United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 08-1826**
	)	**Issued: April 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Springfield, MA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 17, 2008 appellant filed a timely appeal of a February 28, 2008 decision of the Office of Workers' Compensation Programs' hearing representative. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d) (2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied authorization for posterior decompression at L3-4 and L4-5 posterior fusion at L1 through S1 and anterior fusion at L4-5, L5 and S1 surgery.

FACTUAL HISTORY

The Office accepted that appellant, then a 43-year-old building equipment mechanic, sustained a lower back lumbar strain as a result of an employment incident on August 22, 2001. Appellant did not initially stop work.[1] The Office also accepted his claim for displacement of lumbar intervertebral disc without myelopathy, aggravation of lumbar spinal stenosis, degeneration of lumbar or lumbosacral intervertebral disc and unspecified pain disorders of the

[1] Appellant also filed a notice of recurrence on April 24, 2002. He has been totally disabled since October 2002.

lumbar region, lumbago, other psychogenic pain. It authorized several lumbar surgeries including: a decompression of L2-3, L3-4 and L4-5 on March 27, 2003, an exploration and decompression bilaterally at L3-4 with posterior fusion using rods and screws performed on November 27, 2003, an L3-4 anterior fusion on June 3, 2004, a decompression fusion at L2-3 and removal of L3-4 hardware and identification of an L3-4 solid fusion on May 5, 2005.

On March 8, 2007 appellant's treating physician, Dr. Mark A. Linson, a Board-certified orthopedic surgeon, advised that appellant continued to have low back and left thigh pain. Dr. Linson stated that a February 25, 2007 magnetic resonance imaging (MRI) scan showed narrowing at L2-3, neural foraminal narrowing at L3-4, spondylolisthesis and marked left foraminal stenosis at L4-5 and bulging at L5-S1. He advised that appellant wanted more surgery. Dr. Linson advised that he would need to "think about it more" as this would be would be "an extensive operation." In a March 28, 2007 report, he noted advising appellant that his surgical option would include: posterior decompression at L3-4 and L4-5, posterior fusion L1 through S1 and anterior fusion at L4-5 and L5-S1. Dr. Linson advised that, while this would structurally deal with all of his areas of potential pain generation, it would be a very large and somewhat risky surgery since his anterior operation would have to be redone. He stated that appellant was "aware of the significant morbidity of such an operation" and the risks involved. Dr. Linson stated that he would seek authorization for the surgery and the record indicates that he requested authorization for a posterior decompression at L3-4, L4-5, posterior fusion L1 through S1 and anterior fusion at L4-5, L5 and S1.

On May 1, 2007 the Office requested that a district medical adviser provided his opinion with regard to whether the requested surgery should be authorized. In a May 2, 2007 report, the district medical adviser noted appellant's history of injury and treatment. He noted that appellant continued to have "persistent severe low back and leg pain after four operations on his lumbar spine." The Office medical adviser noted that a fifth procedure was recommended by appellant's doctor and indicated that "[t]his is an extensive procedure with a high risk for complications and with questionable benefit considering the results of the previous procedures. This would be the biggest operation to date having been preceded by four unsuccessful procedures." The Office medical adviser stated that he could not recommend the surgery and suggested referral to a neurosurgeon.

On May 8, 2007 the Office referred appellant for a second opinion to Dr. Michael Opalak, a Board-certified neurosurgeon. In a June 4, 2007 report, Dr. Opalak noted appellant's history of injury and treatment. He noted that, while appellant's treatment was proper, "he had the worst possible result of each one of his procedures." Dr. Opalak opined that "[appellant] was concerned about the proposed surgery and any fusion stopping at L1 given the nature of the thoracolumbar junction." He explained that he "was not entirely convinced that [appellant] needs to be fused at L1-2, even with the underlying abnormality there." Dr. Opalak advised that it would be a "formidable procedure" and it would be "tempting fate to try this again." He noted that appellant's prior surgery with an anterior approach resulted in complications including significant bowel anomalies which had resolved. Dr. Opalak opined that appellant should have as little surgery as possible and suggested "foraminotomies without fusions at the concerned levels toward the left hand side." He opined that appellant was unable to work. Dr. Opalak added that appellant had reached maximum medical improvement provided he did not pursue further surgeries.

On July 24, 2007 the Office forwarded Dr. Opalak's report to Dr. Linson and requested that he provide his comments and an opinion as to whether he wished to proceed with the proposed surgery.

In a report dated July 30, 2007, Dr. Linson opined that he continued to believe that "the best surgical option for [appellant] is the five level posterior fusion with instrumentation and bone grafting and two-level anterior fusion with instrumentation and bone morphogenic protein, along with a two[-]level decompression."

On August 21, 2007 the Office found that Dr. Opalak's report created a conflict with the opinions of appellant's attending physician regarding whether the requested surgery should be authorized. On August 23, 2007 it referred appellant along with a statement of accepted facts and the medical record to Dr. C.G. Salame, a Board-certified neurosurgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Linson and Dr. Opalak regarding authorization for the fifth lumbar surgery.

