U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID SPEARMAN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, Ohio

Docket No. 96-1345; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by terminating its authorization for treatment of appellant, who resides in Augusta, Michigan, by a physician in Birmingham, Alabama.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion by terminating its authorization for treatment of appellant, who resides in Augusta, Michigan, by a physician in Birmingham, Alabama.

On November 6, 1991 appellant, then a plumber journeyman, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a back injury when he fell from a ladder. Appellant stopped work on November 6, 1991.[1]

On December 2, 1991 the Office accepted appellant's claim for lumbar strain and subsequently expanded acceptance of appellant's claim to include aggravation of appellant's underlying degenerative condition.

On September 9, 1993 appellant underwent spinal fusion surgery at L4-5 and L5-S1. The surgery was performed by Dr. Marcus Whitman, Jr., a Board-certified orthopedic surgeon and appellant's treating physician who was located in Birmingham, Alabama. Appellant was discharged from the hospital on September 30, 1993. This procedure was approved by the Office.

[1] Appellant was discharged from his temporary position of plumber by the employing establishment effective February 14, 1992 because he misrepresented his medical history during a preemployment physical examination.

In a December 16, 1993 letter, appellant requested home attendant benefits because his father and grandmother took care of him while he recuperated from his back surgery.[2] By letter dated September 30, 1994, the Office advised appellant to submit the answers to accompanying questions regarding his request for home attendant benefits. In response, appellant submitted answers to the Office's questions on October 11, 1994. Specifically, appellant requested home attendant benefits in the amount of $800.00 per month.

By letter dated February 18, 1994, the Office approved appellant's request for a home attendant's allowance for the period October 1 through November 25, 1993 at the rate of $200.00 per week. The Office advised appellant that Dr. Whitman was no longer authorized to provide medical treatment inasmuch as he was located in Birmingham, Alabama, while appellant lived in Augusta, Michigan. The Office directed appellant to obtain a new physician for medical treatment and evaluation of his employment injury. The Office then advised appellant that it would no longer pay for services rendered by Dr. Whitman or any other physician that it did not consider to be located within a reasonable distance from appellant's home effective the date of the letter. The Office further advised appellant to provide the name, address and specialty of the new attending physician within 30 days.

By decision dated April 12, 1995, the Office denied authorization for medical treatment rendered by Dr. Whitman because he did not live within a commuting distance of appellant's home.

By letter dated April 13, 1995, the Office referred appellant to Dr. Augustus L. Guerrero, a Board-certified physiatrist, located in Kalamazoo, Michigan, and advised Dr. Guerrero that advanced authorization was given for any recommended out-patient diagnostic testing necessary for the treatment of the accepted low back condition.

By letter dated May 23, 1995, appellant submitted Dr. Whitman's May 8, 1995 medical report.

Dr. Guerrero submitted a June 8, 1995 medical report.

In an October 3, 1995 letter, appellant requested authorization to undergo additional surgery and reimbursement for his mileage. By letter dated October 11, 1995, the Office advised appellant that it had not received a formal request for surgery and that once it received such a request, a determination would be made regarding authorization. The Office further advised appellant that it was unclear as to the nature of the mileage that he was claiming and that he should submit a more detailed explanation of the exact mileage for which he was requesting reimbursement.

By letter dated November 7, 1995, the Office referred appellant, along with medical records, to Dr. Bruce E. Dall, a Board-certified orthopedic surgeon, located in Kalamazoo, Michigan.

[2] Subsequently, in letters dated February 21 and June 6, 1994 and February 13, 1995, appellant requested an update on the status of his request for home attendant benefits.

The Office received Dr. Whitman's November 22, 1995 medical report.

Dr. Dall submitted a medical report dated December 5, 1995.

