

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

M.T., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
WILLIAM J. HUGHES TECHNICAL CENTER,)
Atlantic City, NJ, Employer)

Docket No. 09-716
Issued: November 12, 2009

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2009 appellant, through his attorney, filed a timely appeal from the March 17, September 5 and November 24, 2008 merit decisions of the Office of Workers' Compensation Programs denying authorization for surgery and expansion of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for surgical authorization; and (2) whether he has established that his current condition of degenerative disc disease of the spine is causally related to his accepted work injuries.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed an Office finding that appellant was not entitled to a schedule award for the left leg but found

that the case was not in posture for decision regarding the extent of any permanent impairment of the right leg.¹ The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On August 17, 2004 Dr. Fernando Delasotta, a Board-certified neurosurgeon, recommended a three-level posterior lumbar interbody surgery with instrumented arthodesis.² On August 26, 2004 he attributed appellant's current condition and need for surgery "to both the work-related injuries of June of 1995 and May of 1997 in which he suffered low back injury." Dr. Delasotta asserted that appellant's "condition has progressed as a result of the injuries in which there has been accelerated degenerative changes in the lumbar spine now necessitating the need for surgery."

An Office medical adviser reviewed the case record on September 30, 2004. He noted that the accepted condition was a soft tissue injury of the lower back muscles and ligaments. The medical adviser asserted that there was "absolutely no relationship whatsoever between the soft tissue injuries resulting in a lumbar sprain and a diagnosis of degenerative disc disease with a request for a lumbar spinal fusion." He concluded that the requested surgery was not casually related to the accepted work injury.

In a report dated February 21, 2005, Dr. Delasotta related that absent the work injury he did not believe that appellant would have such severe pathology. On April 6, 2005 the Office informed appellant's attorney that the medical evidence was currently insufficient to support that his degenerative back condition and need for surgery were causally related to his injuries. It noted that Dr. Delasotta appeared to be unaware that in 1995 appellant was diagnosed with severe preexisting degenerative disc disease.

On May 3, 2005 the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion evaluation. On June 7, 2005 Dr. Stark diagnosed cervical and lumbar degenerative disc disease. He opined that there was "no connection between [appellant's] condition of multiple collapsed dis[c]s and foraminal stenosis to his 1995 and 1997 work-related accidents." Dr. Stark found that lumbar surgery was appropriate but not related to his preexisting degenerative disc disease. He noted that appellant's degenerative disease had not been accelerated or aggravated by the accepted injuries.

¹ Docket No. 02-2065 (issued February 7, 2003). The Office accepted that appellant sustained a lumbosacral sprain and right knee derangement on June 1, 1995, assigned file number xxxxxx701. Appellant underwent an arthroscopic debridement and partial synovectomy on January 30, 1996. The Office further accepted that he sustained a sprain of the neck, shoulder and right knee and a right knee contusion on May 8, 1997, assigned file number xxxxxx543. Appellant underwent a partial medial meniscectomy on July 21, 1997.

² By decision dated December 15, 2003, a hearing representative vacated the June 23, 2003 decision and remanded the case for the Office to determine whether appellant had more than 37 percent right lower extremity impairment. On February 13, 2004 the Office found that he had no more than 37 percent right lower extremity impairment. By decision dated February 1, 2005, a hearing representative affirmed the February 13, 2004 decision. She instructed the Office upon return of the case record to determine whether appellant's low back condition was due to his accepted employment injury and whether surgery should be authorized. On April 6, 2005 the Office denied appellant's request for further review of the merits of his claim under 5 U.S.C. § 8128.

By decision dated June 27, 2005, the Office denied appellant's request to expand acceptance of his claim to include additional spinal conditions and authorization for surgery.³

In 2006 Dr. Delasotta again requested authorization to perform a posterior lumbar interbody fusion at L3-4, L4-5 and L5-S1. On December 26, 2006 an Office medical adviser asserted that the employment-related diagnosis of lumbosacral strain should not require spinal surgery a decade later.

