

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY HVITVED and DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, ELLSWORTH AIR FORCE BASE, SD

*Docket No. 03-884; Submitted on the Record;
Issued June 3, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to authorize medical expenses for an anterior lumbar interbody fusion.

On June 2, 1997 appellant, then a 51-year-old store worker, filed a notice of traumatic injury alleging that she hurt her back that day in the performance of duty, while bending over to clean and restock a freezer. The Office accepted the claim for a lumbar strain. Appellant did not miss any time from work but was placed on light duty by Dr. Michael F. Mazzone, a Board-certified family practitioner, with restrictions of no prolonged sitting or standing and no lifting over 10 pounds.¹ The Office authorized medical treatment including medication, physical therapy and pain management treatments consisting of epidural injections and physiotherapy.

The record reflects that the Office paid medical benefits for approximately six months then there was a lapse in appellant's medical treatment. On June 23, 1999 appellant filed a claim for a recurrence of disability alleging that her back pain from the original work injury had never stopped. Appellant continued to work light duty.²

On December 3, 1999 appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine, which showed degenerative changes at L5-S1 with no disc herniation. Mild disc bulging was reported at L4-5 and L5-S1. In a report dated February 24, 2000, Dr. Edward L. Seljskog, a Board-certified neurosurgeon, indicated that he had examined appellant at the request of Dr. Ceremuga for complaints of ongoing lower back and left leg pain. Physical findings along with appellant's medical and work histories were noted. Dr. Seljskog

¹ Appellant was also seen by Dr. George J. Ceremuga, a Board-certified family practitioner. Both Dr. Mazzone and Dr. Ceremuga were in practice at the employing establishment's health unit.

² The Office obtained a statement from appellant indicating that she was seeking continued medical benefits and that she was not actually claiming a recurrence of disability. Appellant was advised in a letter dated May 25, 2000 to submit any medical bills pertaining to her June 2, 1997 back injury for payment.

reviewed the December 3 1999 MRI scan report and opined that appellant was symptomatic related to a degenerated bulging disc. He recommended that she undergo a limited hemilaminectomy, foraminotomy and disectomy to correct the situation. In a Form CA-20 attending physician's report dated November 3, 2000, Dr. Seljskog listed the date of injury as June 2, 1997 and diagnosed degenerative disc disease at L5-S1. His recommendation included an anterior lumbar interbody fusion.

The Office received a request for authorization for surgery and forwarded a copy of the case file to an Office medical adviser for review.

In an April 17, 2001 memorandum, Dr. Barry Frank, an Office medical adviser, reviewed the December 3, 1999 MRI report and stated that there was no significant disc herniation impinging on the spinal cord, only degenerative changes. He opined that appellant may have experienced a temporary aggravation of her degenerative disc condition at the time of her work injury of June 2, 1997 but that the proposed surgery almost four years later was not causally related to appellant's work injury. Dr. Frank opined that appellant's weight and advancing age played a role in the progression of her degenerative disc disease.

In an April 26, 2001 report, Dr. Seljskog addressed the Office's refusal to authorize surgery, noting his opinion that appellant's work injury along with her continued employment served to aggravate her preexisting degenerative disc condition. He noted that appellant did not have any back symptoms until after the work injury.

The Office referred appellant for a second opinion examination with Dr. Steven K. Hata, a Board-certified neurologist, on February 27, 2002. Dr. Hata related findings with respect to the neurological examination, appellant's work and medical histories. He diagnosed chronic low back pain with referred leg pain in the L5-S1 distribution and indicated that the condition could be discogenic or due to nerve root irritation secondary to foraminal stenosis. Dr. Hata noted that appellant's preexisting degenerative disc disease was asymptomatic until her work injury of June 2, 1997 and opined that her back strain on June 2, 1997 aggravated the underlying condition. He stated "[this] is a permanent aggravation since [appellant's] condition has persisted going on five years and by its chronicity it is likely to continue indefinitely." He recommended that appellant see a neurosurgeon to ascertain the probability that surgery would alleviate her chronic pain symptoms as he was skeptical of the long-term success of the proposed lumbar disectomy fusion.

A copy of Dr. Hata's report was again referred to an Office medical adviser for review. In an April 10, 2002 report, the Office medical adviser stated, "[i]t is my opinion that [appellant] has a long-standing degenerative spine condition. The injury caused a temporary aggravation. Her current need for surgery is related to the preexisting condition, NOT the injury." He concluded that surgery was necessary but was not work related.

In a supplementary report dated May 20, 2002, Dr. Hata diagnosed chronic back pain with sciatica. He indicated that appellant had no neurological defect, and that surgery was not necessary from a neurological standpoint. Dr. Hata noted that surgery could alleviate appellant's pain symptoms but recommended that she be seen by a neurosurgeon or spinal orthopedist. He

further stated that appellant should have a computerized tomography (CT) of the lumbar spine to ascertain bony abnormalities involving the neural foramina and facet joints.

On June 21, 2002 the Office refused to approve authorization for appellant's surgery, noting that the report from Dr. Hata created a conflict in the medical record. The Office subsequently referred appellant along with a statement of accepted facts and questions for resolution to Dr. Thomas Spagnolia, a Board-certified neurosurgeon, for an impartial medical examination.

