United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
	)	**Docket No. 07-1219**
and	)	**Issued: November 8, 2007**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 4, 2007 appellant filed a timely appeal from an October 2, 2006 merit decision of the Office of Workers' Compensation Programs, denying his request for surgery, and a February 7, 2007 nonmerit decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for back surgery; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 1, 2003 appellant, then a 54-year-old body and fender repairman, filed a traumatic injury claim,[1] alleging that on January 30, 2003 he experienced sharp pain in his lower back, whiplash to the neck and chest discomfort resulting from a motor vehicle accident. He stopped work on the date of injury and has not returned to work.[2] By letter dated February 19, 2003, the Office accepted his claim for lumbosacral and cervical strains.

In a November 19, 2004 medical report, Dr. Andrew G. Cappuccino, an attending Board-certified orthopedic surgeon, stated that appellant complained about increasing and intractable discomfort in his back and moderate discomfort in his legs. He also complained about presacral pain. On physical examination, Dr. Cappuccino found loss of lumbar motion and flexion on extension, pain with straight leg raising and generalized dysfunction. Regarding loss of lumbar motion, appellant had 30 degrees of flexion, 20 degrees of extension and 30 degrees of lateral bending and rotation. Manual motor strength testing revealed trace weakness proximally in the L3 and L4 dermatomal distribution. Dr. Cappuccino stated that appellant's planters were flexor and no chlonus was seen. He opined that appellant could no longer tolerate the pain he experienced. Dr. Cappuccino requested authorization to perform posterior decompression at L1-S1 with foraminotomy and anterior retroparatoneal discectomy, and inner body stabilization using disc replacement at four levels. He concluded that appellant remained totally disabled.

During the period August to December 2003 and April to October 2004, the employing establishment conducted surveillance of appellant and videotaped him. In a November 5, 2004 investigative memorandum, the employing establishment reported that appellant was videotaped during the stated periods performing activities that were outside the restrictions set forth by Dr. Cappuccino and while being deemed totally disabled for work. These activities included mowing the lawn, trimming bushes, shoveling dirt into a wheelbarrow and pushing it, lifting and moving a large trailer, climbing a ladder, lifting, loading and pulling cinder blocks onto a hand truck and lifting and dumping a garbage can and pulling it onto a hand truck. The employing establishment requested that the Office reconsider Dr. Cappuccino's request for authorization to perform surgery and refer appellant for a second opinion examination along with accompanying surveillance photographs.

By letter dated August 29, 2005, the Office referred appellant, together with a statement of accepted facts and the case record to Dr. Alan J. Zimmerman, a Board-certified orthopedic surgeon, for an opinion as to whether appellant had any continuing residuals and disability of his March 14, 1997 and January 30, 2003 employment-related injuries. In a September 19, 2005 report, Dr. Zimmerman opined that there was no objective evidence establishing that appellant had any disability causally related to his accepted employment injuries. He stated that the conditions had resolved. Dr. Zimmerman noted that appellant's movements on the videotape and his physical examination findings confirmed that he was capable of returning to work as a

[1] Prior to the instant claim, appellant filed a claim alleging that on March 14, 1977 he hurt his left leg and back when he fell on an icy driveway. The Office accepted his claim for right hip contusion and aggravation of radiculopathy at L4-5. Appellant underwent a laminectomy in 1997.

[2] Appellant retired from the employing establishment effective July 31, 2004.

body and fender repairman. He concluded that no further medical treatment including, surgery was necessary.

In a September 12, 2005 report, Dr. Cappuccino noted appellant's back and lower extremity symptoms. On physical examination, he reported loss of range of motion regarding the lumbar spine and loss of strength of the lower extremities. Dr. Cappuccino stated that, although the surveillance videotape showed that appellant engaged in daily activities, he did so with significant pain. He found that appellant had residuals causally related to the January 30, 2003 employment injury. Dr. Cappuccino again requested authorization to perform back surgery and reiterated that appellant remained totally disabled.

On December 15, 2005 the Office found a conflict in the medical opinion evidence between Dr. Cappuccino and Dr. Zimmerman as to whether appellant had any employment-related disability and whether the proposed surgery was warranted. By letter dated March 14, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Roy A. Hepner, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 22, 2006 report, Dr. Hepner reviewed the history of appellant's employment-related injuries and medical treatment. He also reviewed his medical records. Dr. Hepner stated that he did not review the employing establishment's surveillance videotapes, but that he reviewed evidence which demonstrated a marked inconsistency between the activities that appellant performed on the videotapes and his presentation for examination on March 21, 2006. On physical examination, he reported limited range of motion of appellant's back and left hip, mildly diminished sensibility to light touch of the left foot and calf, low back pain on straight leg raising on either side, tenderness over the midline upper lumbar spine and negative knee jerk on the left and positive on the right. Dr. Hepner diagnosed chronic back and left leg pain, multilevel lumbar degenerative disc disease, deconditioning, narcotic habituation and status post left L4-5 discectomy. In a March 21, 2006 work capacity evaluation (Form OWCP-5c), Dr. Hepner stated that appellant could not perform his usual work duties, but could work four to six hours per day with restrictions.

