United States Department of Labor
Employees' Compensation Appeals Board

A.Z., Appellant	)	
and	)	**Docket No. 10-1016 &**
	)	**No. 10-1751**
U.S. POSTAL SERVICE, POST OFFICE, Southfield, MI, Employer	)	**Issued: March 28, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant, through her attorney, filed a timely appeal from a January 12, 2010 merit decision of the Office of Workers' Compensation Programs. On June 1, 2010 she filed a timely appeal of a May 13, 2010 Office merit decision. Pursuant to the Employees' Compensation Act[1] and 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 authorization for spinal fusion surgery; and (2) whether appellant established a recurrence of disability commencing July 28, 2009, the date of the surgery.

FACTUAL HISTORY

On April 30, 2008 appellant, then a 56-year-old clerk, filed an occupational claim Form CA-2 alleging that she sustained a back injury as a result of lifting and carrying heavy items

[1] 5 U.S.C. § 8101 *et seq.*

during her federal employment. The Office accepted the claim for lumbar strain and L5-S1 protruding disc. Appellant continued to work in a light-duty position.

In a report dated November 12, 2008, Dr. Andres Munk, an orthopedic surgeon, diagnosed L5-S1 degenerative disc disease and stated that appellant wanted to proceed with surgical intervention. The Office referred the case to an Office medical adviser for review. In a January 5, 2009 report, the Office medical adviser stated that the L5-S1 disc extrusion could respond to a simple discectomy that he would recommend, but an anterior spine fusion was a major procedure that he did not find warranted based on the medical evidence of record.

The Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Asad Mazhari, a neurosurgeon. In a February 24, 2009 report, Dr. Mazhari reviewed the history and results on physical examination. He diagnosed a central L5-S1 disc herniation. Dr. Mazhari noted appellant had some degenerative disc disease in the lumbar area, but doubted whether surgery would benefit her. He stated that she was overweight and symptomatically did not have any deficit. Dr. Mazhari advised that if an electromyogram (EMG) was positive for lumbar radiculopathy, then a simple discectomy would help. As to a spinal fusion, he found that appellant would not benefit from the procedure.

On April 1, 2009 Dr. Munk responded that appellant was a good candidate for an anterior lumbar interbody fusion (ALIF) surgery. In an April 29, 2009 report, he stated he did not agree with Dr. Mazhari. Dr. Munk indicated that appellant had a collapsed disc with bony edema around the disc space and mechanical symptoms. He opined that a fusion surgery would relieve her mechanical and radicular pain.

The Office found that a conflict in medical opinion arose under 5 U.S.C. § 8123(a). It selected Dr. Mitchell Pollack, a Board-certified orthopedic surgeon, as the impartial medical specialist. In a June 24, 2009 report, Dr. Pollack reviewed a history of injury and provided results on physical examination. He diagnosed an L5-S1 herniated disc without apparent nerve root involvement. Dr. Pollack stated that an anterior interbody fusion carried significant risk in an obese person with multiple abdominal surgeries. He stated:

> "There is also a significant risk of deep vein thrombosis and pulmonary embolus, including the risk of death. I am not sure that the claimant has been adequately apprised of this situation. There is a possibility that she may benefit from a simple discectomy which would be significantly, though not completely, less risky. There is also the possibility that in someone of her body habitus, with this type of problem with radiating back pain and no significant radicular component, that she would not benefit from either a discectomy or an interbody fusion and continue to have symptoms of back pain with radiation to her lower extremities, in spite of surgery."

Dr. Pollack concluded that, based on the history, examination and medical records, he agreed with Dr. Mazhari and the Office medical adviser rather than Dr. Munk.

In a report also dated June 24, 2009, Dr. Daniel Pieper, a surgeon, stated that appellant had a two- to three-year progression of lower back pain radiating into the left buttock area. He provided results on physical examination and recommended a multilevel discogram.

Appellant underwent anterior lumbar interbody fusion surgery on July 28, 2009.[2] On August 7, 2009 she filed a recurrence of disability claim Form CA-2a commencing July 28, 2009.

By decision dated August 28, 2009, the Office denied authorization for the spinal surgery. Appellant requested a telephonic hearing, which was held on November 30, 2009. On December 28, 2009 she submitted a December 18, 2009 report from Dr. Pieper, who noted she had an interbody fusion on July 28, 2009. Dr. Pieper stated that he was not aware of the degree of improvement appellant had shown since the surgery and could not comment on whether it was a success.

