U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BONITA J. DEDENBACH and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

Docket No. 00-1415; Submitted on the Record;
Issued March 1, 2002

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for written review of the record; and (2) whether the Office properly denied appellant's request for surgery of right total knee revision.

The Office accepted appellant's claim for torn right medial meniscus and fracture of the right patella. She underwent a total right knee replacement on September 10, 1997 and did not return to work after the surgery. By decision dated July 29, 1993, the Office issued appellant a schedule award for a 19 percent impairment of the right leg. By decision dated February 4, 1999, the Office issued appellant a schedule award for a 30 percent loss of use of the right lower extremity.

In a January 25, 1999 report, Dr. Alan C. Odom, a Board-certified orthopedic surgeon and appellant's treating physician, performed a physical examination and found that a bone scan showed slightly positive on the medial aspect of the tibia. He observed a 0 to 90-degree range of motion of appellant's volition. Dr. Odom diagnosed possible reflexive sympathetic dystrophy (RSD) in the lower extremity. He prescribed pain management and physical therapy.

In a progress note dated February 23, 1999, Dr. Odom stated that appellant's right knee condition was the same and that going to physical therapy three times a week and doing a home exercise program had not improved her condition. He stated that appellant had 0 to 40 degrees range of motion "to 11" and 0 to 60 degrees range of flexion with only moderate strength. Dr. Odom recommended a "revision total knee arthroplasty" on the right with osteonics stem prosthesis.

In a March 4, 1999 note, the Office medical adviser did not agree that appellant should undergo revision total knee arthroplasty. He stated that appellant's RSD "should be treated." The Office medical adviser stated that instability of the total knee had not been demonstrated and surgical revision was not yet indicated. He recommended a second opinion evaluation.

In a report dated April 8, 1999, Dr. Lester F. Littell, a Board-certified orthopedic surgeon, noted findings on examination, appellant's history of injury and reviewed an x-ray showing a cementless total knee arthroplasty in good position. He diagnosed RSD. Dr. Littell concluded that appellant's complaints of pain were not due to any mechanical problem with her total knee replacement. He stated that appellant had evidence of RSD and "further surgery would only exacerbate her symptoms with additional pain." Dr. Littell opined that appellant should be "managed nonsurgically in the absence of radiographic or clinical or radiographic evidence of loosening of the prosthesis."

In a report dated May 10, 1999, Dr. Michael F. Najjar, a Board-certified anesthesiologist, considered appellant's history of injury, performed a physical examination and diagnosed RSD of the right knee, with anxiety and depression. He recommended that appellant undergo lumbar sympathetic blocks, resume physical therapy, take anti-depressant medication and undergo another bone scan.

By letter dated May 10, 1999, Dr. Odom stated that appellant had not reached maximum medical improvement and would not reach maximum medical improvement until she had a total knee arthroplasty.

To resolve the conflict between the opinions of Dr. Odom and Dr. Littell as to whether appellant required a total revision knee arthroplasty, the Office referred appellant to an impartial medical specialist, Dr. George Z. Seiters, a Board-certified orthopedic surgeon. In his report dated June 8, 1999, Dr. Seiters considered appellant's history of injury, performed a physical examination and reviewed the x-rays showing progressive arthritic change and a well-positioned prosthesis with no evidence of loosening. He also reviewed the bone scan showing some activity in the tibia. Dr. Seiters diagnosed "knee pain, status post total knee arthroplasty, etiology undetermined." He stated that appellant was currently undergoing an injection course for RSD and the outcome of that treatment would be important in determining the need for revision arthroplasty. Dr. Seiters stated that it was not clear from the information he had to review or current x-rays that revision arthroplasty would be helpful to appellant and if indeed the diagnosis of RSD was established, the outcome of surgery would be very questionable. He recommended that appellant be evaluated by a specialist in total joint revisions.

In a supplemental report dated August 12, 1999, Dr. Seiters stated that he received Dr. Najjar's note dated July 30, 1999, which stated that there was basically no change with intractable right knee pain of uncertain etiology. Dr. Seiters stated that the note indicated to him that it was unlikely that appellant was experiencing RSD and that diagnosis could not be confirmed. He stated that based on the current findings, he did not think appellant should proceed with a total knee arthroplasty and she would be a poor surgical candidate but his statement represented his opinion rather than certainty and reiterated that appellant should be referred to a total joint specialist. Dr. Seiters stated that appellant was at maximum medical improvement if no further orthopedic treatment was undertaken.

