

**United States Department of Labor  
Employees' Compensation Appeals Board**

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CINDY R. TODD, Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Wichita, KS, Employer )

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**Docket No. 05-75  
Issued: April 12, 2005**

*Appearances:*  
*Cindy R. Todd, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On October 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 23, 2004 which denied her request for back surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether the Office properly denied appellant's request for a discectomy at C3-4 and C4-5 with interbody fusion and plating from C3 to C5.

**FACTUAL HISTORY**

On May 4, 2003 appellant, then a 28-year-old lead screener, filed a traumatic injury claim alleging that on May 2, 2003 she injured her right shoulder when lifting bags from a conveyor belt to be searched. The Office accepted her claim for right shoulder tendonopathy, disc

protrusions at C4-5, C5-6 and C6-7. Appellant stopped work on May 4, 2003 and did not return. She resigned on September 21, 2004.

Appellant came under the treatment of Dr. G. Andrew McNickle, a Board-certified orthopedic surgeon, who on May 5, 2003 noted treating appellant for pain in her right upper back and shoulder which occurred after lifting and moving bags at work. His reports of May 21 to July 2, 2003 diagnosed trapezius muscle strain and noted her condition was resolving. An x-ray of the spine dated May 30, 2003 revealed reversal of the normal cervical lordosis. A magnetic resonance imaging (MRI) scan of the spine dated June 10, 2003 revealed a moderate protrusion of disc material at C4-5, marked protrusion at C5-6 and mild disc protrusion at C6-7.

Appellant was also treated by Dr. Eric C. Mills, a neurologist, who on June 18, 2003 noted a history of appellant's work injury and diagnosed cervicalgia, painful right shoulder syndrome and cervical radiculopathy and advised that appellant was totally disabled from work. His reports of July 16 to December 10, 2003 indicated that appellant was treated with cervical epidural injections which provided little relief for her persistent pain. On October 6, 2003 Dr. Mills noted treating appellant for ongoing pain in her right shoulder and neck with radicular symptoms and diagnosed cervical radiculopathy, cervicalgia, painful right shoulder syndrome and cervical disc disease at multiple levels. On December 10, 2003 he noted that appellant's orthopedic physician released her to work despite persistent pain and ache in her right shoulder. Dr. Mills referred appellant to a physiatrist and advised that she was totally disabled from work. An electromyogram (EMG) dated July 7, 2003 revealed no abnormalities. An MRI scan of the shoulder dated July 15, 2003 revealed a mild intrasubstance tendonopathy of the supraspinatus tendon and a possible nondisplaced tear within the superior glenoid labrum.

Dr. Prince Chan, a Board-certified orthopedist, noted, in reports dated August 12 and September 12, 2003, that appellant was treated for a work-related injury to her right shoulder. He diagnosed right shoulder pain with bursitis and impingement with a question of nondisplaced glenoid labrum tear. On September 12, 2003 Dr. Chan released appellant to work with restrictions of no lifting greater than 20 pounds and no overhead lifting. On October 15, 2003 he noted performing a right shoulder arthroscopy with subacromial decompression and diagnosed right shoulder pain, impingement and bursitis. The Office accepted that the surgery was necessitated by the employment injury.

Appellant continued to submit reports from Dr. Mills dated February 4 and 25, 2004 which supported that she was totally disabled from all work. On March 10, 2004 he advised that the discogram study performed on March 4, 2004 revealed evidence of extravasation at C4-5 and significant protrusion of the disc at C3-4 with encroachment into the cervical spinal canal at C5-6. Dr. Mills advised that the two protruding discs account for appellant's ongoing pain involving her neck, shoulder and arm. He opined that appellant exhausted all conservative modalities and he recommended surgical intervention. Dr. Mills indicated that appellant was a candidate for a discectomy at C3-4, C4-5 with interbody fusion and plating from C3 through C5. He opined that appellant's symptomology and disc herniations were directly related to her work injury of May 2, 2003. A March 12, 2004 work capacity evaluation prepared by Dr. Mills advised that appellant was temporarily totally disabled from any work. A computerized tomography (CT) scan of the spine dated March 4, 2004 revealed findings suggestive of radial tears within the protruded discs at C4-5.

