

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY N. DANIUL and DEPARTMENT OF THE ARMY,
U.S. ARMY FORCES COMMAND, Fort Drum, NY

*Docket No. 01-132; Submitted on the Record;
Issued April 4, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On April 3, 1986 appellant, a then a 35-year-old heavy vehicle mechanic, was pulling a hydraulic line when he experienced severe pain in his lower back. The Office accepted his claim for lumbar radicular syndrome.¹ Appellant stopped work on April 3, 1986. The Office paid appropriate compensation. The Office subsequently authorized an L4 to sacrum spinal fusion with iliac crest bone graft and excision of the left greater trochanteric bursa.

By letters dated March 25, 1998, the Office referred appellant and a statement of accepted facts to Dr. Ronald DeThomas, a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 8, 1998 report, Dr. DeThomas noted appellant's history of injury and treatment, which included a history of chronic low back pain, left-sided radicular pain and status post discectomy in 1987 at L4-5 and fusion from L4 to the sacrum in 1991 for spinal instability and persistent pain. Appellant experienced postoperative pain in the left greater trochanteric region which eventually precipitated the need for a left trochanteric bursectomy in 1994, all causally ascribed to the original injury of April 3, 1986. He noted appellant's 1985 back injury and stated that appellant was about 98 percent improved until he was reinjured on April 3, 1986. Dr. DeThomas stated that appellant had continuing complaints of severe low back pain and left leg pain. He noted the discectomy at the L4-5 level, the L4 sacrum fusion in 1991 with left iliac crest bone graft and the trochanteric bursectomy. Dr. DeThomas indicated that appellant's chief complaints were consistent with his previous history of left leg pain and low back pain. Dr. DeThomas stated that his impression was chronic low back pain and failed back syndrome

¹ Appellant had a previously accepted claim for a work-related injury on February 26, 1985. The Office accepted this claim for lumbosacral strain.

with previous L4-5 discectomy, L4 to sacrum fusion and left greater trochanteric bursectomy, all causally related to the back injury from 1986 and an exacerbation of the 1985 back injury. He recommended a functional capacity evaluation and stated that his current observations led him to believe that appellant would not be capable of any suitable significant function.

In a June 5, 1998 addendum, Dr. DeThomas noted that appellant was awaiting authorization for a magnetic resonance imaging (MRI) scan and possible consideration for additional treatment or surgery due to his increased symptoms. He completed an OWCP-5 form, after reviewing a May 22, 1998 functional capacity evaluation, and indicated that appellant could not work eight hours per day. He stated that he could work three to five hours per day and specified physical limitations. Dr. DeThomas also stated that appellant was still undergoing workup and might undergo further surgical procedures which would preclude returning him to the recommended limitations.

In a December 1, 1998 MRI of the lumbar spine, Dr. Marcus A. Allen, Board-certified in diagnostic radiology, conducted a comparison of the June 19, 1995 examination. His impression was degenerative change of the lumbar spine with postsurgical change of the lower lumbar spine. No evidence of recurrent or residual disc herniation at L4-5 or L5-S1. He stated that these levels appeared unchanged, other than some new enhancement of the right posterolateral aspect of the L5-S1 disc of uncertain significance. Dr. Allen also noted a new far lateral disc herniation at L2-3 and peripheral to the left L2-3 neural foramen and recommended a clinical correlation regarding symptomatology.

In a December 15, 1998 report, Dr. Steven C. Robinson, a Board-certified orthopedic surgeon, noted that appellant continued to be bothered by severe left mid-lumbar back pain radiating over the left buttock, down the lateral calf to his posterior calf. He stated that appellant had relatively more back and buttock hip pain and leg pain, and he got sudden sharp pains in this area. He determined that appellant had an MRI scan that showed a new herniated disc at L2-3, extra foraminal on the left, which was not previously present on his January 7th scan. He also noted that nerve studies in May 1997 were normal. Dr. Robinson diagnosed an L2-3 herniated lumbar disc to the left and stated that this correlated with findings of numbness in the anterior thigh and with left-sided pain. He discussed treatment options with appellant and could not be certain that this was the source of his ongoing symptoms. Dr. Robinson explained that there was not much else to try because of the severity and duration of appellant's symptoms apart from surgically removing the disc. Dr. Robinson requested approval for the L2-3 left lateral discectomy with operating microscope.

