

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARCIA E. JONES and DEPARTMENT OF THE ARMY,  
SIERRA ARMY DEPOT, Herlong, CA

*Docket No. 02-154; Submitted on the Record;  
Issued March 4, 2003*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for surgery; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on September 17, 2001.

This is the fourth appeal in this case. In decisions dated March 20, 1989<sup>1</sup> and August 7, 1991,<sup>2</sup> the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits. In its October 19, 1998 decision, the Board found that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on her ability to earn wages as a hotel clerk.<sup>3</sup> The facts and circumstance of the case as set out in the Board's prior decisions are incorporated herein by reference.

Following the October 19, 1998 decision, appellant submitted medical evidence from Dr. Scott Huneycutt, a surgeon, and he requested authorization for anterior cervical discectomy and fusion at C6-7. The Office medical director reviewed the evidence submitted and found that surgery was not appropriate. Due to the disagreement between the Office medical director and appellant's physicians, the Office referred appellant for an impartial medical examination with Dr. William Thieme, a Board-certified orthopedic surgeon, for evaluation. In his June 9, 2000 report, Dr. Thieme concluded that surgery was not appropriate.

In a report dated August 8, 2001, Dr. Benjamin Blair, a Board-certified orthopedic surgeon, recommended surgery and requested authorization on August 15, 2001. By decision dated August 16, 2001, the Office denied appellant's requests for surgery finding that Dr. Thieme's report constituted the weight of the medical evidence.

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<sup>1</sup> Docket No. 88-1913.

<sup>2</sup> Docket No. 91-858.

<sup>3</sup> Docket No. 98-1000.

Appellant requested reconsideration of the August 16, 2001 decision on August 31, 2001 and by decision dated September 17, 2001, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that she failed to submit relevant new evidence.<sup>4</sup>

The Board finds that the Office properly denied appellant's request for surgery.

Section 8103 of the Federal Employee's Compensation Act<sup>5</sup> provides that the Office shall provide a claimant with the service, appliances and supplies prescribed, or recommended by a qualified physician which are likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation. In interpreting section 8103, 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.<sup>6</sup> 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.<sup>7</sup>

Appellant's physician, Dr. Huneycutt, a surgeon, completed a report on January 4, 2000 noting appellant's history of injury which resulted from a horse falling upon her while she was riding. He performed a physical examination and found normal motor strength, brisk, symmetric and equal reflexes with the exception of an absent left ankle reflex. Dr. Huneycutt found that appellant had fair range of motion of the lumbar spine with positive straight leg raising on the left at 30 degrees. He reviewed appellant's magnetic resonance imaging (MRI) scans as demonstrating a small disc herniation at C6-7 in 1991 and a moderate disc herniation at L2-3 in 1997. Dr. Huneycutt recommended an additional MRI scan on February 24, 2000.

The February 28, 2000 cervical MRI scan demonstrated a small left-sided disc protrusion at C6-7 not significantly changed since September 12, 1991. On March 1, 2000 Dr. Huneycutt listed appellant's physical findings as normal motor strength, reflexes diminished throughout and sensation intact to light touch and pin prick. He reviewed the February 28, 2000 MRI and found that it demonstrated a herniated cervical disc at C6-7. Dr. Huneycutt opined that appellant's posterior cervical pain as well as her bilateral upper extremity radiation to the fourth and fifth digits may be related to the disc herniation. He recommended an anterior cervical discectomy and fusion at that level as the most appropriate surgical treatment.

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<sup>4</sup> Following the Office's September 17, 2001 decision, appellant submitted new evidence. As the Office has not considered this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>5</sup> 5 U.S.C. §§ 8101-8193, § 8103.

<sup>6</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>7</sup> *Id.*

The district medical adviser, Dr. Richard G. McCollum, a Board-certified orthopedic surgeon, reviewed appellant's medical records and completed a report on April 6, 2000. Dr. McCollum stated that Dr. Huneycutt had not provided a clinical diagnosis of herniated disc. He noted that appellant's reflexes and her motor sensory examination were normal on January 4, 2000 while on March 1, 2000 reflexes were diminished while strength and sensation were intact and appellant was experiencing total body pain. Dr. McCollum stated: "There was no dermatomal correlation of pain to this minor disc lesion seen on MRI at C6-7 and the symptoms that she did have were in the fourth and fifth fingers which would incriminate the C8 nerve root at the C7-T1 level." He concluded that if appellant had compression of the C7 nerve root she would likely demonstrate radiation of pain into the arm, chest, lateral aspect of the arm and dorsum of the forearm, numbness of the index and middle fingers and triceps weakness as well as decreased triceps or absent reflex. Dr. McCollum did not find an indication for surgery.

Section 8123(a) of the Act,<sup>8</sup> provides: "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." As appellant's physician, Dr. Huneycutt, recommended surgery to correct her C6-7 disc defect and as the Office physician, Dr. McCollum, found that there was no indication for surgery, the Office properly found a conflict of medical opinion evidence and referred appellant to Dr. William Thieme, a Board-certified orthopedic surgeon, for an examination.

