

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA E. RUTHERFORD and DEPARTMENT OF LABOR,
WORKING CAPITAL FUND, Washington, DC

*Docket No. 00-1526; Submitted on the Record;
Issued December 28, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization for back surgery.

The case is before the Board for the second time.¹ Previously, the Board found that appellant's disability compensation was properly terminated because she refused an offer of suitable work. The Board further found that the consequential injury to appellant's right ankle had resolved. However, the Board found a conflict in the medical evidence on whether appellant's request for back surgery should be authorized and remanded the case for referral of appellant to an appropriate impartial medical specialist for an examination and opinion on whether surgery should be authorized.

While the case was pending on appeal, appellant submitted numerous medical reports. In a February 2, 1999 report, Dr. Sharon L. Marselas, a neurosurgeon, stated that appellant had developed over time a large lateral traction spur at the L4 level which was compelling evidence of mechanical instability. Dr. Marselas also noted abnormalities of the L4-5 disc. She reported that electromyogram and nerve conduction studies showed a left L4-5 radiculopathy. She stated that, after many years of unsuccessful conservative treatment, surgical intervention was recommended.

In an October 1, 1999 report, Dr. Hampton Jackson, a Board-certified orthopedic surgeon, stated that appellant had clinical evidence of stenosis that came as a progression of her employment injury. He indicated that there was no guarantee on the outcome of surgery. He recommended that appellant retire. Dr. Jackson commented that there had been a worsening of appellant's condition since he first examined her on March 10, 1995. He diagnosed a chronic lumbar disc displacement at L4-5, nerve root irritation of L5 and S1 roots and progressive

¹ Docket No. 97-2012 (issued August 20, 1999). The history of the case is contained in the prior decision and is incorporated by reference.

degenerative hypertrophic in the low back caused by the employment injury. Dr. Jackson indicated that surgery was a real possibility if there was any progressive neurologic damage. He concluded that appellant had not been fit to work since he first examined her.

The Office referred appellant, a statement of accepted facts and the case record to Dr. James Kunec, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence. In a November 19, 1999 report, Dr. Kunec noted that appellant complained of discomfort in the lower back that radiated into the left leg. He reported that appellant had normal strength in the muscle groups in the leg and sensation in the legs that was equal bilaterally. Dr. Kunec reviewed appellant's MRI scans, stating that the 1986 MRI scan showed no evidence of a herniated disc but did show degenerative disc disease at L3-4 and L4-5. He indicated that the 1990 MRI scan showed no interval change except for a small protrusion of nuclear material on the right at L4-5. Degenerative disc disease remained present at L3-4. Dr. Kunec commented that the 1996 MRI scan showed a slight increase in foraminal stenosis at L4-5 with no obvious nerve root compromise. Progressive degeneration was identified at L3-4 with spondylosis or a bone spur at the site.

Dr. Kunec diagnosed a progressive lumbar disc degeneration with spondylotic changes, most marked at L3-4. He stated that, as appellant's clinical examination did not demonstrate any focal neurological abnormality, the only objective evidence appeared on the MRI scans. Dr. Kunec concluded that the surgery proposed by Dr. Jackson and Dr. Marselas was unnecessary. He indicated that appellant's objective findings were largely degenerative in nature. Dr. Kunec commented that lumbar spine surgery directed at degenerative changes provided unpredictable results at best. He stated that no assurance could be given that the surgery would relieve appellant's current pain problems. Dr. Kunec noted that appellant's employment injury was accepted as a lumbar strain and found it difficult to attribute her degenerative changes to an accepted soft tissue injury in 1986.

In a January 12, 2000 decision, the Office denied appellant's request for authorization of back surgery.

The Board finds that the Office acted within its discretion in denying appellant's request for authorization of back surgery.

Section 8103 of the Federal Employees' Compensation Act provides, in part:

"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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."²

In interpreting section 8103, the Board has recognized that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services

² 5 U.S.C. § 8103(a).

provided under the Act.³ The Office has the general objective of ensuring that an employee recovers from his or her 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.⁴ The only limitation on the Office's authority is that of reasonableness.⁵

Dr. Marselas and Dr. Jackson believed that appellant needed back surgery to alleviate her pain. Dr. Kunec, however, indicated that there was no obvious evidence of nerve root impingement on the MRI scans. He found that appellant had normal strength and sensation in the legs. He detected only degenerative disc disease in appellant's spine, as shown by the MRI scans. He stated that surgery on degenerative changes was unpredictable at best, with no assurances that the surgery would relieve appellant's back pain.

Since Dr. Kunec, acting as an impartial medical specialist, indicated that there were no assurances that back surgery would fulfill any of the purposes of section 8103, particularly to give relief, the Office acted within its discretion to deny authorization for back surgery. As the only limitation on the Office's authority is 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 known facts.⁶ There is no evidence that the Office abused its discretion in this case.

The decision of the Office of Workers' Compensation Programs, dated January 12, 2000, is hereby affirmed.

Dated, Washington, DC
December 28, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ *Daniel Wietchy*, 34 ECAB 670 (1983).

⁴ *Patsy R. Tatum*, 44 ECAB 490 (1993).

⁵ *Joe E. Williamson*, 36 ECAB 494 (1985).

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).