records. He disagreed with Dr. Conaty’s conclusion that all of appellant’s positive findings resulted from conditions prior to the January 5, 2001 accident. Dr. Simpson noted that appellant had been a truck and trailer operator for nearly 25 years and would not have been able to perform his job if he had all these injuries. He noted that Dr. Conaty found that appellant’s work limitations were from previous injuries but there was no history of previous injuries. In a March 26, 2007 supplemental report, Dr. Simpson opined that it was inappropriate to correlate the degree of damage to the motor vehicles to the physical damage to a patient riding in the vehicle at the time of the accident. He listed multiple factors that would affect the amount of injury a person would sustain. Dr. Simpson reiterated his opinion that appellant sustained a chronic cervical musculoligamentous sprain; bilateral chronic carpal tunnel syndrome in wrists; chronic thoracolumbar musculoligamentous sprain; chronic muscle tension contraction headaches; cervical spondylosis; lumbar spondylosis; multiple-level lumbar disc herniations with associated moderate-to-severe neuroforaminal stenosis; and ulnar nerve compression neuropathy of the right wrist. He opined that none of appellant’s conditions were associated with any prior injury as he was in good health prior to the accident.

In a decision dated September 27, 2007, the Office denied modification of its prior decision.

On April 30, 2008 appellant, through counsel, again requested reconsideration.

On December 6, 2007 Dr. Simpson advised that appellant’s conditions were not due to aging. He noted that knowledge of the exact forces sustained in the automobile accident did not reduce the fact that appellant sustained injury. It was unreasonable to attempt to correlate the degree of appellant’s injuries to the visual damage of the automobile involved. Dr. Simpson stated that the contemporaneous medical evidence was not the only relevant factor in determining whether appellant sustained injuries in the motor vehicle accident as endorphins as adrenaline were released that often decreased or covered up pain. Therefore the contemporaneous medical evidence should not be considered the only evidence or even the most important evidence in determining the degree of appellant’s injuries.

By decision dated August 4, 2008, the Office found that the weight of the medical opinion rested with Dr. Conaty.

LEGAL PRECEDENT

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a

specific employment incident or to specific conditions of employment.¹ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical 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 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 established incident or factor of employment.²

Section 8123 of the Federal Employees' Compensation 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.³ 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, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

ANALYSIS

The Office accepted that appellant sustained a minor lumbar strain as a result of the January 5, 2001 motor vehicle accident. This accident occurred when the truck appellant was driving was struck on the left side of his vehicle by a Pontiac Trans Am that ran a stop sign, hit two other cars and crossed three lanes of traffic. Appellant was wearing his seat belt at the time of the collision and estimated that he was traveling 5 to 10 miles per hour. The treatment by Dr. Newman listed findings on examination and diagnosed a lumbar strain. Appellant was released to full duty on January 18, 2001. He submitted additional medical evidence and contended that his claim should be expanded to include other conditions. The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion. The Board notes that appellant initially sought medical treatment the date of the accident, January 5, 2001. Appellant was discharged from care on January 18, 2001 and told he could work without work restrictions. There is no record that appellant sought follow-up medical care until he saw Dr. Johnson on December 19, 2002. No x-rays or diagnostic tests were conducted until January and February 2004.

Dr. Simpson, an attending orthopedic surgeon, found that appellant's neck, left shoulder, right elbow, right wrist and lower back conditions were a result of the January 5, 2001 employment-related accident. He noted that appellant described that the force of this accident

¹ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

² *John W. Montoya*, 54 ECAB 306 (2003).

³ 5 U.S.C. § 8123.

⁴ *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Barry Neutuch*, 54 ECAB 313 (2003).

was so great that the engine of the vehicle hitting appellant's truck was knocked out of the car.⁵ Dr. Simpson also noted behavioral changes as a direct result of the other injuries sustained in this accident. He advised that appellant was totally disabled. The Office referred appellant to Dr. Conaty for a second opinion. Dr. Conaty advised that the injury sustained in the January 5, 2001 employment-related accident resulted in a temporary aggravation of his preexisting degenerative condition, resolved within six months of the accident. He noted that appellant was described as having sustained only a soft tissue injury of the low back which had resolved without residual symptoms. Dr. Conaty stated that appellant could return to duty with restrictions based on his preexisting degenerative disease. On May 14, 2007 Dr. Simpson disagreed with the opinion of Dr. Conaty. He noted that Dr. Conaty found that appellant's work limitations were the result of prior injuries but stated that there was no history of any prior injuries. Dr. Simpson noted that it was inappropriate for Dr. Conaty to correlate the degree of damage to appellant's truck to the degree of injury he sustained. He stated that appellant was in good health prior to the motor vehicle accident and that there was no evidence that he had experienced an accelerated or abnormal aging process. Dr. Simpson advised that the medical evidence contemporaneous to the accident in 2001 was not the only valid evidence and that it was naive to assume that appellant only sustained a minor back injury as a result of the accident.

The Board finds that there is a conflict in medical opinion between Dr. Simpson, appellant's physician, and Dr. Conaty, the second opinion physician, as to the extent of injury appellant sustained as a result of the January 5, 2001 motor vehicle accident and the relationship of the additional medical conditions attributed to the injury.

The case will be remanded to the Office for referral of appellant to an appropriate impartial medical specialist to resolve the conflict in medical opinion. After such development as the Office deems necessary, a *de novo* decision shall be issued.⁶

CONCLUSION

The Board finds that this case is not in posture for decision.

⁵ The Board notes that this statement appears to be an embellishment of the facts with regard to the level of impact as set forth in the accident reports.

⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4, 2008 and September 27, 2007 are set aside and the case remanded for further consideration consistent with this opinion.

Issued: September 24, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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