United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
	)	
and	)	**Docket No. 10-1571**
	)	**Issued: February 16, 2011**
U.S. POSTAL SERVICE, FORT WORTH PERFORMANCE CLUSTER, Fort Worth, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2010 appellant filed a timely appeal from the March 23, 2010 merit decision of the Office of Workers' Compensation Programs. 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 appellant met his burden of proof to establish entitlement to reimbursement for multilevel cervical surgery.

FACTUAL HISTORY

The Office accepted that on March 5, 2004 appellant, then a 45-year-old mail processor, sustained a cervical strain, thoracic strain, brachial radiculitis, displacement and degeneration of

the C4 disc, displacement of a lumbar disc and degeneration of the lumbar spine due to performing his work duties on that date, including writing with a pen in his right hand.[1]

On June 18, 2004 Dr. Michael LaGrone, an attending Board-certified orthopedic surgeon, performed an anterior cervical discectomy with spinal cord nerve root decompression at C5-6, anterior interbody fusion at C5-6 and structural allograft for spinal fusion and anterior plate at C5-6. The procedures were authorized by the Office.

In an August 13, 2008 report, Dr. Stewart C. Smith, an attending Board-certified neurosurgeon, diagnosed cervical radicular pain and positive discogram at C3-4 and C4-5 with degenerative disc disease. Dr. Smith stated:

> "At this time, we will recommend a two-level cervical disc arthroplasty including at C3-4 and C4-5, but if this is not approved, we will perform a hybrid C3-4 disc arthroplasty with C4-5 fusion. We discussed the risks, indications, options and benefits with the patient. [Appellant] understands and wishes to move forward with the surgery."

A request was made for the Office to authorize the surgery recommended by Dr. Smith. On August 27, 2008 Dr. Ronald Blum, a Board-certified orthopedic surgeon serving as an Office medical adviser, stated that he had reviewed the file for the purpose of determining whether authorization should be provided for the requested surgery. Dr. Blum discussed appellant's accepted employment injuries and his course of treatment. He noted that May 12, 2008 magnetic resonance imaging (MRI) scan testing showed a medium sized central protrusion, minimal retrolisthesis and mild right-sided uncovertebral joint spurring resulting in mild central canal stenosis and minimal narrowing of the right neural foramen at C4-5. There was a small central disc protrusion slightly indenting the ventral surface of the cord without evidence of cord contusion or myelomalacia and no foraminal compromise at C3-4. Dr. Blum noted that there was evidence of a previous fusion at C5-6 and a minimal disc bulge at C6-7 without canal or foraminal stenosis. Regarding the nature of the request for surgery, Dr. Blum stated, "Because of continued neck and upper extremity pain, Dr. Smith has recommended two-level disc arthroplasty, but if this is not approved, he recommends a hybrid procedure of fusion of C4-5 and arthroplasty of C3-4." Dr. Blum concluded that the surgery should not be authorized by explaining:

> "The [Food and Drug Administration] has approved disc replacement device for the cervical spine. It is only approved for use in cases where there is skeletal maturity and there is evidence of degenerative disc disease at one level. There is evidence of multilevel degenerative disease in this case. As such the recommended procedure/procedures would constitute an off labeled use of the device. An off labeled use of the device cannot be authorized by the [Department of Labor]."

[1] Appellant also has a number of accepted work injuries (including bilateral carpal tunnel syndrome and right elbow contusion) that are not the subject of the present appeal.

In a September 5, 2008 decision, the Office denied authorization for appellant to have the multilevel surgery recommended by Dr. Smith. It found that the August 27, 2008 report of Dr. Blum showed that the requested surgery should not be authorized.

In a November 14, 2008 letter, appellant requested reconsideration of the Office's September 5, 2008 denial of his request for authorization of surgery.[2] He submitted a report of July 11, 2008 discogram testing at C3-4, C4-5 and C6-7. The testing showed positive concordant painful discs at C3-4 and C4-5 and a nonpainful, nonconcordant disc at C7. On April 1, 2009 appellant had cervical surgery which was not authorized by the Office. The surgery included anterior cervical discectomy at C3-4 and C4-5 and anterior cervical arthroplasty utilizing Syntes ProDisc-C at C3-4 and C4-5.

In a July 8, 2009 decision, the Office affirmed its September 5, 2008 decision denying appellant's request for authorization of multilevel cervical surgery. It found that the weight of the medical opinion regarding this matter continued to rest with the August 27, 2008 report of Dr. Blum.