In a February 15, 1996 letter, appellant requested reconsideration of the Office's April 12, 1995 decision and submitted medical evidence and additional correspondence to the Office. By decision dated February 21, 1996, the Office denied appellant's request for modification based on a merit review of the claim. The Office found that there was no evidence of record establishing that appellant could not obtain the needed follow-up care and possible surgery within the Augusta, Michigan, commuting area. The Office further found that "[i]n fact the evidence would clearly support that such care is available and has been offered to [appellant]." The Office stated:

> "Specifically, Dr. Whitman has indicated that surgery possibly is the response to [appellant's] current level of complaints. However as far back as outpatient reports in early 1994 and as recent as his November 1995 exam it has clearly been stated that surgery cannot be done while [appellant] is still smoking. Thus this addiction must be addressed before even this physician will proceed with the possible surgery."
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> "Dr. Dall in Michigan has also clearly seen the need for addressing several addiction problems from which [appellant] suffers and which have arisen from his response to the pain from the lower back. Further, Dr. Dall has indicated that addressing these addictions might well impact on whether the surgery should actually be done and if so the extent and possible outcome.
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> "In other words Dr. Dall is on the same path as Dr. Whitman in insisting that for the best result [appellant], with the assistance of the medical community, must address problems from which he suffers before proceeding on further, possible surgery. This clearly shows that the same level of care is available in Michigan as it is in Alabama.
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> "In reading Dr. Dall's report that [appellant] should return to Dr. Whitman, it is clear this recommendation arose from [appellant's] presentation of trust and belief in Dr. Whitman. There is presented no medical evidence that such referral is indicated due to the lack of needed type of care being available in Michigan. In fact, as noted above, the level of care is available in Michigan.
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> "Further the impression from Dr. Dall given in his report is that Dr. Whitman is at once ready to do the surgery. A careful reading of Dr. Whitman's report clearly shows that he also wishes the smoking problem addressed prior to any surgery being undertaken. Further, Dr. Whitman has also indicated that further testing is needed; but has not been done due to a lack of authorization. As such Dr. Whitman is also suggesting in effect further actions by [appellant] and medical workup prior to any surgery.

"Dr. Guerro [sic] has also repeated that [appellant] should return to Dr. Whitman. This is merely repeating the recommendation from Dr. Dall who is voicing [appellant's] desires. There is again no medical support which justifies the need to transfer care out of state; beyond [appellant's] desires for such.

"In total [appellant] clearly and without a doubt wishes to return to Dr. Whitman. This return is for surgery which [appellant] presents to this office as needed at once and will mostly correct his medical complaints.

"This belief by [appellant] is not what is reflected by either Dr. Whitman, Dr. Dall or Dr. Guerrero. All of these physicians see a patient in need of care; but none are suggesting surgery as the 'Cure all' but a possibility. All of the physicians are suggesting workups and treatment of addiction(s) which have arisen and which would have negative impact on any surgery which might eventually be done.

"In total th[e]n we have all physicians basically stating the same thing. That is [appellant] and medical community must get together and aggressively address [appellant's] total overall problems. If these items are addressed and further testing confirms the need th[e]n surgery might be indicated. There is no indication that care within the Michigan area needed by [appellant] is not available; and in fact the evidence clearly shows that such is available."

In a letter dated March 20, 1996, appellant requested authorization for back surgery. By letter dated March 28, 1996, the Office advised appellant to exercise his appeal rights.

Section 8103 of the Federal Employees Compensation Act provides, in part:

"(a) 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."[3]

The Office has the general objective of ensuring that an employee recovers from an injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing the means to achieve this goal.[4] The only limitation on the Office's authority is that of reasonableness.[5] 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

[3] 5 U.S.C. § 8103(a).

[4] *Pearlie M. Brown*, 40 ECAB 1090 (1989).

