U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA L. STEWART and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

Docket No. 02-1860; Submitted on the Record;
Issued January 24, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for surgery and subsequent surgical procedure as not causally related to her January 18, 1999 employment injury.

On August 20, 1999 the Office received a notice of occupational disease and claim for compensation from appellant, then a 53-year-old city mail carrier, alleging that as she had been walking through snow drifts up to her knees, she developed pain in her groin area and right leg. She stated that the pain started on January 18, 1999. After developing the claim, the Office accepted that appellant sustained an aggravation of lateral stenosis at L3-4 and L4-5. The record reveals that appellant lost no time from work, but was provided with a limited-duty assignment.

In a December 15, 1999 letter, Dr. John L. Zinkel, a Board-certified neurological surgeon, provided the results of his evaluation and diagnosed bilateral L3, L4 and L5 lateral recess stenosis with right leg sciatica. Dr. Zinkel recommended that appellant undergo right eccentric decompressive laminectomies at L3, L4 and L5.

By letter dated January 27, 2000, the Office requested Dr. Zinkel to provide medical rationale regarding whether surgery was necessitated by appellant's underlying condition of spinal stenosis or the Office accepted condition of aggravation of spinal stenosis. He was further asked that if he believed surgery was due to aggravation of spinal stenosis, to explain the mechanism that occurred as a result of the aggravation, which exacerbated the preexisting spinal stenosis condition to a point that surgery was dictated.

In a note dated February 2, 2000, Dr. Zinkel stated "[appellant] describes exacerbation of low back/leg pain by work, which is/was allevated to some extent by work restriction. Since pain still is n[o]t adequately controlled, surgery is scheduled to be done this month with expected temporary total disability until possibly May 1, 2000."

On February 21, 2000 the Office referred appellant, along with a statement of accepted facts, the medical record and a set of questions, to Dr. Philip J. Mayer, a Board-certified orthopedic surgeon, for an evaluation to determine if surgery was warranted.

In a report dated March 8, 2000, Dr. Mayer noted the history of injury, reviewed the medical records along with appellant's job description and provided the results of his physical examination. He stated that appellant's examination was neurologically normal and there were no objective abnormalities on musculoskeletal examination of her lower extremities and spine. However, radiographically, appellant demonstrated a significant lumbar spinal stenosis, most impressively at L4-5 with a Grade I spondylolisthesis and to a lesser degree at L3-4 noted primarily on extension lateral myelography. There was a demonstrable spondylothesis at L4-5 on the myelogram and a very small spondylolisthesis of L3-4 on the myelogram. Dr. Mayer opined that appellant has symptoms compatible with neurogenic claudication secondary to lumbar spinal stenosis and that the onset of her symptoms were causally related, by history, to working in January 1999, although there was no one specific workplace injury. Appellant's underlying pathology demonstrated no acute changes, but only changes associated with degenerative lumbar spinal stenosis. Dr. Mayer further advised that as appellant failed nonoperative management, the recommendation for surgery was appropriate as she does have a small left lumbar scoliosis and right lumbosacral fractional scoliosis. Additionally, her computerized tomography (CT) scan, particularly at L4-5, demonstrates circumferential changes of spinal stenosis due to ligamentum flavum hypertrophy, facet joint hypertrophy and some bulging of the intervertebral disc. Dr. Mayer opined, however, that appellant was a candidate for bilateral L3-4 and L4-5 decompressive laminectomies with bilateral lateral transverse process technique arthrodesis using morselize iliac bone graft. He further opined that to perform only an asymmetric right sided L3-4 and L4-5 laminectomy as proposed by Dr. Zinkel, would not yield adequate results for appellant and would ultimately require redo reconstructive, which would be more complex than if appropriate surgery was done at the initial setting.

By decision dated July 19, 2000, the Office denied authorization for surgery, finding that the weight of the medical evidence did not support that the proposed surgery was medically warranted due to the accepted work-related condition. In the attached memorandum, the Office credited the opinion of Dr. Mayer as the weight of medical opinion.

Following appellant's request, a hearing was held on January 30, 2001. Additional evidence included copies of a November 4, 1999 lumbar myelogram and computerized axial tomography (CAT) scan report with the required consent for each procedure and discharge instructions.

