United States Department of Labor
Employees' Compensation Appeals Board

H.M., Appellant	)	
and	)	**Docket No. 13-440**
	)	**Issued: May 14, 2013**
DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH SERVICE ADMINISTRATION, Phoenix, AZ, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 17, 2012 appellant, through her attorney, filed a timely appeal from the December 14, 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 appellant's request for authorization of back surgery.

FACTUAL HISTORY

OWCP accepted that on August 26, 2011 appellant, then a 35-year-old nurse specialist, sustained a lumbar strain/sprain when she reached for paper and felt her back "pop" at work.

[1] 5 U.S.C. §§ 8101-8193.

Appellant received treatment from several treating physicians for her complaints, which included low back pain which radiated down into her right leg.[2]

In a November 4, 2011 report, Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that it would appear that appellant's August 26, 2011 work injury consisted of reaching for paper and feeling a "pop" in her back. It represented an aggravation superimposed upon preexisting lumbar degenerative disc disease and aggravation of an annular tear at L5-S1. Dr. Simpson noted that his review of the records indicated a history of back pain commencing in 1999 and stated that the August 26, 2011 incident "would represent most likely an aggravation superimposed on preexisting lumbar degenerative disc disease and most likely preexisting lumbar annular tear."[3]

In a February 16, 2012 report, Dr. Paul Gause, an attending Board-certified orthopedic surgeon, stated that appellant continued to have a significant buttock and leg pain associated with L5 nerve root irritation.[4] He indicated that, given the foraminal and far lateral component of the disc herniation, he thought that the only way to adequately decompress the disc was either a complete facetectomy on one side which would leave appellant unstable and require arthrodesis or a combined anterior/posterior procedure. Dr. Gause stated that the anterior procedure would allow for much better restoration of disc space height and treat the foraminal stenosis and, therefore, recommended that procedure as well as posterior decompression and fusion. Given appellant's prolonged symptoms going on for six months, and lack of considerable conservative care, she elected to proceed with surgery. Dr. Gause recommended an L5-S1 anterior lumbar interbody fusion and L5-S1 posterior decompression and fusion. Appellant submitted a request for spinal surgery to OWCP.[5]

In order to obtain an independent assessment of whether appellant sustained other lumbar spine condition other than a strain as a result of the August 26, 2011 work injury and whether the requested surgery was appropriate and necessary for her work-related lumbar spine condition, OWCP referred appellant to Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Lampert was provided with the factual and medical evidence from the case file and performed an examination on April 25, 2012.

In an April 25, 2012 report, Dr. Lampert provided the diagnosis of lumbar sprain/strain and stated that he found no evidence of any residuals of the lumbar sprain/strain. He also stated that there was no evidence of any aggravation of the preexisting degenerative changes of appellant's lumbar spine. Dr. Lampert posited that appellant's condition of degenerative arthritis

[2] Appellant first reported pain radiating into her right leg on or about September 4, 2011.

[3] Dr. Simpson did not provide an explanation for his opinion and OWCP did not expand appellant's accepted conditions at this time.

[4] Dr. Gause indicated that September 22, 2011 magnetic resonance imaging (MRI) testing showed that there was degenerative disc disease with modic changes at L5-S1. There was a lateral appearing disc protrusion causing right-sided displacement of the L5 root in the far lateral zone.

[5] In a March 23, 2012 report, Dr. Gause indicated that appellant continued to be symptomatic with respect to L5 nerve root symptoms.

of the lumbar spine preexisted the August 26, 2011 work incident, as the medical evidence of file showed that there was a history of a nonemployment-related back injury in 1999 and problems that necessitated treatment of her low back. He found no evidence to suggest that the requested surgical procedures would be related to the August 26, 2011 work injury. Dr. Lampert explained that appellant did not have residuals from the August 26, 2011 injury and noted that, in the September 22, 2011 MRI scan report, there was even some question as to whether the disc protrusion at L5-S1 level was irritating the L5 nerve root. He found that an electromyogram (EMG) of the lower extremities was normal indicating no pathology of the nerves exiting from the low back. Further, Dr. Lampert opined that based on the SOAF appellant's low back symptoms would have resolved in six weeks. Therefore, there were no objective findings to support appellant's subjective complaints.[6]

In a June 8, 2012 decision, OWCP denied appellant's request for authorization of back surgery finding that the weight of the medical evidence rested with the opinion of Dr. Lampert, the second opinion physician. It noted that several physicians had suggested that appellant sustained more than a lumbar strain/sprain on August 26, 2011, but their opinions did not provide adequate medical rationale in support of their conclusions.[7]

In a July 27, 2012 report, Dr. Susan Sorosky, an attending Board-certified physical medicine and rehabilitation physician, stated that she began treating appellant on September 30, 2011 for acute pain which began on August 26, 2011 when she reached around in a twisting motion to grab a form at work and felt a pop in her lower back. Dr. Sorosky noted that appellant reported the onset of right leg pain approximately one week later. She opined that the history, findings on examination and diagnosed test results were consistent with L5 radiculopathy. Dr. Sorosky opined that appellant's current diagnosis was a direct result of the August 26, 2011 work injury noting that she was pain free prior to the incident but felt a pop in the right side of her back and a week later right leg pain developed. She indicated that lifting/twisting was classic for causing discogenic pathology, including right-sided disc protrusion. Dr. Sorosky opined that there was no nonindustrial or preexisting disability as appellant had no significant low back pain prior to the injury and only one self-limited episode of low back pain in 1999 which was nonradicular in nature.

