United States Department of Labor
Employees' Compensation Appeals Board

R.Y., Appellant	)	
and	)	**Docket No. 12-1841**
	)	**Issued: February 11, 2013**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Russellville, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 29, 2012 appellant filed a timely appeal from a June 1, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied authorization for lumbar surgery.

FACTUAL HISTORY

The case was before the Board on a prior appeal with respect to a schedule award. In a decision dated April 18, 2008, the Board noted that OWCP accepted that appellant sustained injuries on February 17, 1999 when a tree fell and struck him on the head while in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of his duties as a forestry technician.[2] The following conditions were accepted: thoracic and neck sprain/strains; displacement of cervical intervertebral disc; headache; postconcussion syndrome; displacement of lumbar intervertebral disc and lumbar spinal stenosis. The Board found appellant was not entitled to a schedule award for a brain disorder, cognitive deficit or emotional condition. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a report dated July 10, 2007, Dr. Steven Gaede, a Board-certified neurosurgeon, stated that appellant had lumbar disease at three levels. He recommended an instrumented interbody and posterolateral decompression and fusion from L3-S1. OWCP referred the case for a second opinion evaluation from Dr. Cyril Raben, a Board-certified orthopedic surgeon. In a report dated July 8, 2008, Dr. Raben stated that he would not recommend surgery from the studies available, but indicated that new diagnostic studies should be performed. Following additional testing, appellant was referred for a second opinion examination by Dr. Alice Martinson, a Board-certified orthopedic surgeon, who stated that she was not a spine specialist and did not perform spine surgery. Dr. Martinson recommended a short trail with a brace before consideration of surgery.

Another second examination was performed by Dr. Christopher Jordan, a Board-certified orthopedic surgeon. In a report dated February 27, 2010, he provided a history and results on examination. Dr. Jordan recommended additional x-rays.

In a report dated September 2, 2010, Dr. Christopher Boxell, a Board-certified neurosurgeon, stated that appellant's best option for surgery was a fusion at L5-Sl and L4-L5, and artificial disc replacement at the L3-L4 level. He indicated that appellant's other option was a three-level fusion utilizing a flexible rod system and extending the fixation to the L2 level.

OWCP again referred the case for a second opinion regarding the need for lumbar surgery. In a report dated September 29, 2011, Dr. Luke Knox, a Board-certified neurosurgeon, provided a history and results on examination. He diagnosed somatoform pain disorder, noting an element of exaggerated pain behavior during examination. Dr. Knox opined that he "would be very hesitant in recommending this individual to pursue an extensive lumbar fusion and/or synthetic disc replacement. I believe the chances of him gaining significant benefit are minimal." Dr. Knox also noted magnetic resonance imaging (MRI) scans were almost two years old and the myelogram, computerized tomography (CT) scan and discogram were over a year old.

Appellant was referred to Dr. Michael Clarke, a Board-certified orthopedic surgeon selected as a referee physician under 5 U.S.C. § 8123. In a report dated March 12, 2012, Dr. Clarke provided a history and results on examination. He indicated that he found no evidence of radiculopathy. Dr. Clarke stated that appellant's intrascapular pain was a musculoligamentous strain, postural in etiology. The mild spondylosis of the lumbar spine could be treated medically and should not prevent him from working. Dr. Clarke concluded, "An MRI [scan] was performed of the lumbar spine on March 12, 2012. It confirmed the mild lumbar spondylosis, no stenosis and no disc herniation. No surgical intervention is indicated."

[2] Docket No. 07-2145 (issued April 18, 2008).

By decision dated June 1, 2012, OWCP denied authorization for the proposed lumbar surgery. It found the medical evidence did not establish the proposed surgery was medically warranted.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician who OWCP, 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 OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[4] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on its authority is that of reasonableness.[5]

While OWCP 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] 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. Both of these criteria must be met in order for OWCP to authorize payment.[8]

Pursuant to 5 U.S.C. § 8123(a), if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make the examination.[9] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10]

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[3] 5 U.S.C. § 8103(a).

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

[5] *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP 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] *See Debra S. King*, 44 ECAB 203, 209 (1992).

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

[8] *See Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[9] 5 U.S.C. § 8123.

[10] 20 C.F.R. § 10.321 (1999).

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11]

ANALYSIS

In the present case, there was significant development of the medical evidence with respect to the proposed lumbar surgery. There was a disagreement between an attending physician, Dr. Boxell, and a second opinion physician, Dr. Knox, as to the necessity of the lumbar surgery. Dr. Boxell opined that appellant would benefit from a fusion at L5-Sl and L4-L5, and artificial disc replacement at the L3-L4 level. Dr. Knox opined that there was little chance that appellant would gain significant benefit from the proposed surgery.

In accord with 5 U.S.C. § 8123(a), OWCP selected Dr. Clarke as a referee physician to resolve the conflict in the medical evidence. In a report dated March 12, 2012, Dr. Clarke provided a complete report with a history, results on examination, and a review of medical evidence. He indicated that an MRI scan was performed on that date which confirmed mild spondylosis, no stenosis and no disc herniation. Dr. Clarke unequivocally opined that no surgical intervention was warranted.

The rationalized opinion of a referee physician, as noted above, is entitled to special weight. The Board finds the Dr. Clarke's opinion represents the weight of the medical evidence with respect to the proposed surgery. OWCP properly exercised its discretion and denied authorization for the surgery on the grounds that the weight of the evidence did not establish that the proposed surgery was medically warranted.

On appeal, appellant states that he continues to have back pain and medications do not give any relief. But the issue on appeal is whether OWCP properly exercised its administrative discretion under 5 U.S.C. § 8103 with respect to the proposed surgery. The development of the medical evidence resulted in a referral to a referee physician, and for the reasons noted above, the opinion of the referee represents the weight of the medical evidence on the issue presented.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds OWCP properly denied authorization for lumbar surgery based on the evidence of record.

[11] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2012 is affirmed.

Issued: February 11, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board