In a January 15, 1999 report, Dr. Robinson stated that appellant was in for a recheck. He determined that appellant had an MRI scan that showed a new herniated disc at L2-3, extra foraminal on the left, which was not previously present on his January 7th scan. He diagnosed a L2-3 herniated lumbar disc to the left and again requested authorization for surgical intervention *via* decompression and discectomy.

By letter dated February 9, 1999, Dr. Robinson stated that appellant had been treated for L2-3 herniated lumbar disc on the left. He stated that he had recommended proceeding with an L2-3 left lateral discectomy with operating microscope. Dr. Robinson further stated that he had

made two previous requests, one in January 1999 and one in December 1998, which were unheeded.

In a March 10, 1999 memorandum to the Office medical adviser, the Office provided a statement of accepted facts and the request for surgery in order to determine whether the requested surgery should be authorized.

In a report dated March 19, 1999, an Office medical adviser noted that this was a complex spine case. He opined that, even if appellant had an L2-3 clinically significant herniated nucleus pulposus requiring surgery, he did not see how it was related to the April 3, 1986 injury of the earlier 1985 injury. He stated that the 1986 injury caused an L4-5 disc herniation and stated that appellant already had two operations at this level, including a fusion to S1. The Office medical adviser opined that even if the disc in the above fusion went it would be L3-4 and not L2-3. He further offered that L2-3 was an unusual level for a disc herniation and his doctor was calling this a "new herniation." The Office medical adviser questioned how and when did appellant get the new herniation. He further stated that Dr. DeThomas examined appellant and made no mention of any new disc herniation or the need for any further spine surgery. Finally, the Office medical adviser offered that a third operation would only add to the complexity of appellant's problem.

By decision dated April 14, 1999, the Office denied authorization for additional surgery for L2-3 left lateral discectomy with operating microscope, finding that appellant had not established that the requested surgery was medically related to the accepted work-related condition.

On May 14, 1999 appellant requested reconsideration and submitted additional evidence. The additional evidence was comprised of previously submitted medical reports and treatment notes from his treating physician, Dr. Robinson, dating back to his 1985 injury, diagnostic tests and new reports.

In a May 5, 1999 report, Dr. Robinson stated that appellant was in for a recheck. He noted that they were waiting approval for appellant's back surgery. He observed that appellant was quite upset and frustrated, as he had just received the denial for his surgery. Dr. Robinson indicated that appellant continued with low back pain, left lateral and anterior thigh pain and numbness, along with pain that traverses the entire left leg. He stated that these symptoms were constant. He noted appellant's history of injury and surgical procedures conducted since the injuries. Dr. Robinson reviewed the Office's April 14, 1999 letter denying his surgery for lack of causality and explained that it was a known fact that there were greater stresses placed on the intervertebral disc superior to fusion sites. He explained that appellant had a herniated disc at a level higher than his fusion. Dr. Robinson opined that this may be at least indirectly if not directly related to the fusion at the L4-5 region. He then proffered that the need for surgery was directly related to the compensation injury of 1985.

In an August 31, 1999 report, Dr. Robinson again stated that appellant was in for a recheck and was frustrated. He repeated his diagnosis of a known L2-3 herniated disc to the left by MRI scan with physical examination that correlates. Dr. Robinson stated that he was repeating his request for surgical intervention.

On October 22, 1999 the Office sent a memorandum to the Office medical adviser requesting his opinion on the request for surgery. On November 1, 1999 the Office medical adviser advised that he would not authorize the surgery as the only new information in the reports of May 5 and August 31, 1999 was an MRI that showed a small herniated nucleus pulposus (HNP) at L2-3, and he questioned the clinical significance.

By merit decision dated November 1, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

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

In this case, there was disagreement between Dr. Robinson, appellant's treating physician, and the Office medical advisers regarding whether appellant required an L2-3 left lateral discectomy with operating microscope to ameliorate his accepted lower back condition. Dr. Robinson stated that the herniated disc was at a higher level than his fusion and that this may be at least indirectly if not directly related to the fusion at the L4-5 region. The Office medical advisers questioned the clinical significance of the HNP at L2-3 and previously opined that it was a new herniation and not related to the work injury. 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."² 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.

² 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).

The November 1, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.³

Dated, Washington, DC
April 4, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³ The Board notes that, subsequent to the Office's November 1, 1999 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).