

File Number:
HR10-D-H

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JUN 15 2010

Date of Injury:
Employee:

RECEIVED JUN 21 2010

Dear Ms.

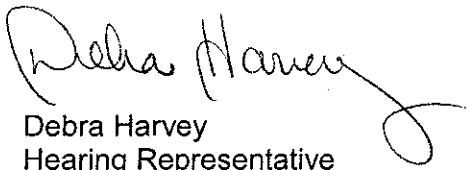
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 02/22/2010. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Denver District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 12 DEN
LONDON, KY 40742-8300

Sincerely,


Debra Harvey
Hearing Representative

DEPARTMENT OF HOMELAND SECURITY
TSA-FEDERAL AIR MARSHAL SERVICE
DENVER FIELD OFFICE
200 WEST PARKWAY DRIVE, SUITE 300
EGG HARBOR TOWNSHIP, NJ 08234

PAUL H FELSER
FELSER LAW FIRM
PO BOX 10267
SAVANNAH, GA 31412

U S DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U S Code 8101 et seq of
, Claimant, Employed by the Department of Homeland Security, Denver, Colorado. Case
No . Oral hearing was held on February 22, 2010, in Jacksonville, Florida.*

The issue is whether the claimant sustained a recurrence of disability for the period June 22 through September 21, 2009, that precluded her from performing her limited duty job.

The claimant, date of birth, , is employed by the Department of Homeland Security in Denver, Colorado, as a Federal Air Marshall. She filed the Form CA-1, Notice of Traumatic Injury, stating on January 15, 2008, while performing an exercise drill in the performance of duty she experienced an injury to her lower back and left hip as a result of a fireman's carry. Her claim was accepted for a lumbar strain and displacement of lumbar intervertebral disk without myelopathy at the L4-5 and L5-S1 levels. Recurrences of February 4, 2008, and May 15, 2008, have been accepted.

Dr. Mark Bryniarski, specialist in neurosurgery, in a report of February 19, 2009, provided a history of lower back pain and symptoms in the lower extremities after a 230 pound man jumped on her back during exercise. He stated she had frequent low back pain with paresthesias and numbness in the buttocks, thighs, and into the knees. He stated the symptoms were increased with sitting, standing and lifting. "She has tried physical therapy without any effect. She does not want to take any medications for her pain especially because it is a requirement at her work." He reviewed the MRI scans and x-rays and stated they showed mild degenerative disk disease, with a "very mild" disk bulge at L5-S1 level centrally with no evidence of nerve root compression. He stated the x-rays showed a bilateral L5 pars defect. The impression was lumbar spondylosis with mild degenerative disk disease and "definitely bilateral L5 pars defect. This may potentially be the cause of her problem." He ordered another MRI of the lumbar spine that was performed on March 13, 2009. The radiologist read the MRI as normal at L1-2 and L2-3. The L3-4 level showed minimal facet arthropathy without stenosis. "At L4-5 the disc is degenerated. There is minimal loss of height and minimal diffuse annular bulge. The facet joints are normal. The canal and foramina are normal. At L5-S1, the disc is degenerated with mild diffuse annular bulge extending laterally into the inferior aspect of both neural foramina." The impression was mild degenerative changes.

On April 7, 2009, a request for a spinal fusion was received from Dr. Bryniarski, due to the L-5 pars defect that made her lumbar spine unstable. The District Office forwarded this request to its District Medical Advisor (DMA) on April 10, 2009. The DMA stated he did not see "frank indications that would suggest a fusion is indicated in a young patient of this nature with nothing more than an spondylolisthesis with reported pain. This is a big step to address a frank unknown for diagnostic purposes, i.e. do the surgery and see if the pain goes away. I do not see that the conservative approaches have all been exhausted as well considering the date of injury is barely over a year out. There is just a real lack of information in the records, both bookmarked and non-bookmarked that suggest surgical intervention is indicated."

A follow-up note from Dr Bryniarski dated April 13, 2009, stated the lumbar spine x-ray did not reveal frank instability, "however MRI of her lumbar spine showed bilateral L5 pars defect with L5-S1 degenerative disc disease. In my opinion this is the most likely source of her incapacitating pain " He recommended a minimally invasive L5-S1 pedicle screw fixation which should lead to fusion "with most likely significant improvement or possibly even reduction of her symptoms " He stated the possibility of significant improvement with conservative treatment "is very low in view of a prolonged course and bilateral L5 pars defect which makes her lumbar spine unstable."

