U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT R. McCULLOUGH and DEPARTMENT OF THE ARMY, MATES, Gatesville, TX

Docket No. 01-751; Submitted on the Record;
Issued February 12, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On January 14, 1999 appellant, then a 41-year-old heavy equipment repairer, sustained employment-related strains to the cervical spine and left shoulder. He did not stop work but continued to experience neck pain. On July 11, 2000 appellant requested authorization for anterior cervical discectomy at three levels. By decision dated November 22, 2000, the Office denied appellant's request, finding that the weight of the medical evidence indicated that the surgery was not medically warranted. The instant appeal follows.

The relevant medical evidence includes[1] a cervical spine x-ray performed on April 26, 1999 that was essentially negative. In a report dated August 24, 1999, Dr. R.K. Hurley, a Board-certified anesthesiologist, advised that a magnetic resonance imaging (MRI) scan of the cervical spine was negative and diagnosed cervical strain with secondary myofascial syndrome. In a January 18, 2000 report, Dr. Hurley noted that appellant had been followed in his pain clinic and had received trigger point injections with temporary relief.

In a February 15, 2000 report, Dr. Arthur F. Evans, Board-certified in neurosurgery, noted appellant's history of injury and complaints of neck and shoulder pain. Physical evaluation was unremarkable. A February 24, 2000 seven-view cervical spine x-ray demonstrated mild degenerative changes at C4-5, C5-6 and C6-7. An MRI scan of the cervical spine that same day demonstrated mild diffuse disc bulges at C4-5, C5-6 and C6-7.

By report dated February 29, 2000, Dr. Evans reported that appellant continued to complain of chronic neck pain but, on examination, found no neurologic disability. He noted

[1] The record also contains reports concerning appellant's shoulder condition and possible diagnosis of carpal tunnel syndrome. These are not relevant to the instant claim.

that the cervical spine x-ray demonstrated degenerative changes and a possibly hypermobile segment at C6-7 and also noted the MRI scan findings of mild disc bulging. Dr. Evans further stated that there was not a specific problem that could be correctable by surgery and had no clear indication of what was causing appellant's pain. He concluded that surgery was not warranted. In a report dated May 31, 2000, Dr. Evans repeated his findings and conclusions. He continued to advise that surgery was not warranted.

Dr. Marcial Lewin, a Board-certified neurosurgeon, submitted a report dated July 3, 2000 in which he advised that he had reviewed the February 2000 MRI scan. He diagnosed degenerative disc disease and herniations at C4-5, C5-6 and C6-7 with chronic cervicalgia. Regarding surgical intervention, Dr. Lewin stated:

> "I explained to [appellant] what I saw on the MRI [scan]. I showed him the actual films and I told him that surgery at those levels perhaps would result in him getting rid of the pain. However, it will need to be a three level fusion, which would produce significant stiffness of the neck. There would be no guarantees whatsoever that it will take care of his condition and that I do not totally disagree with Dr. Evans and his evaluation and opinion. At the same time, this has been going on for 18 months. He says that he is miserable as he is and wants something done."

A seven-view cervical spine x-ray completed on July 3, 2000 was normal. In a July 10, 2000 treatment note, Dr. Lewin advised that he had reviewed the x-ray and recommended anterior discectomy at three levels with autologous bone graft.

In a report dated July 26, 2000, an Office medical adviser noted that the record contained contradictory opinions regarding the need for surgery. He opined that while the recommended surgery was for a condition causally related to the employment injury, the surgery was not medically appropriate in the instant case. He recommended that appellant be referred for a second opinion evaluation.

On August 2, 2000 the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. John D. Ditzler, a Board-certified orthopedic surgeon. In a report dated August 26, 2000, he diagnosed cervical degenerative disc disease. Regarding the need for surgery, Dr. Ditzler advised that the recommended procedure was for a condition causally related to the employment injury and concluded:

> "I do not believe that doing a three level fusion for neck pain with no radicular problem and minimal radiographic problems is warranted. If a surgical procedure is elected to try and alleviate [appellant's] pain, I believe that the procedure outlined by Dr. Lewin would be the appropriate one."

In a report dated September 11, 2000, Dr. Lewin stated: "I told him that triple level surgery only for pain is a complicated decision and it's something he needs to consider very carefully and he told me once again that his pains are so bad, so incapacitating, that he wants to go ahead with the surgery."

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

In this case, it is undisputed that appellant sustained an injury while in the performance of his federal duties on January 14, 1999. The Office accepted his claim for the conditions of cervical strain and left shoulder strain. Appellant then sought authorization for surgery to his neck.

Section 8103 of the Federal Employees' Compensation Act[2] 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.[3] 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. Abuse of discretion is generally 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. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[4] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[5] Thus, in order for surgery to be authorized, appellant must submit evidence to show that such surgery is for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

Section 8123 of the Act provides that if there is 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.[6]

In the instant case, Dr. Lewin, a Board-certified neurosurgeon, requested authorization to perform an anterior discectomy at three levels. However, Dr. Ditzler, a Board-certified orthopedic surgeon who provided a second-opinion evaluation for the Office, advised that the requested surgery was not warranted. The Board finds that these opinions are of approximately equal value and are in conflict on the issue of whether appellant's request for surgery should be granted. The case shall therefore be remanded for referral to an appropriate Board-certified specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing whether the requested surgery is for a condition causally

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8103.

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

[5] *See Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[6] 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).

related to the employment injury and whether it is medically warranted. After such further development deemed necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated November 22, 2000 is hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
February 12, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member