U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. FISHER and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Dallas, Tex.

Docket No. 97-413; Submitted on the Record;
Issued March 2, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for a permanent partial impairment of her back; and (2) whether the Office of Workers' Compensation Programs properly denied authorization for two back surgeries and a Spinal-Stim Fusion System.

On July 9, 1991 appellant, then a contract report clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her back and lower abdomen on June 11, 1991 while carrying a stack of charge out cards from the file room to her desk. Appellant stopped work on June 11, 1991 and returned to work on July 29, 1991.[1]

By letter dated August 16, 1991, the Office accepted appellant's claim for a lumbosacral strain.

On April 5, 1992 appellant filed a claim for a schedule award (Form CA-7).

By decision dated May 28, 1993, the Office denied appellant's claim for a schedule award for permanent partial impairment of the back on the grounds that the back is excluded from the schedule award provisions. On June 2, 1993 appellant requested an oral hearing before an Office representative.

In a letter dated June 29, 1993, Dr. Richard A. Marks, a Board-certified orthopedic surgeon and appellant's treating physician, requested that the Office authorize two back surgeries to be performed on appellant. He also requested that the Office authorize a Spinal-Stim Fusion System for appellant.

By memorandum dated August 12, 1993, the Office referred a statement of accepted facts and appellant's medical records to an Office medical adviser. The Office medical adviser opined

[1] The record reveals that appellant retired on disability from the employing establishment on August 3, 1992.

that appellant's back condition did not require surgical intervention and that appellant did have evidence of a neck strain, but that it did not require surgical intervention.

By letter dated September 13, 1993, the Office referred appellant together with a statement of accepted facts, medical records and a list of specific questions to Dr. Benzel MacMaster, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the Office advised Dr. MacMaster of the referral.

Dr. MacMaster submitted a September 29, 1993 medical report indicating that the proposed surgery was not warranted and that it was not related to the June 11, 1991 employment injury. His report also indicated that appellant's neck condition was not related to the June 11, 1991 employment injury.

By decision dated November 29, 1993, the Office denied authorization for the two proposed surgeries and Spinal-Stim Fusion System. In telephone conversations with an Office employee on October 25 and October 27, 1993, appellant requested an oral hearing before an Office representative.

By decision dated February 18, 1994, a hearing representative affirmed the Office's November 29, 1993 decision. In addition, the hearing representative instructed the Office, upon return of the case record, that it should refer appellant to a Board-certified specialist to determine whether appellant had any residuals of her June 11, 1991 employment injury inasmuch as appellant indicated during the hearing that she was going to file a claim for compensation for loss wages.[2]

In a June 20, 1994 letter, appellant requested reconsideration of the Office's February 18, 1994 decision on the grounds that her back condition prevented her from performing any substantial work. By decision dated June 29, 1994, the Office denied appellant's request for modification based on a merit review of the claim.

In a September 8, 1994 letter to her congressional representative, which was submitted to the Office by her congressional representative, appellant stated that she wished to "appeal" the Office's June 29, 1994 decision. By letter dated October 17, 1994, the Office advised appellant's congressional representative that appellant had failed to specifically identify the appeal process that she wished to pursue and that further action would be taken when appellant clarified the appeal process that she wished to pursue.

On September 15, 1994 appellant appealed the Office's June 29, 1994 decision to the Board. By order dated January 29, 1996, the Board dismissed appellant's appeal on the grounds that appellant wished to submit new evidence to the Office with a request for reconsideration.

[2] In response to appellant's inquiry regarding authorization for surgery, the Office advised appellant by letter dated June 2, 1994 that its November 29, 1993 decision was going to be affirmed based on the April 13, 1994 medical report of Dr. R. Craig Saunders, a Board-certified orthopedic surgeon, revealing that she was not a good candidate for surgery, that she no longer had any residuals due to the June 11, 1994 employment injury and that she could return to her regular work with no restrictions. The Office also advised appellant to exercise her appeal rights which accompanied its February 18, 1994 decision.

On February 14, 1996 appellant requested reconsideration of the Office's June 29, 1994 decision. By decision dated May 7, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

In a May 31, 1996 letter, appellant requested reconsideration of the Office's decision. On October 10, 1996 appellant appealed the Office's decision to the Board noting that she had received no response from the Office regarding her May 31, 1996 request for reconsideration.

The Board finds that appellant is not entitled to a schedule award for a permanent partial impairment of her back.

The Federal Employees' Compensation Act provides that compensation shall be paid for an employment injury when it results in total or partial disability for work.[3] The Act also provides for a payment of a schedule award for permanent impairment of specified members and functions of the body.[4] However, as the Board has consistently held, there is no authority for paying a schedule award for an impairment of a portion of the body not enumerated in the schedule.[5] For this reason, a schedule award may not be made for an impairment of the back.[6] Appellant would be entitled to compensation only if it were established that her back impairment resulted in disability for work during the period of her absence from work.