Dr. Thieme completed a report on June 9, 2000 noting appellant's history of injury and recording his physical findings. He stated that appellant had no cervical spasm, normal contour of the cervical spine, pain on palpitation and limited range of motion. Dr. Thieme stated that the February 28, 2000 and September 12, 1991 MRI scans demonstrated a very slight bulge at C6-7 primarily to the left and that x-rays were normal. He diagnosed chronic complaints of upper extremity pain, weakness and numbness without radicular signs or symptoms, mild cervical disc bulging at the C5-6 level primarily on the left with doubtful clinical significance and probable symptom magnification and functional behavior. Dr. Thieme opined that it was doubtful that the MRI scan abnormality was caused by appellant's 1982 employment injury. He stated that appellant had no signs of cervical nerve root compression or irritation on his examination or in Dr. Huneycutt's findings. Dr. Thieme stated: "There is no indication for cervical disc excision. Since the patient has no signs of mechanical dysfunction in the cervical spine such as instability or advance degenerative disc disease or arthritis, there is no indication for cervical fusion."

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 the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>9</sup> Dr. Thieme based his report on an accurate factual background, reviewed diagnostic testing and reported his physical findings. He concluded that appellant did not demonstrate signs of cervical nerve root compression or irritation nor of mechanical dysfunction in the cervical spine which would warrant surgery.

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<sup>8</sup> 5 U.S.C. §§ 8101-8193, § 8123(a).

<sup>9</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Following Dr. Thieme's June 9, 2000 report, Dr. Huneycutt reviewed his findings and stated that he was in complete agreement. He stated that he had offered a surgical alternative to conservative care, but that he felt that surgical intervention likely had a low yield of reducing appellant's pain significantly or to her liking.

On October 3, 2000 Dr. Huneycutt examined appellant due to her complaints of severe cervical pain which was interfering with her sleep and daily activities. He provided physical findings similar to his January 4, 2000 report and recommended that appellant consider her conservative care options as he felt that surgery would offer only a 50 to 60 percent change of relieving her pain.

Appellant sought treatment from Dr. Benjamin Blair, a Board-certified orthopedic surgeon, on November 20, 2000. Dr. Blair stated that appellant reported increased neck pain radiating to her upper extremity. He recommended epidural steroid injections. On May 29, 2001 Dr. Blair again recommended injections.

An MRI scan on July 30, 2001 demonstrated an osteophytic ridge with disc protrusion left paracentrally at C6-7 with no change since February 28, 2000. On August 8, 2001 Dr. Blair stated that appellant's MRI scan demonstrated herniated disc and stenosis at C6-7. He stated: "At this time, patient is markedly symptomatic and has failed conservative therapy." Dr. Blair discussed surgical intervention in the form of anterior cervical discectomy, interbody fusion, allograft strut and anterior cervical plate.

Dr. Blair has provided the only medical evidence supporting appellant's need for surgical intervention. Dr. Huneycutt stepped back from his recommendations for surgery in his October 3, 2000 report and Drs. McCollum and Thieme concluded that surgery was not appropriate given appellant's lack of appropriate physical findings. Dr. Blair did not provide any physical findings in support of his recommendation for surgery. Furthermore, the July 30, 2001 MRI scan was judged to be without change from the February 28, 2000 MRI scan which was previously examined by Dr. Thieme and found to show only a disc bulge of "doubtful clinical significance." As there is no medical evidence based on a proper history of injury, based on a proper medical history including detailed physical findings as well as medical rationale addressing appellant's need for cervical surgery and the causal relationship between her cervical condition on MRI scan and her accepted employment injury, the Office did not abuse its discretion by denying her request for surgery.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on September 17, 2001.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>10</sup>

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<sup>10</sup> 5 U.S.C. §§ 10.609(a) and 10.606(b).

In support of her request for reconsideration, appellant submitted a detailed narrative statement describing her medical treatment and discussing her conclusions regarding her medical evidence. As appellant is not a physician her opinion is not medical evidence and it has no probative value in establishing the medical aspects of appellant's claim.<sup>11</sup> Appellant also submitted several medical reports previously part of the record dating from 1983 to 1992. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>12</sup>

Appellant submitted three pages of a website addressing whiplash. The Board has held that excerpts of medical publications are of no evidentiary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions or disability were the result of the employment. This material has probative value only to the extent that it is interpreted and cited by a physician rendering an opinion on the causal relationship between a condition and specified employment injury.<sup>13</sup>

As appellant has failed to submit relevant new evidence addressing the causal relationship between her demonstrated cervical condition and her employment or addressing the need for surgical intervention, the Office properly denied her request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated September 17 and August 16, 2001 are hereby affirmed.

Dated, Washington, DC  
March 4, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>11</sup> *Merton J. Sills*, 39 ECAB 572 (1988).

<sup>12</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

<sup>13</sup> *Harlan L. Soeten*, 38 ECAB 566, 567 (1987).