The Office then prepared a Statement of Accepted Facts (SOAF) and referred the claimant for a second opinion evaluation for an opinion on the requested surgery. The examination was performed on May 12, 2009, by Dr. John Douthit. Dr. Douthit provided an accurate history and noted on examination the claimant had a full range of motion with normal neurological status. "On back exam, she was noted to have equal leg lengths. She had a good stance and gait. She has strong trunk musculature. Back motion was mildly restricted fingertips coming to about 6 inches from the floor. Extension was also tender and mildly limited as was lateral bending. Straight leg raising was negative. Reflexes are brisk and equal. There was no motor or sensory loss of her legs. She had full ROM of all major joint of the upper and lower extremities and good stability of knees and good foot posture. Other than the mild restriction of back motion, the skeletal exam was normal." His impression was "low back pain with possible degenerative disc disease"

Dr. Douthit was asked, "What are the medically diagnosed conditions that are directly attributable to the incident of 01/15/2008? Please provide medical rationale for your answer. The claimant has a low back pain with possible aggravated degenerative disc disease. Medical imaging suggests this is a mild condition. Also reported by Mark Bryniarski, M.D. is possibility of pars defect with spondylolysis and instability but this is unconfirmed. I will need to see all medical imaging studies to make an assessment." He was asked if the recommended surgery was indicated and stated the following:

"A report from Dr Bryniarski notes bilateral pars defects and recommendation for fusion. The reports from three radiologists and this report of Dr. Bryniarski were in conflict. The radiologists did not read a pars defect but only mild degenerative changes and a CT showing a mild disc bulge at L4/L5. Dr. Gaynor's report read a degenerative disc at L4-5 and L5-S1 degenerative disc, but did not read into these reports pars defects as Dr. Bryniarski did. Because of this conflict in these reports, this needs to be resolved before one can make a determination regarding the indication of the surgery as the sole indication would be instability from acquired spondylolysis. I would ask these x-rays and MRIs be referred to me and I will review them. If this is inconclusive a board certified radiologist could be consulted to reread these x-rays or make recommendations to resolve this issue if still in dispute. Otherwise, there is no other indication for doing back fusion on this claimant with axial pain. There is evidence of diffuse degenerative disease but this is mild and a back fusion would not be appropriate but only those findings. She does not have neurologic findings and her radiation of leg pain is very intermittent. I do not think a case could be made for this to be a lumbar radiculopathy based on medical imaging and objective physical findings. Her leg pain is intermittent and is probably a referred pain from the lumbar spine not neurologic."

The requested films were provided to Dr. Douthit and he provided a supplemental report dated June 8, 2009. He stated he reviewed the x-ray and MRI films. He stated the x-rays showed no narrowing of the disc spaces and no pars interarticularis defect. He stated the x-rays shows

“evidence of the bifida of the lamina of the S1 vertebrae, which is an anatomical variant. There is no evidence of instability. As noted by the radiologist, there is insignificant finding of unfused epiphysis of S1 vertebrae. There is no particular narrowing of the disc spaces.” He reviewed an MRI of January 24, 2008 that showed evidence of a central disc herniation at the L5-S1 level with a posterior bulging of the L5-S1 disc. There was some bulging at L4-L5. There was no evidence of impingement or spinal stenosis. “The impression of these films is that the claimant has a bulging disc of the L5-S1 vertebrae posteriorly with some bulging at the L4-L5 disc. The plain films and MRI do not show any evidence of instability of the spine or evidence of pars interarticularis defect. This is consistent with a myelogram, which was read by Dr. Amar Shah. The myelogram was done on 10/20/2008 and was noted to show normal neuroforamina and unfused epiphysis at L5 vertebrae, which is insignificant of a normal variant. He noted that there was some mild disc bulge at L4-L5 causing mild narrowing of the canal at both lateral recesses.” He continued:

“In my review of the x-rays, I am in agreement with the two radiologists that have read the claimant’s x-rays in the past. They did not make a note of pars interarticularis defect and I see no evidence of pars interarticularis defect on the films that have been forwarded to me. Therefore, there does not appear to be justification for a fusion of the lumbar spine.”

On July 1, 2009, the Claimant filed the Form CA-2a, Notice of Recurrence, effective June 22, 2009, stating she had worked in a limited duty desk position in the operations section from May 2008 until June 2009 as she was unable to perform the duties of a federal air marshal. She stated, in an evaluation of June 11, 2009, by Dr. Bryniarski, she was told that the constant sitting was progressing and damaging her spine, the pars defect, and was causing disk displacement. She stated she was placed on bed rest with no sitting or standing. She stopped working on June 22, 2009, and was again advised that spinal surgery was needed.

A Form CA-20, Attending Physician’s Report, dated June 22, 2009, from Dr. Bryniarski was received with diagnoses of lumbar spondylosis and degenerative disc disease. He related the condition to heavy physical activity and stated the claimant was unable to work.

