

**United States Department of Labor
Employees' Compensation Appeals Board**

D.N., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Temple, TX, Employer)

**Docket No. 07-25
Issued: April 20, 2007**

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 October 2, 2006 appellant filed a timely appeal of a September 6, 2006 merit decision of an Office of Workers' Compensation Programs with respect to authorization for surgery. Pursuant to 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 the Office properly denied authorization for back surgery.

FACTUAL HISTORY

The Office accepted that appellant sustained the following conditions as a result of employment incidents on November 3, 1996 and September 15, 1997: left shoulder and upper arm contusion; cervical and lumbar stenosis; displacement of lumbar intervertebral disc without myelopathy; lumbago; thoracic or lumbosacral neuritis or radiculitis; spondylolisthesis and postlaminectomy syndrome. Appellant underwent lumbar surgeries in 1986, 1997 and 2000.

Appellant continued to receive treatment from Dr. David Schickner, a neurosurgeon. In a report dated August 8, 2005, Dr. Schickner indicated that appellant continued to have low back pain and he was interested in a consultation for an artificial disc. In a report dated October 5, 2005, Dr. Masaki Oishi, a neurologist, provided a history and results on examination. He stated that appellant had low back pain with bilateral leg pain likely due to stenosis and disc protrusions as well as facet hypertrophy from L3-S1. Dr. Oishi recommended that appellant undergo “L3 through S1 lumbar laminectomy for decompression followed by L4-S1 posterior lumbar interbody fusion with placement of GEO interbody fusion cages, L4-S1 pedicle screw instrumentation, L3-S1 posterolateral arthrodesis and left iliac crest autograft bone supplemented by the postoperative wearing of an LSO [lumbosacral orthosis] brace.”

The case was referred to an Office medical adviser for review. In a report dated February 6, 2006, he opined that the evidence in the record did not support the recommended surgical procedure. The Office medical adviser stated that appellant had a prior decompression that did not help and spine fusion had a poor prognosis for achieving pain relief. He recommended referral to a second opinion physician.

The Office referred appellant for a second opinion examination by Dr. Charles Graham, a Board-certified orthopedic surgeon. In a report dated March 23, 2006, Dr. Graham provided a history and results on examination. In response to an inquiry as to whether the proposed lumbar surgery was warranted, Dr. Graham responded:

“No, the claimant does not need the surgery that is proposed. The reason that he does not need this surgery is: (A) the patient has rather profound diabetic neuropathy from his waist distally. He could not feel the 6.10 Semmes-Weinstein monofilaments. He has no particular radiculopathy. (B) The claimant becomes winded if he walks up [to] 100 feet and it seems to be his wind that stops him rather than his lower extremity pain. (C) He has sleep apnea, as well as narcolepsy and this rather extensive back surgery would more than likely not (sic) be extremely hazardous for this individual in this present condition. (D) He does not likely have pain related to his back arthritis nearly as much as he does from the neuropathic pain from his diabetic neuropathy. In reasonable medical probability, the proposed surgery would be of no benefit to this claimant.”

Appellant submitted an August 1, 2006 report from Dr. Schickner, who diagnosed postlaminectomy syndrome cervical and lumbar spine. Dr. Schickner noted the option of surgery was discussed and appellant was “more comfortable” with Dr. Oishi than with himself. He stated that appellant “understands my feelings of a fusion being optional with lower chances of surgical success.”

By decision dated September 6, 2006, the Office denied authorization for the proposed surgery. The Office found the weight of the medical evidence did not establish that surgery was medically necessary.

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.¹ The Office 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.² The only limitation on the Office's authority is that of reasonableness.³

ANALYSIS

A treating physician, Dr. Oishi, submitted an October 5, 2005 proposing lumbar surgery that included laminectomy and fusion. An Office medical adviser opined that the evidence did not support the proposed surgery, noting that appellant had a prior surgery that was not helpful and that spinal fusions had limited success in achieving pain relief. The second opinion examiner, Dr. Graham, also opined that the surgery was not warranted. He opined that surgery would be hazardous to the claimant due to sleep apnea and narcolepsy. Dr. Graham also discussed diabetic neuropathy and found the proposed surgery would not benefit appellant. The Board notes that an attending neurosurgeon, Dr. Schickner, also appeared to question the need for surgery. He indicated in his August 1, 2006 report that fusion was optional with lower chances of surgical success.

As noted above, the Office has broad discretion with respect to the authorization for surgery. The weight of the evidence in this case supports the Office's determination. Dr. Graham provided a rationalized medical opinion that the surgery would not be of benefit to appellant. An Office medical adviser found the proposed surgery was not medically necessary, and appellant's treating physician, Dr. Schickner, also referred to the low chance of success. The physician who proposed the surgery, Dr. Oishi, did not provide a discussion of why the surgery was recommended in view of appellant's medical history.

Based on the evidence of record, the Office reasonably concluded that the proposed surgery was not warranted. The Office did not abuse its discretion in denying authorization for additional lumbar surgery in this case.

CONCLUSION

The Office properly exercised its discretion pursuant to 5 U.S.C. § 8103(a) in refusing to authorize appellant's request for lumbar surgery.

¹ 5 U.S.C. § 8103(a).

² *Dale E. Jones*, 48 ECAB 648, 649 (1997).

³ *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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 6, 2006 is affirmed.

Issued: April 20, 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