In a January 18, 2001 report, Dr. Zinkel stated that he disagreed with Dr. Mayer's opinion as to how appellant's case should be handled. He advised that he could have appellant undergo new lumbosacral films and a magnetic resonance imaging, which could be compared with her November 4, 1999, lumbosacral myelogram/CAT scan studies and, on that basis, Dr. Zinkel could update his surgical recommendations. Dr. Zinkel stated that in general, the technique of laminectomy with dorsolateral fusion in the absence of instruments, was felt to be an antiquated surgery. He further stated that the question of whether or not appellant's surgical condition was caused by a work injury was based first on the chronology of events including

appellant's back/leg pain history and also on the medical possibility that work injuries could have caused her to need surgery. Dr. Zinkel opined that it was medically possible and by appellant's work injury/pain history, that her low back condition and her need for low back surgery are work related.

By decision dated April 9, 2001, the hearing representative affirmed its prior finding that the requested back surgery was not necessitated by the accepted work-related condition.

Appellant requested reconsideration on March 18, 2002. Submitted with the reconsideration request were Form CA-17, duty status reports, an April 13, 2002 CT scan report, a December 28, 2001 x-ray report, copies of the surgical pathology report and discharge summary for appellant's back surgery of November 27, 2001.

In medical reports dated December 28, 2001 and February 6, 2002, Dr. Zinkel provided the results of his examination post surgical procedure and set forth his recommendations/plans. No discussion pertaining to the causal relationship of the accepted work-related condition and the necessity of the surgical procedure was provided.

By decision dated April 8, 2002, the Office denied modification of appellant's claim for surgical authorization on the grounds that the evidence of record did not support that the surgery performed on November 27, 2001 was warranted or causally related to the January 18, 1999 employment injury.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

The Office is required by section 8103 of the Federal Employees' Compensation Act[1] to provide all medical treatment necessary as a result of an employment injury. 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 Act also provides that appropriate medical care be furnished by or on the order of physicians designated or approved by the Office and that a claimant be allowed the initial choice of physician. This does not, however, restrict the Office's power to approve appropriate medical treatment obtained after the initial choice of physician or without prior authorization from the Office has broad discretionary authority in approving services provided under the Act.[2]

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 relation in a case such as this must include supporting rationalized medical evidence.[3] Therefore, in order to prove that her surgery was warranted, appellant must submit evidence to show that the surgery was for a condition causally related to the employment injury

[1] 5 U.S.C. § 8103.

[2] *See Marjorie S. Greer*, 39 ECAB 1099 (1988).

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

and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

Review of the record in the present case discloses that there is no disagreement between appellant's treating physician, Dr. Zinkel and the Office referral physician, Dr. Mayer, as to whether the surgery was necessitated by the accepted employment-related condition of aggravated recessed lateral stenosis following the failure of conservative medical treatment. There is, however, substantial disagreement as to the type of surgery and the technique to employ in performing the surgery to provide the relief appellant is seeking. Dr. Mayer opined that appellant was a candidate for bilateral L3-4 and L4-5 decompressive laminectomies with bilateral transverse process technique. He opined that the asymmetric right-sided L3-4 and L4-5 laminectomy Dr. Zinkel proposed would not yield adequate results for appellant and would ultimately require redo reconstructive surgery, which would be more complex than if appropriate surgery was done at the initial setting. He on the other hand, advised that the technique of laminectomy with dorsolateral fusion in the absence of instruments was an antiquated surgery and, on November 27, 2001 performed multiple bony decompressions followed by discectomies completely bilaterally at L3-4 and L4-5 followed by screw-size plate fixation as well as cage interbody fixation. The reports of Drs. Mayer and Zinkel are virtually equal in weight and reach different medical conclusions on the type of surgical technique for treatment of the accepted condition once conservative treatment fails.

Section 8123(a) states in pertinent part: "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." To resolve this conflict, the Office should have referred the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation and opinion pursuant to 5 U.S.C. § 8123(a).

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should give a diagnosis of appellant's lumbar condition and provide his reasoned opinion on whether appellant's lumbar condition prior to surgery was an appropriate candidate for surgical intervention and, if so, what is the appropriate or accepted surgical technique for treatment of the accepted condition.

The April 8, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
January 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member