On July 15, 2009, the District Office wrote the claimant and requested additional evidence to support the claim for recurrence. The Office advised the claimant that since she had been performing light or limited duty at the time of the claimed recurrence, evidence to establish that she could no longer perform this duty was needed to show there was a change in the nature and extent of the injury related condition or a change in the nature and extent of the light duty requirements. She was also advised that a medical report was needed “demonstrating knowledge of all of your activities during the period when you returned to light duty and the date of recurrence 06/22/2009. This report should state the current diagnosis (displacement of intervertebral disc without myelopathy L4-5 and L5-S1) a summary of all treatments during this interim period of time, accompanied by relevant medical chart notes. It should provided [sic] a medical opinion with full medical rationale [sic] as to the etiology of the problem, whether it is still due the original employment events, ongoing or new employment since the approved injury of January 2998, and if so why, or is it due to other outside activities or events.” The claimant was also advised that Dr. Douthit had stated the recommended surgery was not indicated. She was asked to provide this information within 30 days.

An August 10, 2009, report from Dr. Bryniarski was received. He stated the claimant’s imaging studies showed degenerative disk disease at L4-5 and L5-S1 levels, with mild-to-moderate disk bulging at L5-S1 levels as well. “Because of her predominately axial pain in her lower back, her

imaging findings, especially in the MRI, correlate well with her clinical presentation” He continued:

“Duties with the Federal Air Marshal Service also require prolonged sitting or standing for many hours a day, which I have determined as not recommended in her condition. She has previously tried physical therapy with no significant improvement. Therefore, I recommended for her surgical stabilization and fusion for her lower lumbar spine. I think that likelihood for improvement with conservative therapy is very low at this point.

Although the possibility of some preexisting condition in her lumbar spine exists, I think that injury during the fireman’s carry on January 15, 2008, strongly exacerbated her degenerative condition, or even caused significant injury to her intervertebral disks in the lower lumbar spine. Continuing a conservative approach to her problem may cause further irritation to her spine and nervous structures and, therefore, carries a potential risk for her future health and safety. By definition, her condition can be also described as spine instability because of significant incapacitating pain during normal physiological performance of her spine.

As I mentioned, she has been also on prescribed narcotic medications secondary to her injury, including Tylenol No 3 and Darvocet. Other medications include Skelaxin and tramadol. Taking those medications creates a safety issue during driving and performing her duties at work.

In conclusion, I have determined that she is totally disabled from the date of June 22, 2009, until her situation improves.”

On August 18, 2009, the Office wrote Dr. Bryniarski and asked for his reasoning as to why he felt the surgery was indicated “in light of the fact that a board certified orthopedic surgeon has advised that this surgery is not feasible at this time.” He was also asked why the claimant was removed from the light duty job and what material change had occurred since the acceptance of the claim and the return to work “that is demonstrated by the objective findings, given Dr. Douthit’s review.” Dr. Bryniarski responded on August 27, 2009, stating the claimant had been injured in January 2008 during exercise. Since that injury, he stated she had been suffering with increasing, “incapacitating” lower back pain with occasional lower extremity pain. He stated her job requires “significant” physical endurance and her imaging studies indicated “significant” degenerative disk disease at L4-5 and L5-S1 with disk bulging at L5-S1 and that “secondary to continuing and frequently incapacitating pain, her condition qualifies as spinal instability.” He went on to describe spinal instability as a condition “when under normal physiologic loads, the patient’s spine indicates mechanical misalignment OR new or persistent neurologic deficits, OR persistent and incapacitating pain.” He stated the claimant has suffered from persistent and incapacitating pain since January 2008. He stated there was no evidence of mechanical misalignment but there was evidence of degenerative disc disease in the lumbar spine. He stated physical therapy and pain control had not improved her situation and he recommended a minimally invasive lower lumbar fusion for stabilization and noted that he felt at her young age, she had high chances for improvement and a good outcome after the surgery.

He stated he determined the claimant was totally disabled secondary to “continuing significant and persistent pain.” He stated that continuing even limited physical activity would prolong her suffering “and most likely increase her problem in the lumbar spine, possibly requiring a much more major operation in the future and possibly significant disability, without intervention at the present time.” He noted that back surgery could be controversial but he disagreed with Dr

Douthit. "The very fact that additional imaging studies did not confirm the presence of pars interarticularis defect does not constitute an immediate exclusion from considering spinal fusion. This is the mainstay argument in Dr. Douthit's report, which I think is mistaken. Again, in my opinion, chances for improvement without surgery, after such a prolonged time with conservative treatment, are relatively low. Therefore, again, my recommendation is to perform minimally invasive lumbar fusion. In view of the above findings, I would not recommend continuing physical activity for Natalie, even at the lowest levels."