The Board further finds that the Office properly denied authorization for two proposed back surgeries and a Spinal-Stim Fusion System.

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 or the period of disability, or aid in lessening the amount of the monthly compensation.[7] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.[8]

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[3] 5 U.S.C. §§ 8105-8106.

[4] 5 U.S.C. § 8107.

[5] *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

[6] *Elizabeth C. Durner*, 24 ECAB 18 (1972); *George J. Lecastre*, 21 ECAB 123; *Anthony P. Bellino*, 20 ECAB 180; *Daniel P. Hebding*, 19 ECAB 638; *Francisco R. LaTorre*, 18 ECAB 668; *Walter L. Streeter*, 17 ECAB 632; *Wilbur S. Ledden*, 16 ECAB 650; *Jerry R. Schmitt*, 16 ECAB 367; *Luis Manalo*, 15 ECAB 400; *John W. Maddox*, 15 ECAB 329; *George G. Sager*, 14 ECAB 181; *Harold Shoopman*, 14 ECAB 173; 5 U.S.C. § 8101(19).

[7] 5 U.S.C. § 8103.

[8] *Daniel J. Perea*, 42 ECAB 214 (1990).

Section 8123(a) of the Act provides that "[i]f 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 an examination."[9] Based on a conflict in the medical opinion evidence regarding the need for appellant to undergo two back surgeries and use the Spinal-Stim Fusion System, between Dr. Marks, appellant's treating physician and an Office medical adviser, the Office properly referred appellant to Dr. MacMaster for an impartial medical examination pursuant to section 8123(a) of the Act. In situations where there are 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 the specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

In the present case, Dr. Marks stated in his June 29, 1993 letter to the Office that appellant was being tentatively scheduled for surgery, specifically, a posterolateral fusion with neural decompression at L4-5 and L5-S1 on September 24, 1993 to be followed by an anterior lumbar interbody fusion at L4-5 and L5-S1 on September 27, 1993. Dr. Marks sought approval for these surgeries. While he sought authorization for the two back surgeries, Dr. Marks failed to provide any medical rationale explaining how the back surgeries would help in the treatment of appellant's residuals that were caused by her June 11, 1991 employment injury.

Dr. MacMaster, an impartial medical examiner, indicated in a September 29, 1993 medical report a history of the June 11, 1991 employment injury, a review of appellant's medical records and his findings on physical examination. He stated in response to the Office's question regarding a causal relationship between the proposed surgeries and the June 11, 1991 employment injury that:

> "[I]t is my opinion that there is no objective data presented by the patient or contained within the history to support a rational connection between the proposed surgery, which is anterior and posterior fusion of L4[-]5 and L5[-]S1, and the June 11, 1991 work injury which in my opinion at worst resulted in mild lumbar sprain."

In response to the Office's question regarding the nature of the relationship, Dr. MacMaster stated "the surgery proposed is out of proportion to any accepted treatment pattern for such an injury and I feel the surgery is in no way warranted now or in the foreseeable future." In response to the Office's question concerning the use of the Spinal-Stim Fusion System if surgery was warranted, Dr. MacMaster stated that this question was moot since he did not feel that the proposed surgeries were warranted. He further stated that there was no causal relationship between appellant's subjective complaints of pain in the neck and the June 11, 1993 employment injury and that at the present time he found no evidence of any deficit either of motion or functional capacity involving the neck or upper extremity. Regarding appellant's treatment, Dr. MacMaster stated that a full and fair attempt at conservative measures had been

[9] 5 U.S.C. § 8123(a).

[10] *Nancy Lackner Elkins*, 44 ECAB 840, 847 (1993).

carried out and that appellant should be released to the work status noted in his accompanying work restriction evaluation with the use of nonprescription medications only concerning her neck and back. He then concluded that regarding appellant's bowel problems, she should be referred to a gastroenterologist. In an accompanying work restriction evaluation, Dr. MacMaster indicated that appellant could work eight hours per day with certain physical restrictions and that appellant had reached maximum medical improvement on September 29, 1993. He provided a well-rationalized opinion based on a complete medical and factual background. Therefore, the Board finds that his report is entitled to special weight and establishes that the two proposed back surgeries and Spinal-Stim Fusion System were not necessary for the treatment of appellant's back condition. Generally, an abuse of discretion is 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.[11] It cannot be found that the Office abused its discretion in refusing to authorize the two proposed back surgeries and Spinal-Stim Fusion System. Thus, the Office's refusal of authorization for the two proposed back surgeries and a Spinal-Stim Fusion System was proper.

[11] *Id.*

The May 7, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.[12]

Dated, Washington, D.C.
March 2, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] The Board notes that in addition to appellant's claim for loss wages due to her June 11, 1991 employment injury, appellant also sought compensation for a recurrence of disability sustained on November 15, 1991. As the record does not contain the Office's final decision regarding appellant's entitlement to compensation for loss wages and a recurrence of disability, the Board has no jurisdiction over these issues; *see* 20 C.F.R. § 501.2(c).