United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 09-125**
	)	**Issued: June 11, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Sequim, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument April 22, 2009

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2008 appellant filed a timely appeal from a September 22, 2008 merit decision of the Office of Workers' Compensation Programs which affirmed a March 26, 2008 decision denying appellant's claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability commencing October 1, 2002 causally related to her accepted employment condition.

FACTUAL HISTORY

On May 30, 2000 appellant then a 43-year-old rural letter carrier, filed an occupational disease claim alleging that on May 2, 2000 she developed low back pain radiating into her leg caused by repetitive lifting and carrying at work. She stopped work on May 2, 2000.

Appellant's claim was accepted for temporary aggravation of preexisting degenerative disc disease at L3-4, L4-5 and L5-S1 and later expanded to include lumbar subluxation.[1]

Appellant came under the treatment of Dr. Leslie Romer, a chiropractor, from May 8 to December 15, 2000, for an acute lower back contusion and subluxation caused by her work duties. She was also treated by Dr. Michael Crim, a Board-certified family practitioner, from May 9 to September 29, 2000, who diagnosed asymptomatic disc disease at L5-S1 secondary to a work injury. A magnetic resonance imaging (MRI) scan of the lumbar spine dated May 16, 2000 revealed a lateral disc bulge at L3-4, at L5-S1, bilateral disc herniation with moderate impingement on both L5 roots and moderate disc space narrowing at L5-S1 with retrolisthesis of L5 on S1. On June 14, 2000 appellant was treated by Dr. John Hsiang, a Board-certified neurosurgeon, who diagnosed degenerative changes at L5-S1 and recommended epidural injections.

Appellant also sought treatment from Dr. Hsiang who treated her for persistent low back pain radiating into her leg and recommended surgical intervention. In an operative report dated October 1, 2002, Dr. Hsiang performed a bilateral hemilamintomy of L5-S1, discectomy decompression of bilateral L5 and S1 nerve root, posterior lumbar interbody fusion of L5-S1 and posterior lateral arthrodesis of L5-S1. He diagnosed degenerative disc disease at L5-S1 with stenosis at L5-S1.[2]

On November 14, 2003 appellant filed a CA-2a, notice of recurrence of disability, alleging that on October 1, 2002 she underwent back surgery for her work-related injury and was totally disabled. In a July 21, 2004 statement, she noted that she underwent surgery on October 1, 2002 because her physician indicated her condition was worsening due to the residuals of her work injury.

In a decision dated July 12, 2005, the Office denied appellant's claim for a recurrence of disability. On July 29, 2005 appellant requested an oral hearing. On May 24, 2006 an Office hearing representative set aside the July 12, 2005 decision and remanded the case for the Office to obtain an opinion from an Office medical adviser regarding whether the October 1, 2002 surgery and resulting disability were due to the accepted work condition.

On September 7, 2006 the Office referred appellant's case record to the Office medical adviser for an opinion as to whether the surgery performed on October 1, 2002 was necessitated by the lumbar subluxation. In a report dated October 3, 2006, the medical adviser opined that the lumbar surgery of October 1, 2002 was in part necessitated by the L5-S1 lumbar subluxation.

In an Office memorandum dated October 30, 2006, the claims examiner noted that the medical adviser's October 3, 2006 report provided no rationale to support her conclusion that the lumbar surgery of October 1, 2002 was in part necessitated by accepted lumbar subluxation. The

[1] On October 31, 2001 the Office terminated appellant's wage-loss compensation based on the opinion of an Office referral physician. In a decision dated July 16, 2002, an Office hearing representative affirmed the October 31, 2001 decision.

[2] The Board notes that appellant did not request prior authorization for surgery.

claims examiner further noted that the medical adviser incorrectly indicated that a subluxation and retrolisthesis with spondylosis were interchangeable medical terms. The claims examiner indicated that for these reasons the medical advisers report would be set aside and appellant referred to a specialist.

