United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 08-1439**
	)	**Issued: November 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 8, 2008 appellant filed a timely appeal from an April 3, 2008 Office of Workers' Compensation Programs' merit decision. Under 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 abused its discretion by denying appellant authorization for lumbar fusion surgery.

FACTUAL HISTORY

Appellant, a 50-year-old letter carrier, filed a Form CA-2 claim for benefits, alleging that he developed degenerative disc disease causally related to factors of employment. The Office accepted the claim for lumbosacral spondylosis. It paid appropriate compensation for temporary total disability.

In a report dated July 11, 2007, Dr. Michael C. Chabot, an osteopath, stated that appellant complained of lower lumbar pain radiating into the left lower extremity. He noted that a

discogram revealed positive reproduction of his back pain symptoms with an injection at the L4-5 level. Dr. Chabot advised that x-rays of the lumbar spine revealed mild disc space narrowing at L5-S1; in addition, a magnetic resonance imaging (MRI) scan showed evidence of disc desiccation and degeneration at L4-5 and L5-S1. He indicated that appellant had to decide whether he wanted to live with his symptoms or consider undergoing surgical intervention in the hope of relieving them. Dr. Chabot stated that the surgical procedure consisted of either a posterior decompressive laminectomy and fusion with interbody implants or a transabdominal anterior interbody fusion with anterior implants. He related that he discussed the risks and benefits of both procedures with appellant.

By letter dated August 9, 2007, the Office asked Dr. Chabot for additional information regarding the spinal surgery he had recommended for appellant. It asked Dr. Chabot what specific surgical procedure he recommended, the specific levels that would be surgically treated and whether a bone stimulator would be utilized after surgery. The Office also asked whether the proposed surgical intervention would be likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of the monthly compensation.

In a report dated August 16, 2007, Dr. Chabot stated that he had not examined appellant since his July 11, 2007 report. He essentially reiterated the findings, conclusions and surgical options he presented to appellant in this previous report. Dr. Chabot advised that he would not use a bone stimulator, but instead would use bone morphogenic protein in the proposed procedure. He stated that, according to recent studies, this has the highest likelihood of achieving a satisfactory fusion at the two anterior and posterior lumbar levels. Dr. Chabot asserted that the intent of any surgical procedure is to offer medical intervention that would cure, give relief, or reduce the degree of disability to an individual.

In a report dated September 16, 2007, an Office medical adviser reviewed the medical record and recommended that the Office deny authorization for the requested two level lumbar fusion surgery. He stated that the June 19, 2007 discogram was not positive at the L4-5 and L5-S1 levels that Dr. Chabot wanted to fuse. The Office medical adviser noted that there were no medical records indicating that appellant had lumbar instability, one of the "traditional" reasons for performing lumbar fusion surgery.

In order to determine whether appellant's two level lumbar fusion surgery was causally related to his accepted lumbosacral spondylosis condition, the Office referred appellant to Dr. Jack C. Tippett, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated October 24, 2007, Dr. Tippett stated that appellant still had residual symptoms of work-related lumbosacral spondylosis and noted imaging evidence of degenerative changes in the lower lumbar spine with degenerative disc disease which were present for several years. When asked whether the recommended operative intervention likely accomplish a cure, relief, or reduction in the degree or the period of disability, he responded:

> "No. The recommended surgery would do just the opposite. It would not cure his symptoms. Although it might give relief, there is a likelihood that he could have even more symptoms, which would be harder to control than [those] he has at the present time. It would increase his period of disability."

The Office found that there was a conflict in the medical evidence between Drs. Chabot and Tippett regarding whether appellant's surgery was related to an accepted condition. It referred appellant to Dr. Marvin R. Mishkin, Board-certified in orthopedic surgery, for an impartial examination to resolve the conflict.