In a decision dated November 5, 2009, the Office denied the claim for a recurrence of disability commencing July 28, 2009. It found that, as the spinal fusion surgery was not established as medically warranted, the claim for wage loss resulting from the surgery was not causally related to the employment injury.

In a decision dated January 12, 2010, an Office hearing representative affirmed the August 28, 2009 Office decision. The hearing representative found the weight of the evidence was represented by Dr. Pollack.

By decision dated May 13, 2010, an Office hearing representative affirmed the November 5, 2009 Office decision. The hearing representative found the evidence did not establish an employment-related disability commencing July 28, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Act provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which the Office, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.[3] In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[4] The Office has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.[5]

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the

[2] Dr. Munk described the surgery as an anterior lumbar interbody fusion surgery. Dr. Mustafa Hares, a co-surgeon, provided a separate report that stated the procedure also included an anterior radical discectomy, L5-S1.

[3] 5 U.S.C. § 8103(a).

[4] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[5] *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

effects of an employment-related injury or condition.[6] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[7] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[8]

It is well established that when a case is referred to a referee physician for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9]

ANALYSIS -- ISSUE 1

In the present case, there was a disagreement between Attending Physician Dr. Munk and Second Opinion Physician Dr. Mazhari with respect to anterior interbody fusion surgery. Dr. Munk felt that appellant was an appropriate candidate for surgery and the proposed surgery would relieve her symptoms. Dr. Mazhari opined that the surgery would not benefit her, noting her weight and symptoms.

Pursuant to 5 U.S.C. § 8123(a), the Office found a conflict in the medical evidence.[10] Appellant was referred to Dr. Pollack as a referee physician, who provided a complete report with an accurate history, results on examination and review of the medical evidence. Dr. Pollack opined that the proposed surgery was not warranted, noting the significant risks of such a surgery, as well as appellant's symptoms and body habitus. As noted, a well-rationalized medical opinion from a referee physician is entitled to special weight. Dr. Pollack provided a rationalized medical opinion resolving the conflict in the medical evidence. His report represents the weight of the evidence and the Office properly relied on that evidence to establish that the interbody spinal fusion surgery was not likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation. The Board finds that the Office properly exercised its discretion in denying the surgery.

The Board notes that appellant submitted reports from Dr. Pieper, who recommended a discogram. Dr. Pieper did not provide an opinion that the interbody fusion surgery was medically warranted and his reports are insufficient to overcome the weight accorded to the referee physician.

---

[6] *See Debra S. King*, 44 ECAB 203, 209 (1992).

[7] *Id.; see also Bertha L. Arnold,* 38 ECAB 282 (1986).

[8] *See Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[9] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[10] The Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). 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 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. 20 C.F.R. § 10.321 (1999).

LEGAL PRECEDENT -- ISSUE 2

The Office's regulations define the term recurrence of disability as follows:

> "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[11]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[12] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[13]

ANALYSIS -- ISSUE 2

Appellant filed a recurrence of disability claim commencing on July 28, 2009, the date of the spinal fusion surgery. She did not allege a change in the nature and extent of the light-duty job. At the February 19, 2010 hearing before an Office hearing representative, appellant acknowledged that the recurrence of disability claim was based on disability resulting from the July 28, 2009 surgery, and if the surgery was found not to be medically warranted, then the resulting disability would not be compensable.

The Board finds that the medical evidence of record does not establish that the surgery was medically warranted for treatment of the employment injury. The Board notes there are two reports regarding the July 28, 2009 surgery. Dr. Munk reported anterior lumbar interbody lumbar fusion surgery, while Dr. Hares indicated both a fusion and anterior radical discectomy, L5-S1. The proposed surgery had been found, by the weight of the medical evidence, not to be medically necessary for treatment of the accepted employment injuries. It is appellant's burden

[11] 20 C.F.R. § 10.5(x).

[12] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[13] *Maurissa Mack*, 50 ECAB 498 (1999).

of proof to establish that any disability is causally related to the accepted employment injuries.[14] The weight of the probative medical evidence does not establish a recurrence of disability commencing July 28, 2009 causally related to the employment injuries. Based on the evidence of record, the Office properly denied the claim for a recurrence of disability in this case.

CONCLUSION

The Board finds that the Office properly denied authorization for interbody spinal fusion surgery. The Board further finds that appellant did not establish an employment-related recurrence of disability commencing July 28, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 13 and January 12, 2010 are affirmed.

Issued: March 28, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[14] *S.S.*, 59 ECAB 315 (2008).