In a July 14, 2009 letter, appellant requested reconsideration of the Office's denial of his request for authorization of multilevel cervical surgery. He expressed his belief that the Office had in fact approved the surgery that Dr. Smith performed on April 1, 2009 and requested reimbursement for this surgery. Appellant asserted that the type of surgery performed on April 1, 2009 was approved by the Food and Drug Administration.[3]

On September 3, 2009 Dr. Blum noted that appellant had surgical treatment on April 1, 2009 consisting of anterior cervical discectomy at C3-4 and C4-5 and anterior cervical arthroplasty utilizing Synthes ProDisc-C at C3-4 and C4-5. He stated:

> "The claimant has had disc replacement arthroplasty at C3-4 and C4-5. The [Food and Drug Administration] approval letter dated December 17, 2007 states 'the ProDisc-C Total Disc Replacement is intended to be used in skeletally mature patients (people who have stopped growing) for reconstruction of the disc from C3-7 following removal of the disc at one level for intractable symptomatic cervical disc disease (SCDD), a condition that results from a diseased or bulging disc.' The letter goes on to say 'the ProDisc-C Total Disc Replacement should not be implanted in patients with an active injection, allergy to any device materials, osteoporosis, marked cervical instability, severe spondylosis, clinically compromised vertebral bodies at any level to be treated and SCDD at more than one level.' It is my opinion that this statement limits the use of the device to one level and use at multiple levels constitutes an off labeled use. It is my understanding the [Department of Labor] is not allowed to authorize off labeled

[2] In later statements, appellant indicated that his private insurer had approved the surgery recommended by Dr. Smith.

[3] Appellant submitted June 2009 diagnostic testing results which showed normal cervical spine alignment from C1 to C7.

usage of devices. Based on this, it is my recommendation that authorization not be given for the above-described surgical procedure dated April 1, 2009."

In a September 21, 2009 decision, the Office affirmed its July 8, 2009 decision indicating that the April 1, 2009 surgery had not been approved and noting that Dr. Blum had stated that the type of surgery recommended by Dr. Smith was not approved by the Food and Drug Administration.

On February 2, 2010 appellant requested reconsideration of the Office's denial of his request for reimbursement for the surgery he underwent on April 1, 2009. He submitted a September 11, 2009 report in which Dr. Smith stated that he was doing well after his April 1, 2009 surgery.

In a March 23, 2010 decision, the Office affirmed its September 21, 2009 decision.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[4] In order to be entitled to reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[5] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[6]

ANALYSIS

The Office accepted that on March 5, 2004 appellant sustained a cervical strain, thoracic strain, brachial radiculitis, displacement and degeneration of the C4 disc, displacement of a lumbar disc and degeneration of the lumbar spine due to performing his work duties on that date. On June 18, 2004 he underwent authorized surgery, including anterior cervical discectomy with spinal cord nerve root decompression at C5-6, anterior interbody fusion at C5-6 and structural allograft for spinal fusion and anterior plate at C5-6.

In an August 13, 2008 report, Dr. Smith, an attending Board-certified neurosurgeon, recommend a two-level cervical disc arthroplasty including at C3-4 and C4-5, but noted that if this procedure was not approved he would perform a hybrid C3-4 disc arthroplasty with C4-5 fusion. A request was made for the Office to authorize the surgery recommended by Dr. Smith. The Office denied appellant's request for authorization for the recommended surgery and on April 1, 2009 Dr. Smith performed cervical surgery which was not authorized by the Office,

[4] 5 U.S.C. § 8103.

[5] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[6] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

including anterior cervical discectomy at C3-4 and C4-5 and anterior cervical arthroplasty utilizing Syntes ProDisc-C at C3-4 and C4-5.

The Board finds that appellant did not meet his burden of proof to establish entitlement to reimbursement for the multilevel cervical surgery performed on April 1, 2009. Appellant did not present sufficient medical evidence to establish entitlement to such reimbursement. The Office acted within its discretion to approve or disapprove medical benefits, including surgery, when it found that the weight of the evidence regarding this matter rested with the opinion of Dr. Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser.

In reports dated August 27, 2008 and September 3, 2009, Dr. Blum explained that the multilevel cervical surgery using Synthes ProDisc-C recommended by Dr. Smith was only approved by the Food and Drug Administration for cases where there is skeletal maturity and there is evidence of degenerative disc disease at one level. He noted that there was evidence of multilevel degenerative disease in appellant's case. Therefore, the recommended surgical procedures would constitute an off-labeled use of a surgical device. Dr. Blum stated that an off-labeled use of a surgical device could not be authorized by the Department of Labor.

Although Dr. Smith recommended the multilevel cervical surgery that he performed on April 1, 2009, he did not provide any explanation why only this procedure would be necessary to treat appellant's accepted work conditions. On appeal, appellant asserted that the type of surgery performed on April 1, 2009 was approved by the Food and Drug Administration, but he did not substantiate his assertion.[7] Under the above-described circumstances, the Office did not abuse its discretion by denying appellant's request for authorization before the multilevel cervical surgery was performed or his request for reimbursement after it was performed.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish entitlement to reimbursement for multilevel cervical surgery.

[7] On appeal, appellant also suggested that the surgery should have been approved because his private insurer approved it. He did not explain why the decision of his private insurer would govern the decision-making process of the Office.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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