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

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| **MIRNA CRUZ, Appellant** | ) | |
| **and** | ) | **Docket No. 06-183** |
| | ) | **Issued: April 5, 2006** |
| **U. S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer** | ) | |

*Appearances:*
*Stephen D. Scavuzzo, Esq*., for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 2, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 5, 2005 which denied modification of a November 17, 2003 merit decision, finding that she failed to establish an injury in the performance of duty. Pursuant to 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 has met her burden of proof in establishing that she sustained an injury in the performance of duty.

### ***FACTUAL HISTORY***

This case has previously been on appeal before the Board.[1] In a May 1, 2003 decision, the Board set aside an August 26, 2002 Office decision and remanded the case for further proceedings. The Board determined that the case was not in posture for decision as the Office

[1] Docket No. 03-570 (issued May 1, 2003).

had requested information from two second opinion physicians, Dr. Michael J. Carciente, a Board-certified neurologist, and Dr. Kenneth Falvo, a Board-certified orthopedic surgeon. The Board found that after the Office received the opinions of Dr. Carciente and Dr. Falvo, it determined that they were of no assistance and relied upon the report of appellant's treating physician, Dr. Nicholas Panaro, Board-certified in physical medicine and rehabilitation. The Board found that as the Office sought the opinions of two medical specialists, it had the responsibility to obtain an opinion that adequately addressed the issue presented in the case. The Board directed the Office to secure a supplemental medical report containing a reasoned opinion on the relevant issue of whether appellant's condition of repetitive stress disorder and her preexisting condition of spondylolisthesis was caused or aggravated by identified compensable factors of employment. The facts and history contained in the prior appeal are incorporated by reference.

By letter dated September 5, 2003, the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. John H. Buckner, a Board-certified orthopedic surgeon.[2]

In an October 6, 2003 report, Dr. Buckner noted appellant's history of injury and medical treatment, stating that the medical records did not contain an exact description of her job duties. Dr. Buckner indicated that appellant informed him that she "never had back pain until the injury of this file in 1997."[3] He explained that this statement would "refute her allegation that she developed back pain as a result of her work activities as a window clerk, unless she worked as a window clerk after the injury on this file in 1997."[4] Dr. Buckner conducted a physical examination and diagnosed preexisting congenital developmental spondylolisthesis with neural foraminal stenosis, mild radicular findings in the right foot and left hip. He noted that there was a history of demyelinating disease, which was indicated to be unrelated. Dr. Buckner explained that there was no documented causally related aggravation of appellant's underlying conditions of spondylolisthesis, foraminal stenosis and lumbar radiculopathy. He further noted that it was "not reasonably medically likely that the injury occurred as described. In my opinion this individual most certainly could not 'jump over a counter' and land on her feet." Dr. Buckner noted that the natural history of the disease was "variable and frequently includes the slow progression of the spondylolisthesis and related symptoms." He opined that appellant "may have experienced an exacerbation of the spondylolisthesis by repetitive heavy lifting; however, there is no documentation of the duration and extent to which such an activity may have occurred." Furthermore, Dr. Buckner noted that, if appellant attributed her low back injury to "bending, lifting, pulling and pushing in her former position as a window clerk," then he needed to review a "[j]ob analysis of each position held by the claimant over the years" as it was "critical." Dr. Buckner explained that appellant "did not report any activity to me that is likely to have

[2] In the accompanying statement of accepted facts, the Office advised that it had accepted as factual that, in 1997, appellant jumped over the counter at work when threatened by a robber. The Office also indicated that she was currently working.

[3] The record reflects that appellant filed an occupational disease claim on December 13, 2000.

[4] Dr. Buckner noted that the medical records provided did not "specify the exact duties of the claimant's job and what she actually did on a daily basis during all the years she worked at the [employing establishment]."

caused an aggravation of the spondylolisthesis." He also indicated that the spondylolisthesis was permanent, but might improve with surgery.

By decision dated November 17, 2003, the Office found that the evidence was insufficient to support that appellant sustained a medical condition causally related to her federal employment.[5]

By letter dated October 12, 2004, appellant's representative requested reconsideration. He alleged that "the decision should be reversed and the case reopened based upon the enclosed witness statements." Appellant's representative noted that the report of Dr. Buckner did not contain the exact duties of appellant's position. He alleged that the statements from appellant and coworkers proved that she worked as a window clerk and performed repetitive lifting after the injury date. Appellant's representative argued that appellant exacerbated her spondylolisthesis as a result of repetitive lifting in her window clerk position and Dr. Buckner be requested to provide an additional opinion. He also alleged that Dr. Panaro had already indicated that appellant had a work-related injury of chronic repetitive stress.