By correspondence dated January 30, 2007, the Office informed appellant's attorney that the matter would be referred to a second opinion evaluation. It requested that appellant provide the lumbar x-ray films taken by her chiropractor and any additional films taken up to the time of her surgery.

In a letter dated February 7, 2007, the Office informed appellant that her case needed to be evaluated by an orthopedist and radiologist and requested that appellant obtain, within 30 days, x-ray films taken from May 2000 up to the time of her surgery. It further noted that, if it did not receive the films or a statement of nonavailability within 30 days, appellant may be considered to have obstructed an Office-directed examination. The Office noted that, when a claimant refuses to attend or cooperate with a medical examination required by the Office, all compensation benefits, including medical expenses, are suspended and not payable from the date of suspension through the date of full compliance.[3]

On February 12, 2008 the Office referred appellant's case for a second opinion to Dr. K. David Bauer, a Board-certified orthopedist, to review the case record and determine whether appellant had a lumbar subluxation prior to October 1, 2002 and whether the surgery performed on October 1, 2002 was medically necessitated by the lumbar subluxation. It provided Dr. Bauer with appellant's medical records, a statement of accepted facts and list of questions to be answered. The record does not contain a referral letter sent by the Office to appellant.

In a report dated February 16, 2008, Dr. Bauer opined that the MRI scan demonstrated that appellant had degenerative disc disease, a disease of life, with no evidence or objective studies of medical subluxation. He noted that the chiropractic subluxation was no longer present on October 1, 2002 and there was no evidence that the lifting injury of May 2000 had any lasting effect in October 2002.

In a decision dated March 26, 2008, the Office denied appellant's claim for a recurrence of disability.

On April 5, 2008 appellant requested an oral hearing which was held on August 5, 2008. She submitted a September 2, 2008 statement, noting that the Office medical adviser agreed that the October 1, 2002 surgery was warranted and causally related to her work injury. Appellant asserted that the Office dismissed the findings of the medical adviser and engaged in doctor shopping by referring appellant's record to a second opinion physician for a file review and not a

[3] On March 23, 2007 the Office proposed to suspend compensation benefits on the grounds that appellant obstructed an examination by not producing lumbar films or providing written proof that they were no longer available as directed by the Office. On April 19, 2007 finalized the proposal. In a January 3, 2008 decision, the hearing representative set aside the April 19, 2007 decision. The hearing representative instructed the Office to issue a *de novo* decision regarding whether appellant sustained a recurrence of disability on October 1, 2002 causally related to her work injury and whether her surgery should be retroactively authorized.

physical examination. She advised that she was not notified in advance of the referral of her case to a second opinion physician and she was not permitted to have a physician present to participate in the examination as allowed by 5 U.S.C. § 8123. Appellant contended that, because the Office failed to follow proper procedure in referring her to a second opinion physician, it was improper to rely on the opinion of Dr. Bauer in denying appellant's claim for a recurrence of disability.

In a decision dated September 22, 2008, the hearing representative affirmed the Office decision dated March 26, 2008.

LEGAL PRECEDENT

Section 8123(a) of the Federal Employees' Compensation Act[4] states, in pertinent part:

> "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination."

Office procedures provide:

> "*Second Opinion Examinations*. The attending physician is the primary source of medical evidence in most cases, but sometimes his or her report does not meet the needs of the Office. When this happens, the Office may request a second opinion examination. Under 5 U.S.C. [§] 8123 the [Office] has authority to order examination of an injured employee as frequently and at the times and places as may be reasonably required."
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> * * *
>
> "d. *Information Sent to Claimant*. After contacting the physician, the MMA [medical management assistant] will notify the claimant in writing of the following:
>
> (1) *The name and address* of the physician to whom he or she is being referred as well as the date and time of the appointment.
>
> (2) *Any request to forward x-rays*, electrocardiograms, etc., to the specialist.
>
> (3) *The claimant's right*, under section 8123 of the [Act], to have a physician paid by him or her present during a second opinion examination,

[4] 5 U.S.C. § 8123(a).