On April 12, 2007 the Office again referred appellant to Dr. Stark for a second opinion examination. In a report dated April 24, 2007, Dr. Stark found no objective evidence that appellant had continuing residuals of the accepted conditions of right knee derangement and lumbosacral strain/sprain. He diagnosed degenerative lumbar joint disease and discogenic disease unrelated to the June 1, 1995 work injury. Dr. Stark further found that the surgery for appellant's degenerative disc disease was unrelated to his 1995 work injury.

On December 19, 2007 an Office medical adviser reviewed the medical evidence and noted that if appellant's back injury caused an aggravation of his underlying degenerative disc disease surgery could be authorized. He recommended an additional medical report from the attending physician describing how conservative care failed necessitating surgery.

On February 13, 2008 the Office referred appellant to Dr. George Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination regarding the causal relationship between appellant's current back condition and his work injury and the need for surgery. On February 26, 2008 Dr. Glenn discussed appellant's history of work injuries and reviewed in detail the medical evidence of record. He found that appellant sustained only a lumbosacral strain due to the June 1, 1995 employment injury and noted that an x-ray obtained at that time showed severe preexisting degenerative disc disease. Dr. Glenn further noted that following the May 8, 1997 incident the medical reports referenced a prior injury to the back and current low back and right hip problems but did not provide a diagnosis. He found that the medical record did not show that appellant received back treatment after the May 8, 1997 work injury until six months prior to Dr. Delasotta's evaluation in February 2004.⁴ Dr. Glenn stated:

"In summary then it is my opinion within reasonable medical probability that the incident of June 1, 1995 caused a lumbosacral strain which basically is a soft tissue injury this superimposed upon rather extensive preexisting lumbar degenerative osteoarthritic changes with compression fracture.

"It is further obvious that [appellant] did not receive any specific treatment for his lumbosacral sprain beyond the short time frame in June of 1995. It is further my opinion that the changes depicted in the subsequent diagnostic studies including the MRI [magnetic resonance imaging] scan, the myelogram, and CT [computerized tomography] scan, and the discogram were as a result of the natural progression of the preexisting degenerative process and that these findings

³ On August 24, 2005 the Office accepted that appellant sustained a recurrence of disability on February 2, 2004.

⁴ Appellant indicated that he received chiropractic treatment.

were not in any way caused by the incident. The[y] may have been temporarily aggravated by the incident, but the aggravation factor in my opinion promptly resolved. It is furthermore my opinion, again, within reasonable medical probability that the preexisting process was not in any way accelerated by the incident of June 1, 1995.”

Dr. Glenn noted that appellant should have a second opinion before having surgery and again asserted that the “work[-]related injury of June 1, 1995 is in no way the proximate cause of the current condition which now prompts the recommendation for surgery by Dr. Delasotta. In actuality [his] actual physical findings are rather meager.”

By decision dated March 17, 2008, the Office denied appellant’s request for authorization for back surgery.⁵ On March 24, 2008 appellant’s attorney requested an oral hearing.⁶ At the hearing, held on July 15, 2008, counsel argued that Dr. Glenn’s opinion was equivocal and required clarification.

On August 4, 2008 Dr. Delasotta disagreed with Dr. Glenn’s conclusion that appellant’s June 1, 1995 injury was a soft tissue injury. He noted that it did not appear that Dr. Glenn reviewed the 1995 x-ray. Dr. Delasotta opined that appellant’s degenerative disc disease would not have progressed as much absent his work injury. He diagnosed lumbar radiculopathy, spinal stenosis and discogenic pain syndrome. Dr. Delasotta explained the lack of back treatment after his 1995 and 1997 injuries to his significant right knee injury and need for surgery. He noted that appellant received chiropractic treatment for his back and further advised that he altered his gait due to his knee pain “which would also be a contributing factor in the aggravation of his lower back pain.” Dr. Delasotta stated:

“Another crucial fact in this case is that the patient did not complain of lower back and leg pain until after the 1995 and 1997 incidents. Therefore, he was not symptomatic as a result of his preexisting degenerative changes but became symptomatic as a result of the injury. This fact is well documented in the past records. The pain became frankly worse in 2004. Over the years his condition has progressively worsened due to aggravation, exacerbation and acceleration of the degenerative process to the point that he now has neurologic deficit.”