On February 23, 2004 the Office referred appellant for a second opinion to Dr. Pat Do, a Board-certified orthopedic surgeon. The Office provided Dr. Do with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a medical report dated March 30, 2004, Dr. Do indicated that he reviewed the records provided to him and performed a physical examination of appellant. He indicated the history of appellant's back injury. Dr. Do diagnosed status post right shoulder arthroscopy and neck pain with disc protrusion at C4-5 and C5-6. Dr. Do did not recommend surgical intervention, rather opined that appellant could return to full-time duties with a lifting restriction of 30 pounds and prolonged awkward positions of the neck. He advised that the restrictions would be temporary, and that one year from the injury she could resume her regular duties without restrictions.

In a memorandum dated April 26, 2004, the Office medical adviser advised that there was a conflict in medical opinion between Dr. Do, the Office referral physician, who did not endorse operative intervention and Dr. Mills, appellant's treating physician, who recommended surgery.

The Office referred appellant to Dr. Paul S. Stein, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated July 1, 2004, Dr. Stein reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Stein diagnosed a soft tissue injury to the neck and right shoulder girdle with some brachial plexus stretch. He advised that appellant did have cervical disc protrusions but there was no definitive evidence of nerve root compression on the right to account for appellant's symptomology in the right upper extremity. With regard to surgical intervention, Dr. Stein advised that he was uncertain that appellant's predominant symptomology into the right upper extremity was secondary to the cervical disc herniations. He opined that cervical surgery would be appropriate if there was nerve root compression on the right. Dr. Stein recommended further testing to determine the appropriateness of surgery and referred appellant for a cervical myelogram, CT scan and EMG. He advised that Dr. Mills' recommendation for surgery at C3-4 and C4-5 was based upon the inaccurate reading on the radiology report and that the positive levels were C4-5 and C5-6. Dr. Stein opined that appellant could return to work with restrictions on repetitive activity with the right upper extremity of no lifting, pushing or pulling more than two pounds with the right arm. He advised that the restrictions would be temporary at this time but would likely become permanent. In a supplemental report dated July 29, 2004, Dr. Stein advised that appellant underwent a cervical myelogram and a CT scan which showed some decrease of cervical curvature and mild disc bulges at C4-5, C5-6 and C6-7, with no rupture or neural compression. On August 9, 2004 he noted that an EMG performed on August 3, 2004 revealed no abnormalities. Dr. Stein advised cervical surgery was not appropriate because the supplemental diagnostic evaluation did not reveal nerve root compression. He noted that appellant had abnormal discs in the neck but experienced pain not only in the neck but radiating into the right shoulder and arm as well as numbness and tingling in the right upper extremity. Dr. Stein concluded that surgical intervention was not appropriate based on his physical examination and the results of the additional diagnostic tests he recommended, specifically the cervical myelogram, CT scan and EMG, which did not document evidence of nerve root impingement to account for the upper extremity symptomology.

Appellant submitted reports from Dr. Mills dated June 9 and July 28, 2004. He indicated that appellant was awaiting approval for her surgery and was temporarily totally disabled. He recommended an anterior cervical discectomy at all levels involved. Other reports from Dr. Chan dated July 15 to October 15, 2003 diagnosed right shoulder pain with bursitis and impingement and advised that appellant underwent a subacromial injection on September 15, 2003. His notes of October 15 to December 12, 2003 noted appellant's shoulder surgery and indicated that she could resume activities as tolerated.

In a decision dated August 23, 2004, the Office denied appellant's request for surgery, finding that it was not warranted or causally related to the accepted work-related injury of May 2, 2003.<sup>1</sup>

### **LEGAL PRECEDENT**

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 or the period of disability, or aid in lessening the amount of the monthly compensation.<sup>2</sup> 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 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.<sup>3</sup>

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

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<sup>1</sup> Subsequent to the filing of the appeal on October 5, 2004, the Office, on November 16, 2004, terminated appellant's compensation on the grounds that she had no continuing disability causally related to the May 2, 2003 work injury. The Board has no jurisdiction over this other issue as the Board's regulations contemplate that the Board only has jurisdiction over Office decisions issued within one year prior to the filing of an appeal. *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

<sup>2</sup> 5 U.S.C. § 8103(a).