By letter dated April 21, 2006, the Office requested that Dr. Hepner clarify his review of an accompanying surveillance videotape and a list of questions. In a May 5, 2006 report, Dr. Hepner opined that appellant had the capacity to perform his normal work duties over extended periods of time with a functional capacity far greater than a sedentary level based on his review of the surveillance videotape. He noted that appellant displayed far greater trunk motion than he did during his March 21, 2006 examination. Dr. Hepner stated that, in view of the clear inconsistencies between the behavior and activities demonstrated by appellant in the videotape and his presentation on March 21, 2006, it was extremely difficult to accurately assess his work capacity. He related that these inconsistencies suggested either a level of insincerity on appellant's part or that he sustained an injury subsequent to surveillance on October 26, 2004. Dr. Hepner concluded that his behavior as demonstrated on the videotape was consistent with, at most, a mild level of disability with a medium work capacity. He further concluded that appellant's behavior was inconsistent with an assessment of total disability from an orthopedic standpoint.

In an August 30, 2006 Form OWCP-5c, Dr. Hepner stated that he had no knowledge of appellant's usual work duties. He opined that appellant had reached maximum medical improvement and that he could work eight hours per day with restrictions.

By letter dated August 30, 2006, the Office advised Dr. Hepner that an accompanying statement of accepted facts had been amended to include a description of appellant's body and fender repairman position. It requested that he review this information and provide a rationalized medical opinion as to whether appellant could perform the duties of this position and if he could not return to full duty, provide his work restrictions.

On September 21, 2006 Dr. Hepner opined that appellant could perform limited-duty work. He reviewed the position description and opined that he was "uncertain" as to whether appellant could lift as much as 70 pounds. Dr. Hepner stated that he could reasonably be expected to lift at least 40 pounds and he had no restrictions with regard to walking, climbing, pushing, pulling, kneeling, stooping, twisting and sitting. He reiterated that, due to the inconsistencies between appellant's presentation on physical examination and multiple surveillance studies, he could not, with assurance, complete the OWCP-5c form. Dr. Hepner reiterated that appellant had reached maximum medical improvement at the time of the surveillance studies. He did not believe that surgery had a reasonable likelihood of improving appellant's condition over that displayed in the surveillance studies. In fact, Dr. Hepner stated that, such treatment would "more likely" worsen such function rather than improve it. He concluded that he had no basis to recommend surgery.

By decision dated October 2, 2006, the Office denied authorization for back surgery. It accorded special weight to Dr. Hepner's medical opinion as the impartial medical specialist.

On November 24, 2006 appellant requested reconsideration. He submitted reports dated October 31 and November 20, 2006 from Dr. Eugene J. Gosy, a neurologist, who found that appellant sustained unspecified backache and mixed discogenic and mechanical pain syndrome that were secondary to his March 14, 1977 and January 30, 2003 work-related injuries. On January 30, 2007 he performed a bilateral L4-5, L5-S1 facet block under fluoroscopic guidance. Appellant submitted laboratory test results dated October 30, 2006.

By decision dated February 27, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was of an immaterial nature and insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which the Office, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.[3] In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee

[3] 5 U.S.C. § 8103(a).

recovers from his or her injury to the fullest extent possible in the shortest amount of time.[4] The Office has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.[5]

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[6] 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.[7] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted.[8] Both of these criteria must be met in order for the Office to authorize payment.[9]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[11] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[12]

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[4] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[5] *James R. Bell*, 52 ECAB 414 (2001); *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

[6] *Debra S. King*, 44 ECAB 203, 209 (1992).

[7] *Id.*; *Bertha L. Arnold*, 38 ECAB 282 (1986).

[8] *Joseph P. Hofmann*, 57 ECAB ___ (Docket No. 05-1772 , issued March 9, 2006).

[9] *Dona M. Mahurin*, 54 ECAB 309 (2003); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[11] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[12] *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

ANALYSIS -- ISSUE 1

The Board finds that the Office abused its discretion in declining to authorize surgery.

The Board finds that the Office properly determined that a conflict arose in the medical opinion evidence between Dr. Cappuccino, appellant's attending physician, and Dr. Zimmerman, an Office referral physician, as to whether appellant had any continuing disability causally related to his March 14, 1997 and January 30, 2003 employment-related injuries and whether the proposed back surgery was warranted. His claim for the March 14, 1997 employment injury was accepted for right hip contusion and aggravation of radiculopathy at L4-5 and his claim for the January 30, 2003 injury was accepted for lumbosacral and cervical strains. Dr. Cappuccino opined that appellant had continuing disability and required posterior decompression at L1-S1 with foraminotomy and anterior retroparatoneal discectomy, and inner body stabilization using disc replacement at four levels due to his accepted employment injuries. Dr. Zimmerman opined that appellant no longer had any employment-related residuals or disability and that surgery was not warranted.

