

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL J. POULIN and U.S. POSTAL SERVICE,
POST OFFICE, Portland, MI

*Docket No. 03-2034; Submitted on the Record;
Issued December 18, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for cervical surgery on July 9 and 18, 2001.

On July 29, 2000 appellant, then a 39-year-old automation clerk, filed a claim alleging that he developed cervical spondylosis and cervical osteoarthritis as a result of the twisting, reaching and grabbing required to perform his job as a sweeper. He stated that he first became aware of his condition on July 28, 2000. Appellant did not stop work, but returned to an administrative position. His claim was accepted for aggravation of cervical spondylosis.¹

Appellant submitted several reports from Dr. William W. Dexter, a Board-certified family practitioner, which noted appellant's treatment for low back and neck pain. His reports of July 27 and 28, 2000 advised that appellant's radicular symptoms had completely resolved, after undergoing physical therapy, traction and using a soft collar. In his report of August 28, 2000, Dr. Dexter diagnosed cervical degeneration, spondylosis and arthritis. He advised that appellant was gradually improving with a discontinuation of his weight-training program and with a change in his job duties. Dr. Dexter's reports of January 5 and 12 and March 15, 2001 noted that appellant experienced a probable recurrence of cervical disc nerve impingement after sneezing, which may be related to his diagnosed condition of spondylosis and advised that his recurrent cervical condition had improved after physical therapy, cervical traction and medications. He recommended that appellant consult with a neurosurgeon to explore the option of an epidural injection or surgery.

Appellant also submitted reports from Dr. William F. D'Angelo, a Board-certified neurologist, dated March 16 and April 10, 2001, which diagnosed cervical radiculopathy and

¹ The record reveals that appellant filed a separate claim for an injury sustained on September 30, 1997 claim No. 01-0356512, which the Office accepted for aggravation of bilateral plantar fasciitis. These claims were not consolidated.

noted that the magnetic resonance imaging (MRI) scan of the cervical spine dated September 22, 1999 revealed a two level disc disease at C5-6 and C6-7. His report of April 10, 2001 recommended conservative treatment of cervical epidural cortisone injections and advised that it would be unwise to rush surgery without a clear-cut goal.

Also submitted was a report from Dr. T. Edward Collins, an osteopath, dated April 4, 2001, who performed nerve condition studies revealing no abnormalities and an electromyogram (EMG) which revealed chronic partial denervation in the left C7 root distribution consistent with left C7 radiculopathy, most likely due to disc herniation. An MRI scan dated April 4, 2001 revealed cervical spondylosis, a prominent spur and soft disc laterally at C5-6 with potential compromise of the exiting C6 nerve root and a bulging disc and spur at C6-7.

On March 15, 2001 appellant filed a Form CA-2a, notice of recurrence of disability, alleging that on January 4, 2001 he sneezed and reinjured his herniated disc and caused an aggravation of cervical spondylosis.²

In a report dated April 4, 2001, the medical adviser evaluated appellant for a schedule award for the upper extremities and advised that he had residual neck and upper back symptoms with no impairment of the right or left upper or lower extremities secondary to the accepted condition of cervical spondylosis aggravated by work.

In a letter dated May 10, 2001, appellant requested cervical surgery for the accepted condition of aggravation of cervical spondylosis. He submitted an operative report from Dr. Edward Woodard, a Board-certified neurologist, dated July 9, 2001, who noted that appellant was treated conservatively without success and he, therefore, recommended cervical decompression surgery. He advised that he performed a C5-6 anterior cervical discectomy with decompression of the cord and nerve roots, interbody fusion at C5-6 utilizing allograft reverse Smith-Robinson iliac bone fusion and anterior plate osteosynthesis at C5-6 and C7, utilizing titanium cervical spine locking plate. Dr. Woodard diagnosed two level cervical disc disease at C5-6 and C6-7. He also noted performing an anterior cervical wound exploration with incision to rule out infection on July 18, 2001.

The Office referred appellant's case record to an Office medical adviser, who in a report dated September 10, 2001, noted that appellant's symptoms were insufficient to cause further deterioration of his cervical condition. The medical adviser further noted that the need for decompressive surgery in July 2001, was necessitated by the natural history of appellant's degenerative cervical arthritic problem unrelated to a temporary aggravation of his arthritis.

Thereafter, the Office referred appellant's medical records, a statement of accepted facts, as well as a detailed description of his employment duties, to Dr. Robert Runyon, a Board-

² It appears from the record that the Office did not issue a final decision with regard to the recurrence of disability filed on March 15, 2001 and, therefore, the Board does not have jurisdiction over the matter. See 20 C.F.R. § 501.2(c).

