U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. HEWLETT and DEPARTMENT OF DEFENSE, DEFENSE INTELLIGENCE AGENCY, Washington, DC

Docket No. 02-1124; Submitted on the Record;
Issued January 10, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant authorization for additional back surgery; and (2) whether the Office properly denied appellant's request for reconsideration.

On November 7, 1977 appellant, then a supervisory computer operator, filed a traumatic injury claim alleging that he injured his lower back on November 4, 1977 while he was lifting boxes of paper. On November 13, 1979 he filed a traumatic injury claim alleging that, on October 20, 1979, a raised flooring panel tipped and he tripped backwards, striking his back against an equipment panel. Appellant contended that this resulted in an injured spinal column causing pain to his back and legs. The Office accepted appellant's claims for lumbosacral strain, recurrent herniated lumbar disc, chronic pain syndrome with associated depression and foot drop. Appellant has had numerous surgeries on his back.

In a medical report dated October 18, 2000, Dr. John J. McCloskey, appellant's Board-certified neurosurgeon, noted that appellant had eight low back surgeries, the last of which was in 1995, at which time he removed appellant's segmental instrumentation at L3-4 and did surgery for spinal stenosis at L2-3. He noted his impressions of appellant as follows: (1) multiple operated failed low back radiculopathy, left leg and mild left foot drop; (2) massive obesity; (3) hypertension; (4) smoker; (5) on Coumadin anticoagulation; and (6) history of malignant melanoma. Dr. McCloskey recommended a lumbar myelogram with computed axial tomography scans of L1, 2, 3, 4 and 5. In a medical report dated October 22, 2001, Dr. McCloskey noted that the Office had denied surgery. He continued:

> "I think it [i]s clear to everyone that [appellant] has an identifiable problem in his low back and that surgery is an option. It does n[o]t appear that his general medical condition is going to improve. It [i]s recognized that he is a surgical risk, but he has had surgery under these circumstances before. I plan an updated myelogram to see if his condition has changed at all. I [a]m going to suggest that he be reevaluated by Dr. [Connolly]."

In a medical report dated November 7, 2000, Dr. McCloskey indicated that he was very reluctant to recommend additional surgery. He noted that further decompression and a spinal fusion would be a tremendous undertaking without an assured good result, particularly considering appellant's obesity. He suggested a consultation with Dr. Connolly. By letter to appellant dated November 9, 2001, Dr. McCloskey indicated that he reviewed appellant's myelogram, and that surgery on his back was a reasonable thing to do. He indicated that he was going to attempt to get permission for surgery, and that, if that failed, he would send appellant back to Dr. Connolly for an updated opinion.

In a medical report dated November 29, 2000, Dr. Edward S. Connolly, a Board-certified neurosurgeon, noted appellant's prior back operations, none of which have provided long lasting relief. He opined:

> "He is obviously a poor surgical candidate, since he is grossly obese. He continues to smoke and he is also on Coumadin apparently for what sounds like atrial fibrillation and the patient also has hypertension.
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> "Since his problem is basically one of neurogenic claudication, he could be handled simply by using a walker or electric cart or some other nonsurgical method. If he really, seriously wants surgery, then I think he would need to quit smoking and lose some weight and then I would be in favor of just doing a simple operation of decompressing L2-3 and look for herniated disc and if I could not find it, just do a decompressive laminectomy at L2-3. I do not believe he requires a fusion at that level. I doubt that this man will do any significant weight loss or stop smoking. Certainly, he would also need to be off of his Coumadin before any surgery, but if he would agree to losing weight and stopping smoking and the Cardiologist says it is okay to stop his Coumadin, then he would probably benefit from a simple operation at L2-3."

Dr. McCloskey recommended that appellant have a decompressive laminectomy at L2-3. The Office requested that an Office medical adviser review the medical evidence. By response dated January 29, 2001, the Office medical adviser did not concur that the proposed surgery was indicated, based on the report of Dr. Connolly.

By letter dated January 30, 2001, the Office denied appellant's request for surgery. The Office noted that both Dr. Connolly and appellant's own physician agreed that, before surgery could be considered, he would have to lose an appropriate amount of weight and stop smoking. The Office informed appellant that they would issue a formal decision at his request.