Dr. Delasotta discussed the July 25, 2008 findings on appellant’s CT scan and recommended surgery.

By decision dated September 5, 2008, the hearing representative affirmed the March 17, 2008 decision. She found that his claim should not be expanded to include an aggravation of degenerative disc disease or that the Office should authorize spinal surgery.

⁵ In a report dated March 26, 2008, Dr. Delasotta diagnosed lumbar and cervical radiculopathy and discogenic pain syndrome due to appellant’s June 1995 and May 1998 work injuries.

⁶ By letter dated March 17, 2008, appellant’s attorney noted that the Office failed to inform him of the impartial medical examination scheduled with Dr. Glenn and requested a copy of the report and a formal decision with appeal rights. It appears from a review of the record, however, that the Office sent a copy of the February 13, 2008 referral letter to the attorney.

On September 18, 2008 appellant, through his attorney, requested reconsideration. He resubmitted the August 4, 2008 report from Dr. Delasotta and a July 25, 2008 myelogram. The myelogram showed spondylosis and degenerative changes at many levels but no disc herniation.

By decision dated November 24, 2008, the Office denied modification of the September 5, 2008 decision. It found that Dr. Delasotta's opinion was insufficiently rationalized to overcome the weight accorded the impartial medical examiner.⁷

LEGAL PRECEDENT -- ISSUE 1

Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.⁸ Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant,¹¹ must be one of reasonable medical certainty¹² explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

Section 8123(a) of the Federal Employees' Compensation Act¹⁴ 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.¹⁵ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an

⁷ The Office used clear evidence of error language in its decision; however, appellant's request for reconsideration was timely. However, it weighed the evidence of record and performed a merit review; consequently, any error is harmless.

⁸ *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

⁹ *John J. Montoya*, 54 ECAB 306 (2003).

¹⁰ *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹¹ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹² *John W. Montoya*, *supra* note 9.

¹³ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Id.* at § 8123(a).

examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁶

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the 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 of the period of disability or aid in lessening the amount of monthly compensation.¹⁸ In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.¹⁹ 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.²⁰ 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.²¹ Proof of causal relationship must include supporting rationalized medical evidence. Thus, in order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.²²

In situations where there are opposing medical reports and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.²³

¹⁶ 20 C.F.R. § 10.321.

¹⁷ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁸ 5 U.S.C. § 8103; see *Thomas W. Stevens*, 50 ECAB 288 (1999).

¹⁹ *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

²⁰ *Claudia L. Yantis*, 48 ECAB 495 (1997).

²¹ *Cathy B. Mullin*, 51 ECAB 331 (2000).

²² *Id.*

²³ See *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS -- ISSUES 1 & 2

The Office accepted that appellant sustained lumbosacral sprain and derangement of the right knee due to a June 1, 1995 work injury and a right knee contusion and sprain of the neck, right knee and right shoulder due to an injury on May 8, 1997. On August 17, 2004 Dr. Delasotta, his attending physician, recommended a posterior lumbar interbody surgery at L3-4, L4-5 and L5-S1. He opined that appellant's June 1995 and May 1997 work injuries "accelerated degenerative changes in the lumbar spine now necessitating the need for surgery." In contrast Dr. Stark, an Office referral physician, asserted in reports dated June 7, 2005 and April 24, 2007 that appellant's degenerative disc disease of the lumbar spine was unrelated to the accepted work injuries. He further attributed the need for surgery to a progression of the nonemployment-related preexisting degenerative disc disease. The Office properly determined that a conflict existed between Dr. Delasotta and Dr. Stark regarding whether his current back condition was due to his accepted work injury and whether the requested surgery should be authorized as employment related. It referred appellant to Dr. Glenn for resolution of the conflict.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²⁴ The Board finds that the opinion of Dr. Glenn, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Glenn accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.²⁵ In a report dated February 26, 2008, he reviewed the medical evidence of record, including the results of diagnostic studies. Dr. Glenn noted that x-rays taken at the time of appellant's June 1, 1995 work injury revealed severe preexisting degenerative disc disease. He also indicated that the medical record did not establish that appellant received medical treatment for his lumbosacral sprain except for a brief period in June 1995. Dr. Glenn further noted that appellant did not receive specific treatment for his back following the May 1997 work injury. He asserted that the changes on diagnostic studies over the years revealed a natural progression of appellant's preexisting degenerative disc disease. Dr. Glenn concluded that the June 1995 employment injury caused a temporary aggravation of the preexisting degenerative disc disease which "promptly resolved" and that the "preexisting process was not in any way accelerated by the incident of June 1, 1995." He provided rationale for his opinion by finding that the diagnostic studies over the years revealed a natural progression of appellant's preexisting degenerative disc disease. Dr. Glenn further concluded that any need for surgery was unrelated to the accepted work injuries. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner and establishes that appellant's current back condition and need for surgery is not related to his accepted work injury.