certified orthopedic surgeon, for consultation.³ In a medical report dated December 20, 2001, he indicated that he reviewed the records provided to him, but did not perform a physical examination of appellant. Dr. Runyon indicated the history of appellant's cervical condition and summarized the findings on various diagnostic studies. He diagnosed appellant with cervical spondylosis of long duration and some minimal evidence on the EMG of chronic root irritation on the left, status post cervical decompression on July 17, 2001 and a history of carpal tunnel syndrome, plantar fasciitis, irritable bowel syndrome and low back problems. Dr. Runyon noted that appellant's cervical spine problems antedated the period of aggravation and the history of weight training and body building aggravated and continued the symptoms in the cervical area. He advised that, the primary cause for the decompressive procedure, without evidence of a new injury, would be the underlying cervical spondylosis and associated reactive change. Dr. Runyon concluded that the surgery was not warranted and necessary because of the aggravation occurring in May 2000. In an addendum report dated February 25, 2002, Dr. Runyon noted that he reviewed the operative reports of July 9 and 18, 2001 and indicated that this additional information neither changed his diagnosis nor his opinion that the primary cause for the decompression procedure would be the underlying cervical spondylosis and associated reactive change.

In a report dated November 9, 2001, Dr. Dexter indicated that appellant was treated for psychiatric issues stemming from the trauma he sustained as a result of undergoing surgery. Also submitted was a report from Dr. D'Angelo dated February 14, 2002, which noted that appellant's cervical radiculopathy and subsequent need for surgery was indicated and well conducted.

In a decision dated March 19, 2002, the Office denied appellant's request for surgical authorization on the grounds that the proposed surgery was neither warranted nor causally related to his accepted work-related injury of July 28, 2000.

By letter dated April 5, 2002, appellant requested a review of the written record and submitted reports from Dr. Dexter dated February 28 to October 4, 2002, who diagnosed chronic myofascial pain, plantar fasciitis, cervical disc and other disc injuries resulting in permanent neurological impairment in his upper extremities also requiring surgical procedures, depression and anxiety. He concluded that there was a direct causal relationship between all of these conditions and appellant's various work duties.

In a decision dated November 13, 2002, an Office hearing representative affirmed the prior decision, noting that appellant had not met his burden of proof to show that the necessity for surgery was causally related to his employment.

In a letter dated April 21, 2003, appellant requested reconsideration of the Office decision dated November 13, 2002 and submitted a report from Dr. D'Angelo dated December 5, 2002, which advised that the cause of appellant's cervical radiculopathy was indeterminate. Also

³ Office procedures provide that the case record must be reviewed by a specialist prior to authorizing surgery for a back condition. Federal (FECA) Procedure Manual, Part 3 -- Medical Services and Supplies, *Medical Services*, Chapter 3.400.5(bX1) (April 1992).

submitted was a report from Dr. Dexter dated April 29, 2003, which noted appellant's treatment for chronic pain and depression.

In a decision dated July 15, 2003, the Office found that the evidence submitted was insufficient to warrant modification of its prior decision.

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

Section 8103(a) of the Federal Employees' Compensation Act 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.⁴ The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. 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.⁵ 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.

In this case, the Office accepted that appellant sustained an aggravation of cervical spondylosis related to his employment factors and paid appropriate compensation thereafter. The Office denied his request for cervical surgery on July 9 and 18, 2001 based on Dr. Runyon's examination and report. The Board finds that there is a conflict in medical opinion between Dr. Runyon, the Office referral physician and Dr. Woodard, appellant's treating physicians, both of whom are Board-certified specialist in their respective fields.

Dr. Runyon advised in reports dated December 20, 2001 and February 25, 2002, that the requested surgery was not warranted. He diagnosed cervical spondylosis of long duration and some minimal evidence on the EMG of chronic root irritation on the left and status post cervical decompression on July 17, 2001. Dr. Runyon advised that the primary cause for the decompressive procedure, without evidence of a new injury would be the underlying cervical spondylosis and associated reactive change. He concluded that the surgery was not warranted and necessary because of the aggravation occurring in May 2000.

By contrast, Dr. Woodard, appellant's surgeon, in a report dated July 9, 2001, diagnosed two level cervical disc disease at C5-6 and C6-7 and noted that he was treated conservatively without success and he, therefore, recommended the cervical decompression surgery. He has consistently supported cervical decompression surgery as related to appellant's work-related

⁴ 5 U.S.C. § 8103(a).

⁵ *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Pereci*, 42 ECAB 214 (1990).

aggravation, while Dr. Runyon found that the surgery was not warranted and necessary because of the aggravation occurring in May 2000.

Section 8123 of the Federal Employees' Compensation Act⁶ provides that if there is a disagreement between the physician making the examination for the United States and the employee's physicians the Office shall appoint a third physician who shall make an examination.⁷ The Board finds that the Office abused its discretion in denying the cervical surgeries of July 9 and 18, 2001 without having resolved the existing conflict between Dr. Runyon, the Office referral physician and Dr. Woodard, appellant's treating physician.

The decisions of the Office of Workers' Compensation Programs dated July 15, 2003 and November 13, 2002 are set aside and the case will be remanded to the Office for resolution of the conflict. On remand the Office should refer appellant, along with the case record and a statement of accepted facts, to an appropriate specialist for a rationalized opinion on the issues in conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

Dated, Washington, DC
December 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8123; *Shirley L. Steib*, 46 ECAB 39 (1994).