U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. BREWER and U.S. POSTAL SERVICE,
POST OFFICE, Platteville, CO

Docket No. 99-599; Submitted on the Record;
Issued December 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for back surgery.

On February 24, 1992 appellant, then a 36-year-old letter carrier, injured his lower back while lifting heavy boxes. He filed a claim for benefits on February 27, 1992, which the Office accepted for lumbar back strain. The Office subsequently expanded its acceptance of the claim to include lumbar disc protrusion with nerve root compression, and herniated discs at L4-5 and L5-S1. The Office also authorized several surgical procedures for appellant's lower back.

On March 6, 1996 appellant's new treating physician, Dr. Kenneth A. Pettine, a Board-certified orthopedic surgeon, found that appellant was disabled from performing all forms of work other than sedentary work, and on March 29, 1996 requested authorization to perform additional back surgery.

The Office referred appellant for a second opinion examination with Dr. John T. McBride, a Board-certified orthopedic surgeon, who, in a report dated April 25, 1996, stated that surgery should be considered as a last resort after further diagnostic testing was completed. He advised, however, that his opinion be guarded because he believed appellant's pain behavior was exaggerated and that the surgery should be carried out only if appellant was willing to stop smoking in order to enhance his chances of success.

In a report dated June 18, 1996, Dr. Pettine stated that he had "no problems" with Dr. McBride's recommendations.

On July 8, 1996 the Office received a memorandum and videotape from the employing establishment, which documented appellant installing an air conditioning unit on June 25, 1996, and depicted him repetitively bending, stooping, reaching, and squatting for extended periods of time with no apparent discomfort.

In a report dated August 3, 1996, Dr. McBride stated that he had reviewed the videotape and concluded that appellant had a significantly greater range of motion than he had previously, and that he would modify his disability rating based on appellant's ability to move and flex in a much greater range of motion; "*i.e.*, having no restrictions on his lumbar spine motion." He stated that his prior recommendations for surgery were based on a patient who was truthful and reported accurate findings, and commented:

> "The one important finding of this video is that [appellant], at least on this day, has a significant amount of motion that he is unwilling to demonstrate on physical examinations with orthopedic surgeons. I would personally recommend that Dr. Pettine evaluate this prior to surgery, for if I was his orthopedic surgeon, I would not be inclined to perform any surgical procedure on a patient who is less than compliant with a physical examination."

By letter dated August 9, 1996, the Office requested that Dr. Pettine review the video.

By decision dated September 20, 1996, the Office denied the request for surgery. The Office noted that it had written a letter to Dr. Pettine and had requested that he view the June 25, 1996 video of appellant, but that he had not responded to the request.

By letter dated October 22, 1996, Dr. Pettine responded by stating that he viewed the videotape and had concluded that appellant could certainly be capable of returning to work for four hours per day within Dr. McBride's restrictions. Dr. Pettine did not, however, render an opinion with regard to the necessity of performing surgery.

By letter dated September 8, 1998, appellant requested a review of the written record by an Office hearing representative.

By decision dated November 10, 1998, an Office hearing representative affirmed the denial of authorization for appellant's back surgery. The hearing representative found that the Office did not abuse its discretion pursuant to section 8103[1] by denying surgery to correct appellant's lumbar spine condition. The hearing representative noted that the Office attempted to ensure that its decision with regard to appellant's request for surgery was as thorough and appropriate as possible by referring appellant for a second opinion evaluation with Dr. McBride before reaching its decision. The hearing representative further stated that the Office exercised appropriate discretion by again requesting the opinions of both physicians, Dr. McBride and Dr. Pettine, the attending physician, subsequent to receiving the June 25, 1996 video of appellant made by the employing establishment and by requesting that they both view the video prior to rendering another opinion.

The Board finds that the Office hearing representative applied an improper standard by finding that the Office did not abuse its discretion when it denied appellant's request for back surgery.

[1] 5 U.S.C. § 8103.

In his November 10, 1998 decision, the Office hearing representative found that the Office did not abuse its discretion pursuant to section 8103 in its September 20, 1996 decision by denying appellant's request to undergo additional lumbar surgery. Section 8103 of the Federal Employees' Compensation Act[2] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[3] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[4]

In this case, the Office accepted that appellant sustained a lumbar disc protrusion with nerve root compression and herniated discs at L4-5 and L5-S1, and authorized several surgical procedures for appellant's lower back. Appellant's treating physician, Dr. Pettine, requested authorization on March 29, 1996 to perform additional back surgery. The Office referred appellant for a second opinion examination with Dr. McBride to determine whether such additional surgery was needed. Dr. McBride initially opined that surgery should be considered as a last resort at the conclusion of further diagnostic testing was completed; however, he subsequently stated, after viewing a videotape in which appellant purportedly demonstrated a greater range of motion than he demonstrated by appellant on examination, that he would be disinclined to perform any surgical procedure on a patient who was not fully cooperative with a physical examination. Dr. Pettine subsequently agreed that appellant would be able to work a four-hour day, but did not withdraw his recommendation for surgery. In fact, Dr. Pettine ultimately did perform such surgery in April 1997.

In his November 10, 1998 decision, the Office hearing representative merely stated, in summary fashion, that the Office in its January 20, 1996 decision had not abused its discretion in denying surgery. The hearing representative did not appear to exercise his discretion on whether the evidence before him supported the need for surgery. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness.[5] The Office

[2] 5 U.S.C. § 8101 *et seq.*

[3] 5 U.S.C. § 8103.

[4] *Daniel J. Perea*, 42 ECAB 214 (1990).

[5] *See Francis H. Smith*, 46 ECAB 392 (1995).

hearing representative, therefore, should have determined whether the Office's January 20, 1996 decision denying the request for surgery was reasonable based on the merits of the claim.[6]

The Office of Workers' Compensation Programs' decision dated November 10, 1998 is therefore set aside and the case is remanded to the Office for a *de novo* decision and determination on the merits pursuant to section 8128(a).

Dated, Washington, DC
December 22, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[6] *See, e.g., Daniel J. Perea*, 42 ECAB 214 (1990)