²⁴ *Id.*

²⁵ *Manuel Gill*, 52 ECAB 282 (2001).

In a report dated August 4, 2008, Dr. Delasotta disagreed with Dr. Glenn's conclusion that appellant sustained only a soft tissue injury on June 1, 1995. He attributed the extent of the progression of his degenerative disc disease to his work injury. Dr. Delasotta explained that appellant did not receive extensive back treatment after his 1995 and 1997 work injuries because of the need for treatment and surgery on his right knee. He found that appellant altered his gait due to his knee injury which also aggravated his back pain. Dr. Delasotta noted that appellant did not complain about radicular pain and low back pain until after his work injury and thus "became symptomatic as a result of the injury." However, a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.²⁶ Further, Dr. Delasotta was on one side of the conflict resolved by Dr. Glenn. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.²⁷

On appeal appellant's attorney contends that the Office medical adviser recommended surgery before Dr. Glenn's opinion. On December 19, 2007 an Office medical adviser found that he may have sustained an employment-related aggravation of his underlying degenerative disc disease. The Office properly developed the medical evidence to resolve this issue by referring appellant to Dr. Stark for a second opinion examination and Dr. Glenn for an impartial medical evaluation.

Counsel also contends on appeal that Dr. Glenn was not properly selected from the Physician's Desk Reference. He did not, however, timely raise this argument at the time of Dr. Glenn's selection as impartial medical examiner. If the counsel objected to the selection of Dr. Glenn because the Office bypassed physicians in its referral, he should have noted his objection at or near the time that he was informed of the appointment.²⁸

Counsel further argues that Dr. Glenn's report is not rationalized and that he does not explain the nature of appellant's preexisting back condition. He further contends that the physician did not address whether the right knee injury aggravated appellant's back condition due to a change in his gait and noted physical findings consistent with radiculopathy. As discussed, however, Dr. Glenn's report is thorough, well rationalized and based on an accurate factual and medical history; consequently, his report represents the weight of the medical evidence. He found that appellant's current back condition was the result of a progression of preexisting degenerative disc disease unrelated to the accepted work injuries.

Counsel also contends that Dr. Delasotta found appellant's lumbar radiculopathy and progression of degeneration was employment related and that his right knee injury caused an altered gait that aggravated his low back condition. He further noted that Dr. Delasotta reviewed the July 25, 2008 myelogram and CT scan. As noted, however, Dr. Delasotta was on one side of

²⁶ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

²⁷ *Jaja K. Asaramo*, *supra* note 8; *Michael Hughes*, 52 ECAB 387 (2001).

²⁸ *See L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

the conflict resolved by Dr. Glenn and thus his report is insufficient to overcome the weight accorded the impartial medical examiner.²⁹

CONCLUSION

The Board finds that the Office properly denied appellant's request for surgical authorization. The Board further finds that he has not established that his current back condition is causally related to his accepted work injuries.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 24, September 5 and March 17, 2008 are affirmed.

Issued: November 12, 2009
Washington, DC

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

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

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

²⁹ *Id.*