[5] *Daniel J. Perea*, 42 ECAB 214 (1990); *Brown, supra* note 4.

to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[6]

Section 10.401 of Title 20 of the Code of Federal Regulations provides, in relevant part:

> "(a) A claimant shall be entitled to receive all medical services, appliances or supplies which are prescribed or recommended by a duly qualified physician and which the Office considers necessary for the treatment of a job-related injury.... A claimant shall also be entitled to reimbursement of reasonable and necessary expenses, including transportation...."[7]

Section 10.402 provides, in relevant part:

> "(c) In determining the use of medical facilities, consideration must be given to their availability, the employee's condition, and the method and means of transportation. Generally, 25 miles from the place of injury, the employing agency, or the employee's home, is a reasonable distance to travel, but other pertinent factors must also be taken into consideration."[8]

In the present case, there is no evidence of record establishing that appellant's travel to Birmingham, Alabama, from Augusta, Michigan, was reasonable and necessary in order to obtain medical treatment. There is no indication that competent and appropriate medical care is not available within appellant's commuting area.[9]

In a May 8, 1995 medical report, Dr. Whitman noted his findings on physical and x-ray examination. Dr. Whitman stated that there was no question in his mind that appellant needed further surgery. Dr. Whitman stated that if he performed the surgery, then appellant would have to quit smoking cigarettes prior to admission to the hospital, preferably several weeks prior to the surgery and that he refused to perform the surgery until appellant did so. Dr. Whitman further stated that treatment by a physiatrist, as appellant relayed to him, was not the proper treatment because such treatment could cause breakage of the hardware and increased aggravation of possible flexion segment transition syndrome. In a November 22, 1995 medical report, Dr. Whitman opined that appellant had a definite nonunion of the spinal fusion at L5-S1 and a probable nonunion of the spinal fusion at L4-5. Dr. Whitman further opined that at that point in time, *i.e.*, 26 months post-spinal fusion, he could not expect appellant to progress to a solid union and, with what appeared to be a painful unstable transitional segment above the fusion, that he could not expect appellant to reach maximum medical improvement and be as comfortable as he

[6] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[7] 20 C.F.R. § 10.401(a).

[8] 20 C.F.R. § 10.402(c).

[9] *See Willie E. Lobster*, 32 ECAB 756 (1981) (the Board found that the Office did not abuse its discretion in terminating authorization for treatment by physicians in Minneapolis, Minnesota, after appellant relocated to St. Louis, Missouri, based on the Office's finding that he could secure competent medical care within his commuting area).

could hope to become without further surgery. Dr. Whitman stated that appellant required revision of his spinal fusion with further bonegrafting, extension of the spinal fusion upward at least from L4 to 3 and possibly further. Dr. Whitman then stated that additional studies needed to be performed prior to surgery, probably two discograms and a multiplaner reconstruction computed axial tomography (CAT) scan, before he could determine how to extend the spinal fusion. Dr. Whitman noted that appellant had been going to a smoking clinic to attempt to quit smoking and that appellant knew that he had to quit smoking prior to surgery.

In a June 8, 1995 medical report, Dr. Guerrero noted a history of the November 6, 1991 employment injury and appellant's medical treatment, and his findings on physical examination. Dr. Guerrero opined that appellant had failed surgical low back pain syndrome with possible pseudofusion of L5-S1 based on Dr. Whitman's report but that he could not confirm this because he did not have appellant's x-rays. Dr. Guerrero recommended changing appellant's use of percodan to a duragesic patch because he believed that appellant was addicted to the narcotic medication and stated that he would not advise the use of any other medications. Dr. Guerrero further recommended using a pantaloon cast for two weeks to find out if body casting relieved appellant's lower back discomfort and stated that if it worked, then there was a 70 percent chance that back surgery in the form of fusion would help appellant. Dr. Guerrero also recommended that no further diagnostic testing, including electromyogram (EMG) and nerve conduction studies be performed, since appellant had shown an intention to return to Alabama[10] and have the second surgery performed as soon as possible. Dr. Guerrero then stated that while appellant was waiting for surgery, he should stop smoking. Dr. Guerrero further stated that he did not believe that conservative treatment, such as physical therapy, would help appellant, but that after the proposed surgery, appellant would probably benefit from a physical medicine post-surgical care.