The claimant provided a written statement stating on the date of recurrence, she was working in the Operations Section of the Denver Field Office. She stated she sits for prolonged periods of time entering data into a computer. She stated she has to sit erect while performing this duty due to her previous back injury. She stated her back pain and stiffness increased and she went to see Dr. Bryniarski who placed her on medication to relieve muscle spasms and pain as a result of the disc displacement. She stated he believed her spine was becoming "unstable and unsafe, thus taking me off work status at this time." She denied any incidents outside work that would contribute to the back problem.

On September 1, 2009, the District Office denied the claim, finding the doctor had not provided rationale to support his opinion that she could not continue her limited duty job.

The claimant returned to work on September 22, 2009.

The claimant disagreed with the Office's decision to deny her claim for recurrence and, through her Attorney, Paul Felser, requested an oral hearing before an OWCP Hearing Representative. The hearing was held on February 22, 2010, in Jacksonville, Florida. The claimant did not appear for the hearing, but was represented by Mr. Felser. He argued that the claimant was unable to work as an Air Marshal and that her disability had been sufficiently documented.

Mr. Felser was advised that a supplemental report from the treating physician was needed. It was noted that Dr. Bryniarski had changed his diagnosis from a pars defect to degenerative disk disease and stated he was holding the claimant off work due to pain which is not a basis for compensation. Mr. Felser was advised that documentation for holding the claimant off work was needed, as well as additional documentation to justify the surgery request was needed.

The record was left open to allow for receipt of additional evidence. A copy of the hearing transcript was sent to the Employing Agency on March 10, 2010, for review and comment.

On April 2, 2010, Mr. Felser submitted a brief in which he stated the evidence appeared to support a compensable claim. At the least, he stated, there was a conflict in medical opinion that required a referee evaluation. Prior statements from Mr. Felser, along with medical reports that have been previously submitted were received.

In this case, Dr. Bryniarski has stated the claimant has degenerative disk disease that was resultant from the original injury. He has opined for a lumbar fusion due to spinal instability and stated the claimant was unable to work due to pain from this instability for the closed period claimed. Dr. Douthit, the second opinion examiner, has stated the claimant had possible aggravated degenerative disc disease. In his supplemental report, he stated the claimant did not have a pars defect but the review of the x-rays showed bulging discs and a herniation. He did not provide any firm diagnosis. He merely ruled out surgery based on the pars defect. He did not comment on the claimant's ability to work.

I find that the reports from neither of these physicians is sufficient to carry the weight of the evidence. Dr Bryniarski does not provide sufficient rationale to support his opinion that the claimant was disabled for the period claimed. He does not provide sufficient rationale to establish the claimed surgery is indicated for an employment-related condition. However, Dr. Douthit does not even provide a diagnosis. He merely comments on the request for surgery due to a pars defect. The reports from these physicians carry equal weight.

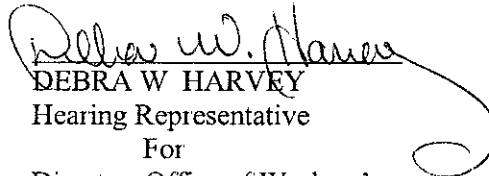
Section 8123(a) [of the FECA] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹ When there are opposing medical reports of virtually equal weight and rationale, the case will be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical opinion.²

In this case, the Office should update the SOAF as needed and refer the claimant to an appropriate Board-certified medical specialist for a referee examination. The physician should be asked to provide a history of the injury, objective findings found on examination, firm diagnosis (es), and a rationalized opinion as to whether the claimant has a pars defect. If so, the relationship between this condition and employment should be explained with medical rationale. The physician should also be asked if the claimant's degenerative disc disease of the lumbar spine was caused, aggravated or exacerbated by the employment injury. The physician should be asked if the claimant was totally disabled from her limited duty job for the period claimed, June 22 – September 21, 2009, and whether the proposed surgery is indicated for an employment-related condition. Rationale for all opinions should be provided and any further diagnostic testing requested should be authorized. After this examination has been completed, and after completion of any additional development the Office deems necessary, a *de novo* decision should be issued on the recurrence and proposed surgery.

Therefore, the decision of the District Office dated September 2, 2009, is hereby SET ASIDE and the file REMANDED for action as described above.

DATED: JUN 15 2010

WASHINGTON, D.C


DEBRA W HARVEY
Hearing Representative
For
Director, Office of Workers'
Compensation Programs

¹ *Vaheh Mokhtarians*, 51 ECAB ____ (Docket No. 97-2381, issued December 3, 1999)

² *Cathy B. Millin*, 51 ECAB ____ (Docket No. 97-2898, issued February 10, 2000)