U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WESLEY R. THOMPSON and U.S. POSTAL SERVICE,
SOUTHEAST POST OFFICE, Tulsa, OK

Docket No. 00-2717; Submitted on the Record;
Issued June 26, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant authorization for additional lower back surgery.

On February 6, 1987 appellant, a 36-year-old letter carrier, experienced pain in his lower back and legs while loading trays into his vehicle. The Office accepted his claim for low back strain, herniated disc at L5-S1 and bilateral sciatica. Appellant was off work due to his work-related conditions for intermittent periods, for which the Office paid appellant appropriate compensation.

Appellant underwent surgery on July 7, 1987 for a left-sided L5-S1 discectomy and foraminotomy, which was performed by Dr. David R. Hicks, a specialist in orthopedic surgery and appellant's treating physician.

Dr. Hicks performed a right-sided L5-S1 discectomy and foraminotomy on appellant on October 15, 1998. In a report dated October 15, 1999, Dr. Hicks stated:

> "[Appellant] returns with discograms that clearly show that his symptoms are due to painful internal disc disruption with annular tears at the L5-S1 level. I have discussed at length with [appellant] the nature of his diagnosis, the alternatives in care available to him, techniques and risks of surgery and realistic long-term prognosis."

Dr. Hicks recommended additional surgery for lumbar decompression and fusion at L5-S1 with right posterior iliac bone graft and tenor spinal instrumentation.

In a report dated December 17, 1999, Dr. Hicks advised that his proposed surgical procedure was causally related to appellant's accepted work injuries based on history, examination and diagnostic tests. He stated that further studies including a discogram had

demonstrated that the etiology of appellant's pain was internal disc derangement with motion segment dysfunction at the L5-S1 level.

In a report dated January 20, 2000, an Office medical adviser agreed with Dr. Hicks that appellant's current condition was work related. He stated, however, that appellant's accepted condition was L4-5 and L5-S1 degenerative disc disease and opined that a fusion of L5-S1 with degenerative disc disease at L4-5 was not indicated.

On February 3, 2000 the Office referred appellant for a second opinion examination with Dr. Fred M. Ruefer, a Board-certified orthopedic surgeon, to ascertain appellant's current condition and determine whether the surgery recommended by Dr. Hicks was appropriate and necessary to treat any work-related residual disability.

In a report dated February 22, 2000, Dr. Ruefer, after reviewing the medical records and the statement of accepted facts and stating his findings on examination, concluded that appellant did not require surgery. He stated appellant's symptoms were mainly neurological on the right lower extremity and noted that appellant complained of pain only from the knee down and not in the lower back itself. He stated:

> "It is my opinion his symptoms are coming from the nerve itself and intraneural scarring. I would have reservations [as to] whether surgical intervention will be appropriate in relieving his symptoms. [Appellant] does not appear to have any neurological impingement on the right side. He does not have significant L5-S1 compression on any of the x-rays. [Appellant] does not have an [electromyelogram] EMG showing any acute denervation, but only chronic innervation, all [of] which would be consistent with intraneural scarring and not ongoing compression, etc.
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> "When [appellant] is asked what he expects from surgery, he states he expects return to 'normal.' Also, he states he needed to do something because he 'cannot get worse from surgery.' I think both statements are unrealistic. I do [not] think returning to normal is a reasonable expectation, even with a good result from surgery and certainly due to the fact his condition could be worse from surgery, although hopefully that would not be the case.
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> "I feel he might have to accept the disability as it is. Personally, I would not operate on [appellant]. I may consider epidural steroid injections and stabilization with a claim shell brace to see if that will help his symptoms and then possibly consider surgery; however, I feel [appellant's] symptoms are mainly neurological. He has had adequate and appropriate decompression and has not improved, but probably from intraneural scarring, which would … probably be unresolved with any further surgery at this time."

By decision dated March 14, 2000, the Office denied authorization for additional surgery for L5-S1 decompression and fusion, finding that Dr. Ruefer's opinion represented the weight of the medical evidence.

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

In this case, there was disagreement between Drs. Ruefer and Hicks regarding whether appellant requires additional decompression and fusion surgery to ameliorate his accepted lower back condition. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[1] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. As the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures, to resolve the outstanding conflict in medical evidence. An appropriate medical specialist should submit a rationalized medical opinion on whether appellant requires lumbar decompression and fusion surgery to ameliorate his accepted lower back condition. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The March 14, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
June 26, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

[1] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).