By letter dated April 17, 2001, Dr. McCloskey stated, "It is my belief that [appellant] is a candidate for a lumbar laminectomy, even if he can[no]t lose weight and stop smoking." Dr. McCloskey attached a copy of his chart note from December 18, 2000, wherein he noted that Dr. Connolly believed appellant to be a good surgical candidate, but that appellant should have a simple decompression. He noted, "We [a]re going to try to get his surgery precerted."

Appellant's case was again reviewed by the Office medical adviser. In a report dated May 1, 2001, the Office medical adviser stated that the surgery request for a lumbar

laminectomy should be denied. He noted that appellant had neither lost weight nor quit smoking. He also noted that appellant did not show dermatone changes at L2-3.

By decision dated May 2, 2001, the Office denied appellant's request for surgery of decompressive laminectomy at L2-L3 and lumbar laminectomy. The Office found that the evidence of record indicated that appellant was not physically able to undergo these surgeries at this time.

By letter dated August 25, 2001, appellant requested reconsideration. By decision dated October 4, 2001, the Office found that, as appellant's letter neither raised substantive legal questions nor included new and relevant medical evidence, it was insufficient to warrant a review of the merits. The Board finds that the Office properly denied appellant's request for back surgery.

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

> "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the service, 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."[1]

The Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.[2]

The Board finds that the Office acted reasonably in denying appellant's request for surgery. Appellant has had numerous prior surgeries on his back. Dr. McCloskey, in his November 7, 2000 report, expressed his reluctance to recommend surgery, noting that this would be "a tremendous undertaking without an assured good result, particularly considering his tremendous obesity and the fact that he [i]s a smoker, and probably also diabetic." On November 9, 2000, after reviewing his myelogram, Dr. McCloskey indicated that surgery was "a reasonable thing to do." Dr. McCloskey, referred appellant to Dr. Connolly for an opinion with regard to surgery. Dr. Connolly, in his November 29, 2000 report, stated that appellant was a poor surgical candidate due to his obesity, his smoking and the fact that he was on Coumadin. He noted that if, appellant really wanted surgery, he should lose some weight and quit smoking, but that he recommended a decompression of L2-3, not a fusion. The Office's medical examiner agreed with Dr. Connolly that surgery was contraindicated at this time, as appellant has neither lost weight nor quit smoking. Although Dr. McCloskey, in his note of April 17, 2001, indicated that he believed appellant was a candidate for a lumbar laminectomy "even if he can[no]t lose weight and stop smoking," the Office was more persuaded by the opinion of Dr. Connolly. Dr. McCloskey did not give a reasonable explanation detailing why he thought that appellant would be a good surgical risk despite the fact that he was grossly overweight and smoked. This is especially relevant due to the fact that Dr. McCloskey was initially reluctant to recommend

[1] 5 U.S.C. § 8103(a).

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

surgery. The Office reasonably chose to follow the advice of Dr. Connolly, who indicated that surgery was not appropriate until such time as appellant's physical health improved. Accordingly, the Office acted within its broad discretion in denying appellant's request for surgery.

The Board further finds that the Office, by its October 4, 2001 decision, properly refused to reopen appellant's case for further review of the merits of his claim.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[3]

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4]

Appellant submitted no new evidence with his request for reconsideration. Furthermore, appellant's August 25, 2001 request for reconsideration does not show that the Office erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by the Office. Accordingly, the Office properly denied appellant's request for reconsideration on the merits.

[3] 5 U.S.C. § 8128(a).

[4] *James R. Bell*, 52 ECAB ____ (Docket No. 99-2133, issued July 2, 2001); *Eugene F. Butler*, 35 ECAB 393 (1984).

The decisions of the Office of Workers' Compensation Programs dated October 4 and May 2, 2001 are hereby affirmed.[5]

Dated, Washington, DC
January 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[5] Subsequent to the issuance of the Office's October 4, 2001 decision, appellant submitted additional medical evidence into the record. The Board cannot review this evidence on appeal, as the Board's jurisdiction is limited to reviewing the evidence and arguments that were before the Office at the time of its final decision; *see Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995); *Carroll R. Davis*, 46 ECAB 361 (1994).