(4) *A warning* that benefits may be suspended under 5 U.S.C. [§] 8123(d) for failure to report for examination.

(5) *Copies* of Forms SF-1012, SF-1012A, and instructional Form CA-77 to claim travel expenses."[5] (Emphasis in the original.)

ANALYSIS

The Office accepted appellant's claim for temporary aggravation of preexisting degenerative disc disease at L3-4, L4-5 and L5-S1 and lumbar subluxation. It reviewed the medical evidence and determined that a second opinion was necessary for a determination as to whether appellant still had a lumbar subluxation on October 1, 2002 and whether the surgery performed on October 1, 2002 was medically necessitated by the lumbar subluxation. Consequently, the Office referred appellant to Dr. K. David Bauer, a Board-certified orthopedist. It provided Dr. Bauer with appellant's medical records, a statement of accepted facts and questions. The record does not contain a referral letter sent by the Office to appellant.

In this case, the Board finds that the Office failed to follow its procedures with regard to providing information to appellant in advance of referring appellant to a second opinion physician. The Office's procedure manual specifically provides:

"d. *Information Sent to Claimant*. After contacting the physician, the MMA will notify the claimant in writing of the following:

(1) *The name and address* of the physician to whom he or she is being referred as well as the date and time of the appointment.

(2) *Any request to forward x-rays*, electrocardiograms, etc., to the specialist.

(3) *The claimant's right*, under section 8123 of the [Act], to have a physician paid by him or her present during a second opinion examination,

(4) *A warning* that benefits may be suspended under 5 U.S.C. [§] 8123(d) for failure to report for examination.

(5) *Copies* of Forms SF-1012, SF-1012A, and instructional Form CA-77 to claim travel expenses."[6] (Emphasis in the original.)

The record does not contain any correspondence referring appellant or her record to Dr. Bauer, including his name and address or the date and time of the appointment. Additionally, the record does not contain notification to appellant of her right, under section

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3(d)(1)-(5) (May 2003).

[6] *See id.*

8123 of the Act,[7] to have a physician paid by her present during the second opinion examination. While correspondence to appellant on January 30, 2007 indicated that the Office would be scheduling the case for a second opinion evaluation and that appellant would be required to provide x-ray films from May 2000 to October 2002, there was no correspondence in advance of the evaluation notifying her of the specific time, place and the name of the physician performing the second opinion evaluation. Similarly, in correspondence dated February 7, 2007, the Office advised appellant that her case would be evaluated by a referral physician and noted the penalty provisions pursuant to 5 U.S.C. § 8123 for failure to attend or cooperate with a medical examination; however, there was no corresponding notification of appellant's right under section 8123 to have a physician paid by her present during examination. The Board finds that the Office's referral of the record to Dr. Bauer for a second opinion failed to fully comply with Chapter 3.500(d) of the Office's procedures[8] and Board precedent.[9]

The Board, therefore, finds that, as the Office did not follow its procedures, the referral of appellant to Dr. Bauer was improper. The Office is therefore precluded from relying on the opinion of Dr. Bauer. The case will be remanded to the Office for referral of appellant for another second opinion examination with appropriate notification provided to appellant, consistent with the Office's procedures, which will afford her the opportunity to have her physician participate in the examination.

CONCLUSION

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

[7] 5 U.S.C. § 8123(a).

[8] *Supra* note 5.

[9] *See Donald J. Knight*, 47 ECAB 706 (1996) (where the Board found that the Office failed to notify appellant's authorized representative of the referral to a second opinion physician effectively denied appellant's statutory right to have a physician designated and paid by him to be present and participate in the examination pursuant to 5 U.S.C. § 8123).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and March 26, 2008 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: June 11, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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