U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE S. TREVINO and DEPARTMENT OF AGRICULTURE,
Frost Proof, FL

Docket No. 02-1585; Submitted on the Record;
Issued October 7, 2002

DECISION and ORDER

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

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

The Board has duly reviewed the case record in this appeal and finds that the case is not in posture for decision.

On December 29, 1996 appellant, then a 37-year-old commodity grader, filed a traumatic injury claim alleging on that date he experienced pain in his neck, right shoulder, shoulder blade, lower back and right wrist when he slipped on the floor.

The Office accepted appellant's claim for lumbar strain, cervical sprain and herniated nucleus pulposus at L5-S1. On October 16, 2000 appellant underwent a bilateral lumbar laminectomy and foraminotomy at L4-5 and L5-S1 with discectomy at L5-S1.

The Office received the January 31, 2001 treatment notes of Dr. James Sanders, a Board-certified neurosurgeon and appellant's treating physician, recommending that appellant undergo a bilateral decompressive cervical laminectomy at C3, C4, C5, C6 and C7 with foraminotomies.

An Office medical adviser reviewed appellant's medical records and determined that the surgery was not related to appellant's employment injury. The Office medical adviser, however, recommended that appellant undergo a second opinion examination to clarify whether the proposed surgery was necessary.

By letter dated March 20, 2001, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Rosario Musella, a Board-certified neurosurgeon, to determine whether the proposed neck surgery was necessary due to appellant's December 29, 1996 employment injury.

Dr. Musella submitted an April 9, 2001 report finding that the cervical spine surgery was not warranted.

By decision dated May 18, 2001, the Office denied appellant's request for cervical spinal surgery based on Dr. Musella's opinion. In a June 4, 2001 letter, appellant, through his counsel, requested an oral hearing before an Office hearing representative.[1]

In a February 20, 2002 decision, the hearing representative affirmed the Office's decision.

In this case, it is undisputed that appellant sustained an injury while in the performance of his federal duties on December 29, 1996. The Office accepted his claim for the conditions of lumbar strain, cervical strain and herniated nucleus pulposus at L5-S1. Appellant then sought authorization for surgery to his cervical spine.

Section 8103(a) of the Federal Employees' Compensation Act 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 of the period of disability, or aid in lessening the amount of the monthly compensation.[2] 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.[3] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[4] Thus, in order for surgery to be authorized, appellant must submit evidence to show that such surgery is for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

[1] The record reveals that on July 12, 2001 appellant underwent decompressive laminectomy of C3-4, C4-5 and C6-7 with foraminotomies.

[2] 5 U.S.C. § 8103(a).

[3] *France H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[4] *See Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

Section 8123 of the 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.[5]

Dr. Sanders, a Board-certified neurosurgeon and appellant's treating physician, requested authorization to perform bilateral decompressive laminectomy at five levels. In his November 20, 2001 deposition, Dr. Sanders provided a history of appellant's worsening cervical condition, his findings on physical and objective examination and medical treatment. He testified that the request for authorization for the proposed surgery was based on clinical findings. He further testified:

> "This surgery would be causally related to the initial fall that [appellant] had on December 29, 1996. Interestingly, we had noted that since the fall what had been set in motion was increasing angulation of the cervical spine at C3-C4 and C4-C5 resulting in a worsening situation. This gave also more emphasis to the cause, that being the fall. The fall must have resulted in increasing ligamentous instability in the upper cervical segments that resulted in this angulation and progressive spurring."

Dr. Musella, a Board-certified orthopedic surgeon who provided a second opinion evaluation for the Office, advised that the requested surgery was not warranted. He provided his findings on physical examination and a review of medical records including a computerized tomography myelogram taken in 2000. Dr. Musella diagnosed resolved cervical and lumbar strains and herniated disc at the L5-S1 level. He further diagnosed mild cervical spondylosis that was not causing any radiculopathy or myelopathy. Dr. Musella opined that none of the clinical diagnoses were causally related to appellant's employment injury. He concluded that appellant was not a candidate for spinal surgery since he had no obvious radiculopathy and myelopathy.

The Board finds that the opinions of Drs. Sanders and Musella are of approximately equal value and are in conflict on the issue of whether appellant's request for surgery should be granted. The case shall therefore be remanded for referral to an appropriate Board-certified specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing whether the requested surgery is for a condition causally related to the employment injury and whether it is medically warranted. After such further development deemed necessary, the Office shall issue a *de novo* decision.

[5] 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).

The February 20, 2002 and May 18, 2001 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
October 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member