United States Department of Labor
Employees' Compensation Appeals Board

SCOTT A. PLUNKET, Appellant	)	
	)	**Docket No. 04-1718**
and	)	**Issued: December 27, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Norfolk, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 28, 2004 appellant filed a timely appeal of a June 17, 2004 decision by an Office of Workers' Compensation Programs' hearing representative, affirming a June 4, 2003 decision that denied reimbursement for a July 2002 thoracic surgery and March 2002 thoracic and cervical diagnostic tests. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issues adjudicated in the June 17, 2004 decision.

ISSUE

The issue is whether the Office properly denied reimbursement for thoracic surgery and thoracic and cervical diagnostic testing.

FACTUAL HISTORY

The Office accepted that appellant sustained a back strain on May 15, 1990, a lumbar strain on September 18, 1990, and a lumbosacral strain on February 18, 1992. On March 5, 2001 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim for continuation of pay/compensation (Form CA-1) alleging that he sustained a lumbar injury when he fell backwards off a chair. The Office accepted the claim for a lumbar strain. Appellant received

compensation for temporary total disability and underwent lumbar fusion surgery on July 23, 2001.

Appellant submitted treatment notes dated January 8 to February 21, 2002 from Dr. Arthur Horn, an orthopedic surgeon, for pain in the cervical area at C6-7. In a report dated February 19, 2002, Dr. Mark Kerner, an attending surgeon, noted that appellant complained of diffuse thoracic pain, upper back and neck pain. In a report dated March 5, 2002, he stated that he did not know the etiology of the thoracic back pain and a magnetic resonance imaging (MRI) scan of the thoracic spine would be obtained. An MRI report dated March 11, 2002 stated that three levels of disc protrusion were found, the most prominent of which was at T5-6. An MRI report dated March 19, 2002 of the cervical spine revealed mild multilevel cervical spondylosis.

In a report dated May 28, 2002, Dr. Kerner indicated that he had discussed thoracic surgery with appellant who wished to proceed with the surgery. The Office requested an opinion from an Office medical adviser, who stated in a June 21, 2002 report that he did not see any evidence of a work injury to the thoracic spine and opined that the recommended surgery was not warranted due to the accepted back conditions. On July 25, 2002 Dr. Kerner performed an anterior thoracic discectomy and fusion at T5 through T8.

The Office referred appellant to Dr. Edward Gold, a Board-certified orthopedic surgeon, for an opinion regarding appellant's employment injury. The Office requested an opinion as to whether appellant continued to have residuals of the employment injury, and the nature and extent of any employment-related disability. In a report dated March 24, 2003, Dr. Gold provided a history and results on examination. He noted that appellant had a thoracic surgical fusion, which did not seem to be attributable to the March 15, 2001 employment injury.

By decision dated June 4, 2003, the Office denied authorization for the July 2002 thoracic surgery and for the thoracic and cervical diagnostic tests. Appellant requested a hearing, which was held on April 21, 2004. Appellant submitted a July 29, 2003 report from Dr. Kerner, who noted that appellant had received treatment for the lumbar and thoracic spine. He indicated that while causation between the employment incident and the thoracic spine was not as clear as with the lumbar spine, appellant was not symptomatic prior to the accident and did not have any intervening trauma. Dr. Kerner opined that it was "quite possible and likely that the patient also had injured his thoracic spine at the time of his fall from the stool and that the pain was simply masked or outweighed by the low back pain he was having."

In a decision dated June 16, 2004, the Office hearing representative affirmed the June 4, 2003 decision. The hearing representative found that the weight of the evidence was represented by Dr. Gold.

LEGAL PRECEDENT

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.[1] 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.[2]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[3] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[4]

ANALYSIS

The medical evidence in this case is in conflict with respect to the thoracic surgery. An Office medical adviser stated that he did not see evidence of an employment-related thoracic injury. Dr. Gold, the second opinion referral physician, stated that the surgery did not seem attributable to the work injury. On the other hand, the physician who performed the surgery, Dr. Kerner, opined that it was likely that appellant sustained a thoracic injury from the employment incident and that low back pain masked the thoracic pain. A disagreement exists between the attending physician and Office physicians with respect to an employment-related thoracic injury and the July 25, 2002 surgery. Under section 8123(a) the Office shall appoint a third physician to make an examination if such a disagreement exists. The case will be remanded to the Office for referral to an impartial medical specialist and a reasoned opinion that resolves the issues presented. The impartial medical specialist should address whether there is an employment-related thoracic injury, and if so, whether the surgery was appropriate and which diagnostic tests were appropriate for treatment of the injury. After such further development as the Office deems necessary, it should issue a merit decision.

CONCLUSION

The Board finds that there is a conflict in the medical evidence with respect to an employment-related thoracic injury and appropriate treatment, and the case must be remanded for resolution of the conflict.

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[1] 5 U.S.C. § 8103(a).

[2] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[3] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[4] *William C. Bush*, 40 ECAB 1064 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member