In a September 20, 2007 report, Dr. Salame noted appellant's history of injury and treatment. He conducted an examination and noted that appellant used a cane to ambulate and had a slightly antalgic gait. Dr. Salame determined that appellant was able to sit and stand on his own, stand on tiptoes and heels and bend to touch knees. He indicated that appellant's low back extension was limited. Dr. Salame's findings included a well-healed scar over the lower back and left superior iliac crest area. He determined that appellant had failed back syndrome, chronic pain without any objective weakness noted in lower extremities and a mild neurogenic bladder. Dr. Salame opined that the proposed surgery, "which would be the fifth in the lower back, appears to me to be very ambitious and more importantly I am not sure if it will solve the patient's major issue which is chronic pain." He added that during his examination appellant was not suffering from any significant objective lumbosacral radiculopathy. Dr. Salame opined that he would focus a treatment plan geared towards alleviating pain, which was appellant's "main medical incapacitating factor." He recommended an intrathecal pump for management of chronic low back pain and noted that, while appellant's treatment was proper, it was not effective for relief of his right sciatica. Dr. Salame reiterated that he would place appellant on a morphine pump to relieve his chronic and debilitating back pain. He indicated that, within about a year from placement of such pump, appellant should have reached maximum medical improvement for his lower back.

By decision dated November 2, 2007, the Office denied authorization for the proposed surgery. It found the weight of the medical evidence established that the surgery was not medically necessary.

On November 9, 2007 appellant requested an examination of the written record. In a January 18, 2008 report, Dr. Linson indicated that appellant continued to have pain in his back, both hips and groins. He noted that a pain clinic was not successful and advised that they were "still in the process of attempting to get permission for his recommended extensive lumbar fusion."

By decision dated February 28, 2008, the Office hearing representative affirmed the Office's November 2, 2007 decision. It found that the weight of the medical evidence rested

with the opinion of Dr. Salame, the independent medical examiner, who found that the proposed surgery was not appropriate at the present time.

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.[2] It 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.[3] The only limitation on its authority is that of reasonableness.[4] For a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[5]

Furthermore, the Act[6] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, it shall appoint a third physician who shall make an examination.[7] In cases where it has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

The Office determined that a conflict of medical opinion existed regarding whether the requested lumbar surgery should be authorized between the opinions of Dr. Linson, appellant's physician, a Board-certified orthopedic surgeon and Dr. Opalak, a Board-certified neurosurgeon and second opinion physician. Therefore, the Office properly referred appellant to an impartial medical examiner, Dr. C.G. Salame, a Board-certified neurosurgeon.

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[2] 5 U.S.C. § 8103(a).

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

[4] *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that 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).

[5] *R.C.*, 58 ECAB ___ (Docket No. 06-1676, issued December 26, 2006).

[6] 5 U.S.C. §§ 8101-8193, 8123(a).

[7] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

The Board finds that Dr. Salame's September 20, 2007 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that the requested surgery was not medically appropriate and necessary for treatment of appellant's work-related condition. Dr. Salame provided an extensive review of appellant's medical history, reported his examination findings and opined that the surgery, "which would be the fifth in the lower back, appears to me to be very ambitious and more importantly I am not sure if it will solve [appellant's] major issue which is chronic pain." He explained that his examination findings did not reveal that appellant was suffering from any significant objective lumbosacral radiculopathy. Dr. Salame indicated that appellant's treatment should be geared towards alleviating pain, which was appellant's "main medical incapacitating factor." He recommended an intrathecal pump for management of chronic low back pain and noted that, while appellant's treatment was proper, it was not effective for relief of his right sciatica. The Board finds that Dr. Salame gave a reasoned opinion that, despite the four previous lumbar surgeries, appellant did not achieve a desirable result. Dr. Salame answered questions posed by the Office and opined that the requested surgery would not necessarily relieve appellant's chronic pain which was his "main medical incapacitating factor." In these circumstances, it properly accorded special weight to the impartial medical examiner's September 20, 2007 findings.

When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background must be given special weight.[9] The Board finds that Dr. Salame's report represents the weight of the medical evidence and established that the requested surgery was not medically appropriate and necessary.

Subsequent to the evaluation by Dr. Salame, the Office received an additional report from Dr. Linson dated January 13, 2008. However, Dr. Linson indicated that a pain clinic was not successful and reiterated that he was continuing to try to obtain the requested surgery. As he had been on one side of the conflict in the medical opinion that the impartial specialist resolved, the treating physician's reports were insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.[10] The additional report from Dr. Linson does not contain any new information or rationale sufficient to overcome or create a new conflict with the opinion of Dr. Salame.

Based on the evidence of record, the Office reasonably concluded that the proposed surgery was not medically warranted to treat appellant's work-related conditions. It did not abuse its discretion in denying authorization for the requested surgery.

CONCLUSION

The Board finds that the Office properly exercised its discretion pursuant to 5 U.S.C. § 8103(a) in refusing to authorize appellant's request for posterior decompression at L3-4 and L4-5 posterior fusion at L1 through S1 and anterior fusion at L4-5, L5 and S1 surgery.

[9] *Id.*

[10] *Barbara J. Warren*, 51 ECAB 413 (2000); *Alice J. Tysinger*, 51 ECAB 638 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: April 15, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board