Appellant's representative submitted a statement from appellant who described her activities from June 9, 1995 until her work injury on July 21, 1997. She listed several activities under the heading of eight hours per day, they included; walking, which was unlimited; lifting up to 70 pounds, unlimited bending and squatting, climbing, kneeling, standing, pulling and pushing. Appellant also indicated that she was on her feet during this period for approximately 6 hours daily. She alleged that she lifted 20 to 50 pounds 30 times a day, bend 100 times a day and squat 30 times per day, kneel 50 times a day, push 20 to 70 pounds, 80 times each per day and pulling 20 to 70 pounds 80 times per day. Appellant alleged that after her employment injury of July 21, 1997, her condition worsened and that she was supposed to be on light duty; however, she was never given light duty and continued to work the above-mentioned duties. She alleged that her duties aggravated her spondylolisthesis and caused her to lose time from work from November 13, 1999 to April 3, 2000. Appellant alleged that on April 3, 2000, she returned to work for four hours a day and her work restrictions were reduced to walking for ½ hour, standing for 10 to 15 minutes, lifting of 0 to 5 pounds and no bending, squatting, climbing kneeling and pushing or pulling only 0 to 5 pounds. She explained that on September 25, 2000, her work restrictions changed again and advised that she was working 6 hours a day, with 2 to 4 hours of walking, lifting from 0 to 10 pounds, no bending, squatting for no more than a ½ hour, climbing for ½ to 2 hours and no kneeling, standing for 2 to 6 hours when leaning against something and intermittent breaks every 15 minutes, with sitting for 2 to 6 six hours; pushing and pulling of 0 to 10 pounds and driving for no more than 20 minutes.

By decision dated August 5, 2005, the Office denied modification of the November 17, 2003 decision.

[5] The cover letter is dated October 17, 2003; however, the decision is dated November 17, 2003.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his or 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.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. 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 implicated 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.[9]

## ***ANALYSIS***

Appellant alleged that her condition of repetitive stress disorder and her preexisting condition of spondylolisthesis was caused or aggravated by factors of her federal employment. The Board remanded the case to the Office to secure a supplemental medical report containing a reasoned opinion on the relevant issue of whether appellant's repetitive stress disorder and preexisting spondylolisthesis were caused or aggravated by her employment.

On remand, appellant was seen by Dr. Buckner, a Board-certified orthopedic surgeon and second opinion physician. Based on his October 6, 2003 report, the Office denied her claim, finding that her repetitive stress disorder and preexisting condition of spondylolisthesis were not

[6] 5 U.S.C. §§ 8101-8193.

[7] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] *Id.*

caused or aggravated by the factors of her employment. The Board finds, however, that Dr. Buckner's opinion is of diminished probative value and an insufficient basis to support the Office's denial of the claim.

In its referral of appellant to Dr. Buckner, the Office requested that he provide an opinion regarding whether her repetitive stress disorder and her preexisting condition of spondylolisthesis was caused or aggravated by identified compensable factors of employment. In the accompanying statement of accepted facts, the Office advised Dr. Buckner that it had accepted as factual that in 1997 appellant jumped over the counter at work when threatened by a robber. The Office also indicated that she was currently working. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to Dr. Buckner through the preparation of a statement of accepted facts.[10] The Office procedure manual provides:

> "When the [Office] medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[11]

In a report dated October 6, 2003, Dr. Buckner generally negated causal relationship and questioned the way the injury occurred despite the account listed in the statement of accepted facts. He opined that it was not likely that the injury occurred as described and opined that he did not believe that appellant could jump over a counter and land on her feet. It was improper for Dr. Buckner to make his own fact findings on this matter.[12] To the extent that Dr. Buckner's' opinion is outside the framework of the statement of accepted facts, it is based on an inaccurate history and, thus, of diminished probative value.[13]

Dr. Buckner indicated that the records forwarded to him did not set forth appellant's employment duties and physical requirements. Thus, while portions of his report appear to negate causal relationship, Dr. Buckner also noted that appellant may have had an exacerbation of her condition due to repetitive heavy lifting, but stated that the exact requirements and demands of her job were unclear. As noted above, a physician's report must be based on an accurate factual background. To the extent that the record does not contain an accurate listing of her job duties, the Office should appropriately supplement the record to ensure that a reviewing physician has an accurate listing of appellant's work duties and physical requirements during the

[10] *Helen Casillas*, 46 ECAB 1044 (1995).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[12] *See George Tseko*, 40 ECAB 948, 953 (1989) (a physician's function is only to provide opinions on medical questions, not to determine facts).

[13] *See Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value).

pertinent time periods. The Office should incorporate as appropriate such evidence into an updated statement of accepted facts.

The Board has held that, when the Office refers a claimant for a second opinion evaluation and the report does not adequately address the relevant issues, the Office should secure an appropriate report on the relevant issues.[14] The Board finds that Dr. Buckner did not sufficiently address the relevant matters in this case. Consequently, the case will be remanded for the Office to obtain a medical report that adequately and accurately addresses the relevant points at issue.

On remand the Office should refer the updated statement of accepted facts, the medical record and appellant to an appropriate medical specialist for examination and a reasoned medical opinion on the relevant issue of whether her condition of repetitive stress disorder and preexisting condition of spondylolisthesis was caused or aggravated by identified compensable factors of employment.[15] Following any such further development as necessary, the Office shall issue an appropriate merit decision.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision and that it must be remanded for further development of the evidence.

[14] *Ayanle A. Hashi*, 56 ECAB ___ (Docket No. 04-1620, issued December 27, 2004).

[15] After a claims examiner requests clarification of an issue from an attending physician, the Office's procedure manual provides, "The claims examiner must ensure, however, that the attending physician's reply really does dispose of the issue." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(a) (April 1993).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 5, 2005 is set aside and remanded to the Office for further proceedings consistent with this decision.

Issued: April 5, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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