

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILLARD MEEK and DEPARTMENT OF JUSTICE,
OFFICE OF THE INSPECTOR GENERAL, Tucson, Ariz.

*Docket No. 96-377; Submitted on the Record;
Issued January 21, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for additional surgery for his employment-related condition.

On February 2, 1991 appellant, then a 48-year-old special agent, was lifting boxes of evidence when he developed back pain. The Office accepted appellant's claim for a herniated L4-L5 disc. Appellant received continuation of pay from February 16 through April 1, 1991. The Office paid appellant temporary total disability compensation effective April 2, 1991. Appellant did not return to work.

On April 18, 1991 appellant underwent surgery for a laminectomy and excision of a herniated L4-L5 disc. On October 9, 1992 appellant again underwent surgery for a repeat laminectomy and excision of a herniated L4-L5 disc and fusion of L4-L5. In an August 8, 1995 decision, the Office denied appellant's request for additional surgery on the grounds that the report of Dr. J. Wright Cortner, a Board-certified orthopedic surgeon, selected to serve as an impartial medical specialist, found that the proposed surgery was not recommended.

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

The Office found that there was a conflict in the medical evidence between Dr. Larry Mann, a Board-certified orthopedic surgeon and appellant's treating physician and Dr. John Krempen, a Board-certified orthopedic surgeon, selected by the Office to give a second opinion. In a June 28, 1994 report, Dr. Mann stated that appellant appeared to have a solid fusion and was beginning to develop an interbody fusion. He indicated that he could not account for appellant's continued symptoms. Dr. Mann commented that there was no indication of a failure of the fusion but admitted that the possibility existed. He recommended a re-exploration of the fusion and repeated bone grafting if found necessary. Dr. Krempen, in an October 6, 1994 report, stated that appellant had a failed fusion. He recommended that appellant undergo surgery for an interior lumbar interbody fusion at the L4-L5 level. Dr. Krempen indicated that if the fusion was

successful appellant might be able to return to work but he would not return to work until the fusion was performed. Therefore, both physicians concluded that appellant required additional surgery. They only differed as to the type of surgery to perform. There was, therefore, no conflict in the medical evidence on appellant's need for surgery at the time the Office referred appellant to Dr. Cortner. Hence, Dr. Cortner cannot be considered an impartial medical specialist because he did not face a conflict in the medical evidence at the time appellant was referred to him. His report, therefore, is not entitled to any special weight. He was, in effect, an additional Office referral physician.¹

Dr. Cortner, in his January 11, 1995 report, stated that x-rays suggested appellant had a fusion. He commented that appellant may or may not have a successful fusion but indicated that even a successful fusion would not return appellant to work. Dr. Cortner concluded, therefore, that further surgery was not indicated. He stated appellant could be employed at a sedentary position. Dr. Cortner's conclusion that appellant did not need surgery was based on inadequate rationale because he based his opinion only on his opinion that appellant would never be able to return to his former position. Under section 8103(a)² medical benefits under the Federal Employees' Compensation Act are given if the medical services are considered by the Office likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of the monthly compensation. Dr. Cortner's opinion only addressed whether the surgery would reduce the degree of appellant's disability and presumed that the surgery would not cure appellant's condition. Dr. Mann and Dr. Krempen recommended surgery because it would cure or give relief to appellant. Dr. Cortner's opinion, therefore, is inadequate to address the issue of medical benefits because he did not consider whether the surgery would achieve any of the goals of section 8103(a).

The case must be remanded for review of the record by an Office medical adviser on whether the proposed surgery for appellant's back condition would achieve the purposes of section 8103(a). After further development as it may find necessary, the Office should issue a *de novo* decision.

¹ *James C. Ross*, 45 ECAB 424 (1994).

² 5 U.S.C. § 8103(a).

The decision of the Office of Workers' Compensation Programs, dated August 8, 1995, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
January 21, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member