In a report dated January 7, 2008, Dr. Mishkin noted findings on examination and reviewed appellant's history of injury and medical records. He stated:

> "It is my opinion within a reasonable degree of medical certainty that this individual has very mild to minimal degenerative disc disease at L4-5 and L5-S1. Based on the x-rays taken in this office, there has been no evidence of any significant structural changes in the lower lumbar spine or disc spaces at L4-5 or L5-S1. [Appellant] has no clinical evidence of radiculopathy. He has no evidence of any neurological deficit based on this examination.
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> "It is my opinion within a reasonable degree of medical certainty that I would not recommend surgical treatment to the lumbar spine, as indicated in the reports of Dr. Chabot. I would not recommend anterior surgical procedure with decompression or posterior surgical procedure with decompression and fusion. (Emphasis in the original.)
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> "It is my opinion that [appellant's] subjective complaints do not correlate with the lack of objective evidence. Therefore, he would not be an appropriate candidate to perform back fusion. Such surgery should be performed if there is definite clinical evidence of nerve root compression or vertebral instability resulting in symptoms with objective findings of neurological deficit that has been documented over a period of time and are getting progressively worse, and which did not respond to conservative treatment. [Appellant] does not have such a history and does not have such findings.
>
> "Any surgery performed on this individual, in my opinion, would not be associated with any work-related injury and, based on the information available to me, would be related to [appellant's] subjective complaints of pain with no significant clinical evidence of radiculopathy or nerve root compression."

By decision dated April 3, 2008, the Office denied authorization for left shoulder arthroscopy with rotator cuff repair. It found that the weight of the medical evidence, as represented by Dr. Mishkin's impartial medical opinion, indicated that the recommended surgical intervention was not related to his employment.

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation Act[1] 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

[1] 5 U.S.C. § 8101 *et seq.*

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] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. 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. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. 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.[3]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4]

ANALYSIS

In this case, the Office accepted that appellant had sustained the condition of lumbosacral spondylosis. Dr. Chabot stated in his July 11 and August 16, 2007 reports that appellant's lower lumbar pain radiating into the left lower extremity. He noted that lumbar spine x-rays revealed mild disc space narrowing at L5-S1 and that an MRI scan showed evidence of disc desiccation and degeneration at L4-5 and L5-S1. Dr. Chabot stated that appellant could either live with these symptoms or consider undergoing surgery to relieve them. He recommended either a posterior decompressive laminectomy and fusion with interbody implants or a transabdominal anterior interbody fusion with anterior implants, which had the highest likelihood of achieving a satisfactory fusion at the two anterior and posterior lumbar levels. However, the Office medical adviser and Dr. Tippett, the second opinion physician, found that the need for such surgery was not related to any employment-related incident or activity. Dr. Tippett opined that the recommended surgery would not cure his symptoms and might even increase them. To resolve this conflict in the medical evidence, the Office referred appellant to Dr. Mishkin for an impartial medical examination. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness. In his January 7, 2008 report, Dr. Mishkin asserted that he would not recommend the type of lumbar fusion surgery proposed by Dr. Chabot. He stated that, because appellant's subjective complaints did not correlate with objective evidence, he would not be an appropriate candidate for lumbar spine fusion. Dr. Mishkin opined that without definite clinical evidence of nerve root compression or vertebral instability resulting in objective, documented findings of a long-term, worsening neurological deficit, appellant should not undergo the recommended procedure. He concluded that any surgery performed on appellant would not be associated with any work-related injury.

[2] 5 U.S.C. § 8103.

[3] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[4] 5 U.S.C. § 8123(a).

The Board finds that the Office properly found that Dr. Mishkin's referee opinion negated a causal relationship between appellant's condition and the proposed two level lumbar fusion surgery. Dr. Mishkin's opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Mishkin's opinion the special weight of an impartial medical examiner.[5] Accordingly, the Board finds that Dr. Mishkin's opinion constituted sufficient medical rationale to support the Office's April 3, 2008 decision.

Therefore, given the fact that the weight of the medical evidence of record, as represented by Dr. Mishkin's referee opinion, indicates that the need for lumbar fusion surgery is not work related, the Office did not unreasonably deny appellant's request for surgery to ameliorate his lumbosacral spondylosis/degenerative disc condition. The Office did not abuse its discretion to deny appellant authorization for two level lumbar fusion surgery.

CONCLUSION

The Board finds that the Office did not abuse its discretion to deny appellant authorization for lumbar fusion surgery.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 13, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[5] *Gary R. Seiber*, 46 ECAB 215 (1994).