<sup>3</sup> *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>4</sup> *Cathy B. Mullin*, 51 ECAB 331 (2000).

## ANALYSIS

The Office accepted that appellant sustained right shoulder tendonopathy and disc protrusions at C4-5, C5-6 and C6-7. Appellant returned to full-time light duty in May 2003 and resigned on September 21, 2004. The Office properly determined that a conflict of medical opinion existed over whether cervical surgery was warranted. Dr. Mills, appellant's treating physician, stated that appellant required a discectomy at C3-4 and C4-5 with interbody fusion and plating from C3 to C5, while Dr. Do, an Office referral physician, did not recommend cervical surgery and opined that appellant could return to full-time duties with restrictions. Thus, the Office properly referred appellant to Dr. Stein for an impartial medical examination.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>5</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Stein. After reviewing appellant's complaints, her medical history including the May 2, 2003 work-related injury, her medical records and conducting a physical examination, Dr. Stein diagnosed soft tissue injury to the neck and right shoulder girdle with some brachial plexus stretch. He indicated that cervical surgery would be appropriate if there was nerve root compression on the right and recommended further diagnostic testing to confirm this condition. Appellant underwent a cervical myelogram and a CT scan which showed some decrease of cervical curvature and mild disc bulges at C4-5, C5-6 and C6-7 with no rupture or neural compression. On August 9, 2004 Dr. Stein noted that an EMG performed on August 3, 2004 revealed no abnormalities. Dr. Stein concluded that surgical intervention was not appropriate based on his physical examination and the results of the additional diagnostic tests did not reveal nerve root compression. He opined that appellant could return to work with temporary restrictions on repetitive activity with the right upper extremity, no lifting, pushing or pulling more than two pounds with the right arm.

Dr. Stein reviewed the case record and various reports, including Dr. Mills' report on appellant's medical treatment since the initial May 2003 injury. He examined appellant thoroughly, discussed the diagnostic testing, explained his clinical findings and provided medical rationale for his conclusion that the requested back surgery was not needed. Thus, Dr. Stein provided an opinion that was sufficiently well rationalized and based upon a proper factual background such that his opinion is entitled to special weight. The Board finds that Dr. Stein's report represents the weight of the medical opinion evidence and establishes that appellant required no further treatment for the accepted work injury.<sup>6</sup>

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<sup>5</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>6</sup> *David Alan Patrick*, 46 ECAB 1020, 1023 (1995) (impartial medical examiner's opinion was based on a complete review of the medical record and a thorough examination and was sufficiently rationalized to establish that appellant had no work-related residuals of his diagnosed cervical condition; thus his opinion was entitled to special weight).

Appellant submitted several reports from Dr. Mills, dated June 9 and July 28, 2004, which recommended an anterior cervical discectomy at all levels involved. However, his reports failed to provide a rationalized opinion regarding the causal relationship of the proposed cervical surgery to the employment injury and address whether this procedure was medically warranted.<sup>7</sup> Moreover, his report of July 28, 2004, which was submitted after the impartial medical examiner's report, was similar to his prior reports and was insufficient to overcome that of Dr. Stein or to create a new medical conflict as Dr. Mills was on the one side of the conflict that Dr. Stein resolved.<sup>8</sup> Other reports from Dr. Chan dated July 15 to October 15, 2003 diagnosed right shoulder pain with bursitis and impingement and indicated that appellant underwent a right shoulder arthroscopy with subacromial decompression without complications. However, Dr. Chan failed to address the proposed cervical surgery and failed to provide any medical rationale in support of cervical surgery.

Accordingly, the Board finds that the Office acted within its discretion in denying authorization for the requested surgery.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's claim for authorization of a discectomy at C3-4 and C4-5 with interbody fusion and plating from C3 to C5.

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<sup>7</sup> *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

<sup>8</sup> *See Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Mills report did not contain new findings or rationale upon which a new conflict might be based.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 23, 2004 is affirmed.

Issued: April 12, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member