To resolve the conflict, the Office referred appellant to Dr. Hepner, selected as the impartial medical specialist. In a March 22, 2006 report, Dr. Hepner reviewed the history of the January 30, 2003 employment injuries. He did not review the employing establishment's surveillance videotape. Instead, Dr. Hepner reviewed evidence which he did not specifically identify that demonstrated a marked inconsistency between appellant's activities on the videotape and appellant's presentation for his examination on March 21, 2006. On physical examination, he reported limited range of motion of appellant's back and left hip, mildly diminished sensibility to light touch of the left foot and calf, low back pain on straight leg raising on either side, tenderness over the midline upper lumbar spine and negative knee jerk on the left and positive on the right. Dr. Hepner diagnosed chronic back and left leg pain, multilevel lumbar degenerative disc disease, deconditioning, narcotic habituation and status post left L4-5 discectomy. In a March 21, 2006 OWCP-5c form, he opined that, appellant could not perform his usual work duties, but he could work four to six hours per day with restrictions.

In a supplemental report dated May 5, 2006, Dr. Hepner found that appellant had the capacity to perform his normal work duties over extended periods of time with a functional capacity far greater than a sedentary level based on his review of the surveillance videotape. He stated that, appellant demonstrated far greater trunk motion than he did during his March 21, 2006 examination. Dr. Hepner opined that in view of the clear inconsistencies between the behavior demonstrated by appellant in the videotape and his presentation on March 21, 2006, it was extremely difficult to accurately assess his work capacity. He stated that, these inconsistencies suggested either a level of insincerity on appellant's part or that he sustained an injury subsequent to surveillance on October 26, 2004. Dr. Hepner concluded that his behavior and activities as demonstrated on the videotape was consistent with at most, a mild level of disability with a medium work capacity. He further concluded that appellant's behavior was certainly inconsistent with an assessment of total disability from an orthopedic standpoint.

In an August 30, 2006 OWCP-5c form, Dr. Hepner found that appellant had reached maximum medical improvement and that he could work eight hours per day with restrictions.

In an addendum report dated September 21, 2006, Dr. Hepner reviewed a description of appellant's body and fender repairman position. He opined that appellant could perform limited-duty work, stating that he was "uncertain" as to whether appellant could lift as much as 70 pounds, but that he could reasonably be expected to lift at least 40 pounds. Dr. Hepner stated that there were no restrictions with regard to walking, climbing, pushing, pulling, kneeling, stooping, twisting and sitting. He reiterated that due to the inconsistencies between appellant's presentation on physical examination and multiple surveillance studies, he could not, with assurance, complete an OWCP-5c form. Dr. Hepner reiterated that appellant had reached maximum medical improvement at the time of the surveillance studies. He did not believe that surgery had a reasonable likelihood of improving appellant's condition over that displayed in the surveillance studies. Dr. Hepner stated that such treatment would "more likely" worsen such function rather than improve it. He concluded that he had no basis to recommend surgery.

The Board finds that Dr. Hepner's opinion that appellant was able to work and that the proposed back surgery was not warranted is speculative and equivocal in nature. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[13] Dr. Hepner did not unequivocally find that appellant could work or that he did not require back surgery due to his accepted employment-related injuries. He found that, appellant could perform part-time work with restrictions while stating that he was unable to assess appellant's disability for work due to discrepancies in the activities he performed on the surveillance videotape and his presentation for physical examination. Further, Dr. Hepner stated that he was "uncertain" about appellant's ability to lift 70 pounds but failed to provide medical rationale explaining why he could not do so. Moreover, Dr. Hepner stated that, the proposed surgery would "more likely" worsen appellant's condition without providing supportive medical rationale. The Board, therefore, finds that Dr. Hepner's opinion has little probative value and is insufficient to resolve the conflict in the medical opinion evidence regarding the issue of whether appellant has any continuing disability and whether the proposed back surgery are causally related to his accepted March 14, 1977 and January 30, 2003 employment-related conditions. The Office shall refer appellant, the case record and a statement of accepted facts to another impartial medical examiner to resolve whether appellant's disability for work and proposed back surgery are related to the accepted employment-related injuries. After conducting such further development as is deemed necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the Office improperly refused to authorize appellant's request for surgery because an unresolved conflict exists in the medical opinion evidence as to whether he has any continuing residuals or disability causally related to the accepted employment-related conditions and whether the requested back surgery was warranted.[14]

[13] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006); *Cecelia M. Corley*, 56 ECAB ___ (Docket No. 05-324, issued August 16, 2005).

[14] In light of the Board's disposition of this issue, the issue of whether the Office properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a) is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 2, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision of the Board.

Issued: November 8, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board