Appellant requested a telephone hearing with an OWCP representative. During the October 10, 2012 hearing, she described the course of her back condition describing some problems she had prior to August 26, 2011. Appellant's attorney argued that surgery should be authorized because she actually sustained a more severe back injury on August 26, 2011 than had been accepted.

[6] An October 4, 2011 EMG report from Dr. John Sollenberger, an osteopath, showed there was no electrodiagnostic evidence of right lumbar radiculopathy, lumbosacral plexopathy or other peripheral nerve pathology affecting the right lower extremity.

[7] In a July 6, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the opinion of Dr. Lampert. The record, at the time the appeal was filed on December 17, 2012, did not contain a final decision of OWCP regarding this matter and it is not currently before the Board.

In a December 14, 2012 decision, an OWCP hearing representative affirmed the June 8, 2012 decision, finding that the weight of the medical evidence regarding appellant's need for surgery due to a work-related condition rested with the opinion of Dr. Lampert.

LEGAL PRECEDENT

Section 8103(a) of FECA states in pertinent part: "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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[8]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[9] The only limitation on OWCP's authority is that of reasonableness.[10] 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.[11]

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[12] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[13]

ANALYSIS

OWCP accepted that on August 26, 2011 appellant sustained a lumbar strain/sprain when she reached for paper and felt her back "pop" at work. Appellant later requested authorization for low back surgery, including L5-S1 anterior lumbar interbody fusion and L5-S1 posterior decompression and fusion.

The Board finds that OWCP properly denied appellant's request for authorization for surgery. OWCP properly relied on the well-rationalized report of Dr. Lampert, a Board-certified orthopedic surgeon serving as a second opinion physician. Dr. Lampert provided an April 25, 2012 report in which he diagnosed lumbar sprain/strain and stated that he found no evidence to indicate any residuals of the lumbar sprain/strain. He also noted that there was no evidence to indicate any aggravation of the preexisting degenerative changes of the lumbar spine.

[8] 5 U.S.C. § 8103.

[9] *Vicky C. Randall*, 51 ECAB 357 (2000).

[10] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[11] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[12] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[13] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

Dr. Lampert posited that appellant's condition of degenerative arthritis of the lumbar spine preexisted the August 26, 2011 work incident as the medical evidence on file showed that there was a history of a back injury in 1999 and problems that necessitated treatment of her low back. He stated that he found no evidence to indicate that any of the requested surgical procedures would be indicated as they related to the August 26, 2011 work injury. Dr. Lampert explained that appellant did not have residuals from the August 26, 2011 work injury and noted that his opinion was supported by diagnostic testing showing normal results with respect to the reported right leg radiculopathy.

Appellant submitted a February 16, 2012 report in which Dr. Gause, recommended that she undergo L5-S1 anterior lumbar interbody fusion and L5-S1 posterior decompression and fusion. Dr. Gause explained why he felt that this surgery would provide relief to appellant. Although he suggested that appellant's right leg radicular symptoms were related to the August 26, 2011 work injury, he did not provide adequate medical rationale in support of this opinion other than noting that appellant did not seem to exhibit such symptoms prior to early September 2011. However, the Board has held that the fact that a condition manifests itself or worsens during a period of employment[14] or that work activities produce symptoms revelatory of an underlying condition[15] does not raise an inference of causal relationship between a claimed condition and employment factors. Appellant also submitted reports, including a report dated July 27, 2012 report, in which Dr. Sorosky, an attending Board-certified physical medicine and rehabilitation physician, posited that she sustained a more severe injury on August 26, 2011 than a lumbar strain/sprain because appellant had been pain free prior to the incident. However, Dr. Sorosky did not provide adequate medical rationale in support of this opinion.[16]

The Board has held the fact that a condition arises after an injury and was not present before an injury is not sufficient to support causal relationship.[17]

For these reasons, the Board finds that OWCP properly exercised its discretion to deny appellant's request for authorization for back surgery.

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 that OWCP properly denied appellant's request for authorization of back surgery.

[14] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[15] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[16] On appeal, counsel argued that OWCP procedure required that appellant's spinal surgery request first be submitted to an OWCP medical adviser for an opinion. However, OWCP procedures allow for referral to either a second opinion physician or an OWCP medical adviser in such situations. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.10c (September 2010).

[17] *Michael S. Mina*, 57 ECAB 279 (2006).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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