In a report dated August 15, 2002, Dr. Spagnolia discussed appellant's work and medical histories, symptoms of ongoing back and left leg pain. Physical findings included tenderness along the lumbar spine region, worse on left than right, with limited range of motion. Dr. Spagnolia also discussed the MRI scan findings of December 1999. He stated that he agreed with the initial diagnosis of lumbar strain at the time of the June 2, 1997 work injury. He opined that appellant's "original injury was simply a progression of her underlying and preexisting condition [degenerative disc disease] which was apparently exacerbated by the June 2, 1997 accident." He noted that appellant suffered from mechanical back pain that has been constant since the work injury with the exception of occasional more severe pain. Dr. Spagnolia recommended that an additional MRI scan be obtained prior to authorization of surgery to look for any other structural problems in her back and to decide whether she would "benefit from possible provocative discography which might separate a mechanical osteoarthritic pain from a discogenic pain." He indicated that, if the MRI scan and discography were negative, then appellant should undertake a weight-loss program and further pain management with medication. Alternatively, he stated, "[if] her MRI [scan] warrants further discography due to appearance of the disc, there is a possibility she may benefit from fusion operation but this is premature to tell at this time."

In an August 22, 2002 chart note, Dr. Spagnolia reported that he reviewed a recent MRI scan dated August 16, 2002³ which demonstrated that appellant had significant degenerative disc disease at L5-S1. He opined that appellant would benefit from provocative discography and "at least consideration of a fusion study, dependent on the results of the study." In an October 28, 2002 report, Dr. Hata responded to additional questions posed by the Office. He stated that appellant's current diagnosis was low back pain and degenerative disc disease of the lumbar spine without myelopathy or radiculopathy.

In a decision dated December 4, 2002, the Office denied authorization for medical treatment on the grounds that the weight of the medical evidence failed to establish that such treatment was medically necessary for appellant's accepted work injury.

The Board finds that this case is not in posture for decision.

³ A copy of the August 16, 2002 MRI scan report is part of the record.

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.⁴ Proof of causal relation in a case such as this must include supporting rationalized medical evidence.⁵ Therefore, in order to prove that a surgical procedure is warranted, appellant must submit evidence to show that the procedure is for a condition causally related to the employment injury and that the surgery is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

In this case, appellant's attending physician recommended that she undergo anterior lumbar discectomy and fusion to correct a bulging disc he related to appellant's June 2, 1997 work injury and underlying degenerative disc disease. Two Office medical advisers have opined that the proposed surgery is not causally related to appellant's work injury, pointing out that the lumbar strain at best caused a temporary aggravation of appellant's degenerative back condition that resolved prior to her need for surgery. Dr. Hata, as the second opinion physician, stated that appellant's work injury caused a permanent aggravation of her work injury. The basis for his opinion on causal relationship appears to be the fact that appellant was asymptomatic for lower back pain until her work injury, and claims to have suffered ongoing back pain since June 2, 1997. He did not explain how appellant's low back strain resulted in permanent aggravation of her degenerative disc disease with supporting medical rationale, only appellant's symptom complaints. Dr. Hata, however, advised that surgery was not necessary from a neurological standpoint.

Because a conflict existed in the record between appellant's treating physician and the Office medical advisers as to the need for surgery and whether it was due to appellant's work injury, the Office sent appellant to an impartial medical specialist for an evaluation. In his report dated August 15, 2002, Dr. Spagnolia agreed that appellant sustained a lumbar strain at work on June 2, 1997, but opined that her ongoing back symptoms were the natural progression of her back condition complicated by the fact that she had continued to work in the intervening years performing duties that required significant bending and restocking of shelves. He opined that appellant's work duties caused a permanent aggravation of the original work injury and her preexisting disc disease. He then specifically stated that appellant's current condition was most likely a permanent exacerbation of her injury on June 2, 1997. Dr. Spagnolia felt that appellant should undergo discography prior to having a discectomy in order to confirm that her pain was discogenic in origin and not due to mechanical osteoarthritic pain.

Where 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.⁶ In this case, the Office credited

⁴ See 5 U.S.C. § 8103(a) (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, that the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of any monthly compensation). To be entitled to reimbursement of medical expenses, however, the employee must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation must include supportive rationalized medical evidence. *Carolyn F. Allen*, 47 ECAB 240 (1995).

⁵ See *Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

⁶ *Richard L. Rhodes*, 50 ECAB 259 (1999); *James R. Driscoll*, 50 ECAB 146 (1998).

Dr. Spagnolia's opinion as supporting a finding that appellant's requested surgery was not medically necessary for her accepted work injury. The Board, however, disagrees with this characterization of Dr. Spagnolia's report. Contrary to the Office's analysis, Dr. Spagnolia specifically stated that appellant could benefit from surgery if discography confirmed that her back pain was discogenic in origin and not due to osteoarthritis. Moreover, Dr. Spagnolia's opinion suggests at least a tenuous causal link between appellant's current back condition and her accepted work injury.

The Board is concerned with the statement from Dr. Spagnolia that appellant's "original injury was simply a progression of her underlying and preexisting condition [degenerative disc disease] which was apparently exacerbated by the June 2, 1997 accident." The Board finds that since the Office undertook to obtain an impartial medical specialist opinion, it now has the obligation to see that it obtains a sufficiently reasoned report as to whether there is a causal relationship between appellant's work injury and her preexisting degenerative disc disease.⁷ The Board directs the Office to request a supplemental report in order to clarify from Dr. Spagnolia what he means by "original injury." He must explain whether appellant's work injury of June 2, 1997 resulted in a permanent aggravation of her preexisting degenerative disc disease. If so, then the Office should have appellant scheduled for a discography as recommended by Dr. Spagnolia such that he can make a more informed decision as to the medical necessity for appellant's requested surgery.

The decision of the Office of Workers' Compensation Programs dated December 4, 2002 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
June 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁷ See e.g., *Elmer K. Kroggel*, 47 ECAB 557 (1996) (the Board remanded the case for the Office to obtain supplemental report from the impartial medical specialist).