By decision dated August 26, 1999, the Office denied appellant's request for a right total knee revision, stating that the weight of the medical evidence showed that the requested surgery "would not likely cure, give relief or reduce the degree or period of disability." The Office also

denied appellant's request to interrupt the schedule award because appellant had not yet reached maximum medical improvement and the recurrence of her condition had not been accepted.

In an undated letter received by the Office on September 23, 1999, appellant requested reconsideration of the Office's decision and submitted additional evidence consisting of a September 10, 1999 medical report from Dr. William T. Ballard, a Board-certified orthopedic surgeon, and associate of Dr. Odom, and a follow-up note from Dr. Odom dated September 22, 1999. Dr. Ballard considered appellant's history of injury, performed a physical examination and reviewed the x-ray, stating that it revealed no hardware complications with osteopenia. He stated that appellant had right knee "TKR" (total knee replacement), that she failed treatment for RSD and he had no clear source of her pain. Dr. Ballard noted that appellant failed extensive nonoperative treatments and that Dr. Odom recommended a revision of her total knee and because she failed all other recommendations Dr. Ballard concurred with Dr. Odom. He stated that "long stems" might help. In a follow-up note dated September 22, 1999, Dr. Ballard stated that appellant was "doing about the same," that he discussed the risks and benefits of a total knee revision with appellant and was going to admit her for the procedure and do it under general anesthesia.

In notes dated October 12, 1999, another Office medical adviser reviewed Dr. Ballard's September 10, 1999 report, in which he recommended a total knee revision and stated that the source of appellant's severe pain was not clear. The Office medical adviser stated that the x-rays showed osteopenia but no component worsening and he saw no investigation of low-grade infection with aspiration culture. He stated that appellant had treatment for RSD in the past, questioned whether that was the cause of her severe pain and, if it was, he stated that further surgery would not help her. The Office medical adviser recommended that appellant obtain another opinion with a subspecialist in total joints.

In an addendum to his notes dated October 15, 1999, the Office medical adviser noted that Dr. Ballard stated that there was no clear source of appellant's knee pain and that appellant had diagnoses of RSD in the past. He questioned whether a low-grade infection had been ruled out, suggested that arthroscopy might be needed and stated that he thought appellant would be a poor surgical candidate. The Office medical adviser recommended that another opinion from a total joint specialist be obtained.

In a report dated December 14, 1999, a second opinion physician, Dr. W. Carl Dyer, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays showing some lucency in the distal femur underneath the implant and a questionable line that went across the distal femur in the suprapatellar region comparative to the healing fracture. He diagnosed status post total knee replacement and osteolysis of the distal femur. Dr. Dyer advised that appellant obtain a chemical profile, CBC and sedimentation rate and a bone scan.

A bone scan dated December 20, 1999 showed mild increased activity about the right knee compatible with loosening, inflammation or infection and nonspecific mildly increased activity in the lumbar and cervical spine and left sternum.

In a report dated December 21, 1999, Dr. Dyer stated that appellant did not obtain the blood work and the bone scan was inconclusive. He performed a physical examination and diagnosed nonlocalizing radiculopathy of the sciatic nerve, degenerative disc disease of the lumbar spine, status post total knee replacement and pain with the above and RSD. Dr. Dyer recommended that appellant obtain a magnetic resonance imaging (MRI) scan of the lumbar spine, prescribed medication and an epidural steroid.

In a report dated January 12, 2000, Dr. Dyer reiterated his physical findings and the results of the x-rays in his December 14, 1999 report. He opined that appellant did not need to have revision of the total knee replacement. Dr. Dyer stated:

> "This is predicated on all the testing and the clinical course, both previously and subsequent to this. It should be noted that [appellant] will need to have a revision at some time in the future. The exact timing is difficult to assess at this point. I feel that it is imperative that she be seen by Dr. [Najjar] for an epidural steroid injection of the lumbar spine. I feel like this is an integral part of the pain in her leg. I feel like it is impossible to make an accurate diagnosis without having an MRI of the lumbar spine."

By decision dated January 14, 2000, the Office denied modification of the August 26, 1999 decision denying surgery.

By letter dated February 25, 2000, appellant requested a review of the record by an Office hearing representative.

By decision dated April 4, 2000, the Branch of Hearings and Review denied appellant's request.

The Board finds that the Branch of Hearings and Review properly denied appellant's request for review of the record.

Section 20 C.F.R. § 10.616(a) provides that appellant injured on or after July 4, 1996, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The regulation states in pertinent part that appellant must not have previously submitted a reconsideration request, regardless of whether or not it was granted, in the same decision.