In a report dated December 5, 1995 to Dr. Guerrero, Dr. Dall noted appellant's medical history and his findings on physical and x-ray examination. Dr. Dall opined that appellant had severe chronic pain syndrome, that appellant probably had a nonunion of the L5 and S1 posterior lumbar interbody fusion. Dr. Dall further opined that, based on the January 1995 x-ray films, there was no loosening that was obvious of the screws or plates, but that this may have changed in the interim. Dr. Dall also opined that appellant had severe weakness and numbness of both lower extremities to the degree where he was almost paraplegic. Additionally, Dr. Dall opined that the cause of the severe leg symptoms was currently unknown and that there was no test to date which demonstrated the spinal canal or the nerves in the spinal canal. Dr. Dall stated that

[10] In a July 10, 1995 telephone conversation with the Office, Toy True, appellant's field nurse whom the Office referred appellant on March 24, 1995, advised the Office that appellant was moving back to Alabama, while appellant's wife remained in Michigan. On July 12, 1995 Ms. True advised the Office that appellant had returned to Alabama. Ms. True prepared a closure report dated July 13, 1995 and stated that appellant requested authorization to continue medical treatment by Dr. Whitman. By letter dated July 27, 1995, the Office advised appellant that it would authorize medical treatment by Dr. Whitman, but not surgery based on Dr. Guerrero's opinion to first use conservative measures to treat his back condition. In a September 11, 1995 letter, appellant advised the Office that he would not be returning to Alabama, until his financial situation improved. In a memorandum to the file dated September 19, 1995, the Office indicated that since appellant was not returning to Alabama, treatment by Dr. Whitman was not authorized until written notification was received indicating that appellant had in fact relocated to Alabama.

appellant was addicted to narcotics, specifically percodan and valium, and nicotine. Dr. Dall also stated that appellant was psychologically depressed, psychologically angry and demonstrated symptoms of a sleep disorder. Dr. Dall then stated:

> "My first recommendation is that [appellant] should go back to the surgeon who treated him. I feel that overall, without a total multidisciplinary approach that I personally, as a single surgeon even with someone much as yourself backing me up, I have very little to offer [appellant] in terms of a surgery that could control all the pains that he is having. If he were to stay here and not go to Alabama, then I would recommend the following: A psychological evaluation and a full psychological treatment program to treat depression, anger, to teach him to be goal directed, to help him quit smoking and to help him wean from narcotics. He would have to see you on a regular basis and you would have to manage all of his narcotics and all of his medicines. I would not dispense any medications to [appellant] except during the preoperative course if it ever came to that. Thirdly, he would need bilateral EMG and either a myelogram or a [computed tomography] CT scan.... These are the primary tests that would tell us whether we should go farther along with the psychological evaluation. If we could address all of the addictions that he has, psychologically regain control or have him regain control and explain on an organic basis all the leg symptoms he is having, then it might open the door for a potential surgery. I think we are talking about months of evaluation and intensive treatment prior to that time."

Dr. Dall concluded that surgery may be possible after all of appellant's addictions were addressed and tests performed. Dr. Dall further concluded that "[appellant] has a lot of faith in his primary treating physician who operated on him and he might be best served by allowing him to go back to his treating physician."

In a January 18, 1996 report, Dr. Guerrero noted that appellant had been seen by Dr. Dall and Dr. Dall's recommendation that appellant return to Alabama, for possible surgical intervention. Dr. Guerrero noted his findings on examination and diagnosed nonunion of lumbosacral fusion with severe back pain. Dr. Guerrero stated:

> "[A]t this time I believe [appellant] should return to Dr. Marcus Whitman his original orthopedic surgeon for possible consideration of another surgery. I do not think physical therapy can be very helpful for him as I have already noted [o]n June 8, 1995. Pantaloon cast is probably not a consideration since Dr. Dall did not even mention this in his evaluation of [appellant]."

The Board finds that the Office adequately explained its reasons for not continuing medical treatment by Dr. Whitman in Birmingham, Alabama, after appellant's relocation to Augusta, Michigan.[11] Therefore, the Office did not abuse its discretion by terminating its authorization for further treatment by Dr. Whitman in Birmingham, Alabama.

[11] *See Sylvia Roberson*, 31 ECAB 67 (1979).

The February 21, 1996 and April 12, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
April 3, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member