

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARJORETTE HUDNALL and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

*Docket No. 03-2158; Submitted on the Record;
Issued December 11, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant authorization for cervical surgery; and (2) whether the Office denial of appellant's request for a hearing constituted an abuse of discretion.

On March 11, 2002 appellant, a 42-year-old automation clerk, filed a Form CA-2 claim for benefits, alleging that she developed a left shoulder tendinitis condition as a result of repetitive work activities and that she first became aware that this condition was related to her employment on January 28, 2002. The Office accepted appellant's claim for left shoulder tendinitis; left rotator cuff tear; and temporary aggravation of degenerative disc disease, C4-5 to C5-6 levels. Appellant missed work intermittently due to her accepted condition for which the Office paid her appropriate compensation.

In a May 15, 2002 report, Dr. Stephen E. Robbins, a Board-certified orthopedic surgeon, noted appellant's complaints of left shoulder pain and reviewed the results of a magnetic resonance imaging (MRI) scan. The MRI revealed degenerative disc disease changes at C4-5 and C5-6 with a slight disc herniation at C4-5 on the right. Dr. Robbins stated:

“[Appellant] has a diagnosis of degenerative dis[c] disease of the cervical spine, C4-5 and C5-6. This is contributing to her left[-]sided neck pain and possibly some of her shoulder discomfort, although the majority of her symptoms appear to be related to a left rotator cuff tear, impingement syndrome and tend[i]nitis.... If there is nothing further to recommend in regards to [appellant's] shoulder [she] could be treated with an anterior cervical discectomy and interbody fusion, but I instructed her that it is quite likely that she would have significant residual left shoulder pain and discomfort.”

In a report dated September 11, 2002, Dr. Robbins stated:

“[Appellant] has a diagnosis of discogenic neck pain. I have nothing further to recommend. [She] has been involved in physical therapy and an exercise program. [Appellant] has had symptoms for the past nine months. At this point [she] needs to function as best as she can with her present symptoms. [Appellant] has plateau-ed in her healing.... I do not view [her] as a good surgical candidate in view of her chronic complaints and failure to respond to conservative measures.”¹

In a report dated December 9, 2002, Dr. Stephen P. Delahunt, an attending Board-certified orthopedic surgeon, reiterated the previous diagnosis of advanced degenerative disc disease at C4-5 and C5-6. Dr. Delahunt also advised that appellant had spinal stenosis at the C5-6 level with edema of the spinal cord or myelomalacia. He recommended anterior discectomy and interbody fusion at C4-6, due to the intractability and severity of her symptoms.

In a report dated March 20, 2003, Dr. Delahunt stated:

“[Appellant] is under my care for cervical spondylotic myelopathy. She has cervical spinal stenosis with myelomalacia at the C5-6 level as well as considerable degenerative disc disease at C4-5. [Appellant] sustained a temporary aggravation of her preexisting degenerative disc disease. This temporary aggravation occurred until December 1, 2002. [Appellant] sustained no permanent impairment as a result of her cervical spine condition. Her need for surgical intervention is due primarily to the congenital spinal stenosis that was present and the further degenerative disc disease that is not directly related to her work exposure at the [employing establishment].”

On an Office surgery request form dated March 27, 2003, Dr. Delahunt stated, in a handwritten notation, that the condition for which surgery was required was not related to appellant’s work injury. In an Office memorandum dated March 27, 2003, the Office noted Dr. Delahunt’s recommendation for anterior discectomy and interbody fusion at the C4-6 levels and forwarded the case for review for authorization by an Office medical adviser. In a report dated March 31, 2003, an Office medical adviser recommended that the Office withhold authorization for surgery.

By decision dated April 10, 2003, the Office denied authorization for cervical fusion surgery. By letter dated May 16, 2003, appellant requested a hearing before an Office hearing representative. By decision dated June 5, 2003, the Office denied appellant’s request for an oral hearing. The Office stated that appellant’s request was postmarked May 16, 2003, which was more than 30 days after the issuance of the Office’s most recent merit decision on April 10, 2003

¹ Appellant also received treatment for her left shoulder condition and on November 29, 2002 the Office authorized arthroscopic/excision surgery for her left shoulder. In a June 25, 2002 report, Dr. Dean W. Ziegler, an attending Board-certified orthopedic surgeon, who primarily treated appellant’s shoulder condition indicated that her cervical condition had not reached maximum medical improvement and noted that she “may require surgery” for her cervical condition.

and that she was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process.

The Board finds that the Office did not abuse its discretion by denying appellant's request for authorization for cervical surgery.

Section 8103 of the Federal Employees' Compensation Act² 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 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.⁴

In this case, the Office accepted that appellant had sustained the conditions of left shoulder tendinitis; left rotator cuff tear; and temporary aggravation of degenerative disc disease at the C4-5-C5-6 in the performance of duty. In his March 20, 2003 report, Dr. Delahunt opined that appellant's need for surgical intervention was due primarily to the congenital spinal stenosis that was present and that further degenerative disc disease was not directly related to her work exposure at the employing establishment. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness. In his March 20, 2003 report and on the March 27, 2003 Office surgical request form, Dr. Delahunt explicitly ruled out a causal relationship between appellant's congenital spinal stenosis and degenerative disc disease conditions and factors of her employment.⁵ Therefore, given the fact that the medical evidence of record, which is uncontroverted, indicates that appellant's congenital spinal stenosis and degenerative disc disease conditions are not work related, the Office did not unreasonably deny appellant's request for surgery to ameliorate these conditions. The Office did not abuse its discretion to deny appellant authorization for cervical surgery.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8103.

⁴ *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁵ Moreover, Dr. Robbins, an attending Board-certified orthopedic surgeon, determined, in September 2002 that appellant was not a good candidate for cervical surgery due to her chronic complaints and failure to respond to conservative treatment. In June 2002 Dr. Ziegler, an attending Board-certified orthopedic surgeon, indicated that appellant "may require surgery" for her cervical condition, but he did not provide a clear opinion on this matter.

The Board further finds that the Office did not abuse its discretion by denying appellant's request for a hearing before an Office hearing representative.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office hearing representative when a request is made within 30 days after issuance of an Office final decision.⁶ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of the issuance of the decision as determined by the postmark of the request.⁷ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.⁸ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁹

In the present case, appellant's May 16, 2003 request for a hearing was postmarked more than 30 days after the Office's April 10, 2003 decision denying authorization for surgery.¹⁰ Therefore, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. The Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.¹¹

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.131(a)(b).

⁸ *William A. Seare*, 47 ECAB 663 (1996).

⁹ *Id.*

¹⁰ On appeal appellant alleged that the Office's decision denying her request for cervical surgery was issued on April 21, 2003 rather than April 10, 2003 and that, therefore, her May 16, 2003 request for a hearing was timely. The Board notes that the record as constituted does not support such an assertion. Appellant submitted additional evidence on appeal, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

¹¹ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *See, e.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated June 5 and April 10, 2003 are affirmed.

Dated, Washington, DC
December 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member