The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[1] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which

[1] *Henry Moreno*, 39 ECAB 475, 482 (1988).

provided the right to a hearing,[2] when the request is made after the 30-day period for requesting a hearing[3] and when the request is for a second hearing on the same issue.[4]

In this case, appellant's February 25, 2000 request for written review of the record followed his request for reconsideration on September 23, 1999. Appellant, therefore, submitted a request for reconsideration prior to submitting his request for written review of the record. Since appellant previously submitted a reconsideration request, the Branch exercised its discretionary powers in denying appellant's request for written review of the record and in so doing, did not act improperly.

The Board finds that the case is not in posture for decision regarding appellant's need for total knee revision.

Under section 8103 of the Federal Employees' Compensation Act, the Office has the authority to provide medical services, appliances and supplies to an employee injured while in the performance of duty which the Office considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of monthly compensation.[5] In interpreting section 8103, the Board had recognized that the Office has broad discretion in approving services provided under the Act.[6] The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, had broad administrative discretion in choosing means to achieve this goal.[7] The only limitation on the Office's authority is that of reasonableness.[8] As the only limitation on the Office's authority is 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 known facts.[9]

In this case, to resolve the conflict between appellant's treating physician, Dr. Odom and the referral physician, Dr. Littell, the Office referred appellant to the impartial medical specialist, Dr. Seiters. In his June 8, 1999 report, he stated that the x-rays showed progressive arthritic change and a well-positioned prosthesis with no evidence of loosening. He was unable to determine the etiology of appellant's knee pain. Dr. Seiters stated that determining whether appellant had RSD was important for determining appellant's need for revision arthroplasty and if she did have RSD, the outcome of surgery would be "very questionable." He recommended

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[2] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[3] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[4] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[5] 5 U.S.C. § 8103(a); 20 C.F. R. § 10.310(a) (1999).

[6] *Janice Kirby*, 47 ECAB 220, 225 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[7] *Janice Kirby*, *supra* note 6; *see M. Lou Reisch*, 34 ECAB 1001 (1983).

[8] *James R. Bell*, 52 ECAB ___ (Docket No. 99-2133, issued July 2, 2001); *Joe F. Williamson*, 36 ECAB 494 (1985).

[9] *Janice Kirby*, *supra* note 6.

that appellant be evaluated by a specialist in joint revisions. In his August 12, 1999 report, Dr. Seiters, upon reviewing Dr. Najjar's July 30, 1999 note, stated that it was unlikely that appellant had RSD but the diagnosis could not be confirmed. He stated that he did not think appellant should proceed with a knee arthroplasty but that was his opinion, not certainty and he reiterated that appellant should be referred to a total joint specialist.

In her request for reconsideration, appellant submitted Dr. Ballard's September 22, 1999 report, in which Dr. Ballard stated that he saw no clear source of appellant's pain, that appellant failed treatment for RSD and in view of her failing all other recommendations, he agreed with Dr. Odom that appellant should undergo total knee revision. In an October 12, 1999 report, the Office medical adviser considered Dr. Ballard's findings that appellant had no clear source of her pain and stated that, if appellant had RSD, surgery would not help her. He recommended that appellant be evaluated by a subspecialist in total joints. In his October 15, 1999 addendum, the Office medical adviser reiterated that appellant would be a poor surgical candidate but should see a total joint specialist.

In a December 21, 1999 report, Dr. Dyer stated that a bone scan was inconclusive and recommended that appellant obtain an MRI scan. In his January 12, 2000 report, Dr. Dyer opined that he did not think appellant should have a revision of total knee replacement "at this point" but would need to have one at some time in the future, although he did not describe the factors on which appellant's need for surgery was contingent. He also stated that it "was imperative" that she see Dr. Najjar for an epidural steroid injection of the lumbar spine and that it was "impossible" to make an accurate diagnosis without an MRI scan of the lumbar spine.

The Board finds that a new conflict exists in the medical evidence between Drs. Ballard and Dyer regarding appellant's need for a revision total knee arthroplasty. Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United Stated and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] The case be remanded for the Office to refer appellant to an impartial medical specialist to resolve the conflict. Since Dr. Ballard and the Office medical adviser recommended that appellant should be evaluated by a total joint specialist, the impartial medical specialist should have that expertise. If the impartial medical specialist requires further tests, they should be obtained. After any further development the Office deems necessary, the Office shall issue a *de novo* decision.

[10] *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).

The April 4, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed. The January 14, 2000 and August 26, 1999 decisions are vacated and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
March 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member