

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY GARZA and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 01-360; Submitted on the Record;
Issued April 5, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
A. PETER KANJORSKI

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

The Board has duly reviewed the case record and finds that the Office properly denied authorization for back surgery.

On April 27, 1970 appellant, then a 31-year-old distribution clerk, filed a claim alleging that he hurt his back while lifting a parcel on April 16, 1970.

The Office accepted appellant's claim for back strain. The Office approved the following surgeries: lumbar laminectomy and spinal fusion of L4 through the sacrum performed on January 25, 1972; laminectomy and disc excision at L3-4 performed on February 21, 1980; spinal fusion at L3-4 with bone graft and insertion of Knodt rods performed on February 19, 1987; removal of Knodt rods performed on June 22, 1988; and left retroperitoneal exploration and L2 laminectomy and decompression with posterior fusion at L2-3 with "TSRH" pedicle screw fixation performed on May 17, 1994.

On July 30, 1999 Dr. Michael C. Longley, an orthopedic surgeon and appellant's treating physician, recommended that appellant undergo anterior and posterior fusion at L2-T4.

By letter dated August 31, 1999, the Office referred appellant along with the case record, a statement of accepted facts and a list of specific questions to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Agarwal of the referral.

Dr. Agarwal submitted a September 27, 1999 report finding that surgery was not necessary.

By decision dated October 25, 1999, the Office denied authorization for back surgery based on Dr. Agarwal's opinion. In a November 22, 1999 letter, appellant requested an oral hearing before an Office representative.

In an April 3, 2000 decision, the hearing representative vacated the Office's decision and remanded the case to resolve a conflict in the medical opinion evidence between Drs. Longley and Agarwal as to whether the proposed back surgery was warranted.

On remand, the Office referred appellant along with the case record, a statement of accepted facts and a list of specific questions to Dr. Glenn M. Amundson, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated May 4, 2000. By letter of the same date, the Office advised Dr. Amundson of the referral.

Dr. Amundson submitted a July 10, 2000 report finding that appellant did not require the proposed surgery and that appellant should undergo a functional capacity evaluation to determine his ability to work.

Appellant underwent a functional capacity evaluation on August 8, 2000 and Dr. Amundson submitted a supplemental report dated September 17, 2000 concurring with the results of the functional capacity evaluation that appellant could perform sedentary work for no more than four hours per day with certain physical restrictions.

By decision dated September 25, 2000, the Office denied authorization for the proposed back surgery based on Dr. Amundson's opinion.¹

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 service, 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.”²

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.³

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

¹ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

² 5 U.S.C. § 8103(a).

³ *Daniel J. Perea*, 42 ECAB 214 (1990).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴

In this case, the weight of the medical opinion evidence rests with the reports of Dr. Amundson, a Board-certified orthopedic surgeon and impartial medical examiner. In his July 10, 2000 report, Dr. Amundson detailed the history of appellant's April 16, 1970 employment injury, subsequent medical treatment and medical background. He provided a comprehensive review of factual and medical records and his findings on physical examination. Dr. Amundson noted a review of videotapes and a report demonstrating appellant's ability to engage in physical activities in significant excess than the debilitation described in Dr. Longley's treatment notes and for a man describing his condition as bedridden and unable to walk more than 50 feet. He stated that he could not support the proposed surgery at that time. Dr. Amundson explained:

“Anatomically, I do n[o]t find his pathologic condition to be a clear indication for surgery and since he is an unreliable historian, I find it difficult to use complaints of pain and debility (overstatements) as further indications to support aggressive massive surgical intervention.”

Dr. Amundson recommended that appellant undergo a functional capacity evaluation to determine his ability to work.

In his September 17, 2000 supplemental report, Dr. Amundson reviewed the results of the functional capacity evaluation and noted appellant's inconsistent efforts and equivocal findings. Appellant's limitations included the following: sedentary work for 4 hours a day; sitting up to 30 minutes at a time; occasional standing, walking, spinal forward bending and squatting through full motion; frequent partial squatting; avoiding lifting from floor level; and occasional climbing of stairs, kneeling, crawling and lifting up to 15 pounds. Dr. Amundson stated:

“I find it difficult to deviate from the recommendations of these experienced evaluators. I therefore would support finding [appellant] able to function at a sedentary work level for four hours per day. I fully realize that this most probably represents a significant underestimation of [appellant's] abilities. Restrictions with respect to other activities such as standing, sitting and walking are as previously dictated.”

The Board finds Dr. Amundson's opinion that the proposed surgery was not warranted was rationalized and based on an accurate and factual medical background.

Dr. Longley submitted treatment notes covering the period August 1, 1999 through May 3, 2000 and a January 7, 2000 report recommending that appellant undergo back surgery. He failed to address whether the proposed medical treatment was necessary because of appellant's accepted employment-related back strain. Thus, the additional medical evidence is

⁴ *Nathan L. Harrell*, 41 ECAB 402, 407 (1990).

insufficient to overcome the weight accorded Dr. Amundson's opinion as the impartial medical specialist or to create a new conflict with it.⁵

As Dr. Amundson, the impartial medical examiner, found that the proposed back surgery would not be beneficial to appellant's condition, the Office's decision to deny the request for surgery was not unreasonable.

The September 25, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 5, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member

⁵ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).