

placed on the compensation rolls and referred for vocational rehabilitation services in October 2001 when her employer could no longer accommodate her restrictions. By decision dated October 17, 2002, the Office found that the constructed position of a medical office assistant reasonably represented appellant's wage-earning capacity and reduced her compensation to zero effective November 3, 2002 as the amount of wages in the selected position equaled or exceeded the current pay for her date-of-injury position.

In an April 14, 2003 medical report, Dr. Elvert F. Nelson, a Board-certified orthopedic surgeon, noted the history of injury and provided findings on examination. He provided an impression of L4-5 and L5-S1 internal disc derangement with a magnetic resonance imaging (MRI) scan and clinical evidence of neurogenic claudication secondary to L4-5 central spinal canal stenosis. He opined that conservative treatment had failed and recommended an anterior interbody fusion at L3-4 and L4-5 followed by a posterior L4-5 hemilaminectomy and partial facetectomy and a transpedicular fixation as a stress shield device.

The Office found that there was sufficient evidence to support continuing disability and placed appellant back on the compensation rolls effective March 19, 2003 pending the issue of the authorization of surgery. The Office referred the case file to an Office medical adviser for review of Dr. Nelson's surgical request. In a July 18, 2003 report, the Office medical adviser recommended that appellant be referred for further medical evaluation.

In a July 25, 2003 letter, the Office advised appellant that a second opinion examination on her surgical request was warranted. In a September 16, 2003 report, Dr. John Chu, a Board-certified orthopedic surgeon and Office referral physician, provided a history of the injury and his findings on examination. He diagnosed chronic low back strain, degenerative disc disease of the lumbosacral spine, mild to moderate L4-5 spinal stenosis by MRI scan with aggravation of the preexisting condition by the work injury and subsequent degenerative changes at the facet and/or hypertrophy. No neurologic deficits were noted. Based on these findings, Dr. Chu opined that the proposed back surgery was rather extensive and did not guarantee improvement of appellant's symptoms. He did not believe that all nonoperative treatment options had been exhausted and provided his recommendations on further treatment to help improve appellant's pain symptoms.

In a supplemental report of November 12, 2003, Dr. Chu opined that the aggravation of appellant's preexisting condition was temporary and reiterated that nonoperative treatment options should be exhausted before such an extensive surgical procedure was carried out.

The Office found a conflict in medical opinion evidence between Dr. Nelson, who opined that appellant should undergo the proposed back surgery, and Dr. Chu, who opined that not all nonoperative treatment options had been exhausted. By letter dated January 15, 2004, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a February 3, 2004 report, Dr. Auerbach reviewed the history of the injury, the medical evidence of record and provided his findings on examination. He indicated that appellant had

chronic lumbar degenerative disc disease and spondylosis at L4-5 and L5-S1. Dr. Auerbach stated that appellant continued to have residuals of her March 9, 2000 injury and opined that her orthopedic lower back problem had stabilized and that maximum medical improvement had been reached. He noted that appellant's subjective complaints were not totally supported by the objective findings and results. Dr. Auerbach concluded that appellant, at the age of 39, overweight and deconditioned with functional overlay, including claustrophobia, should not have any aggressive back surgery or be on narcotic medications. He recommended that she lose weight, perform daily home stretching, strengthening and range of motion abdominal and back exercise, participate in an aggressive exercise program for the abdomen and back and pursue other nonoperative treatments such as a series of epidural injections. Dr. Auerbach further opined that appellant should be able to continue with her rehabilitation vocational training to be a medical assistant as she was able to work four to six hours a day with permanent restrictions. An OWCP-5c work capacity evaluation form of February 22, 2004 was provided which listed appellant's restrictions and the number of hours she was able to work.

By decision dated May 13, 2004, the Office denied authorization for the requested back surgery on the basis that the weight of the medical opinion evidence rested with Dr. Auerbach, the impartial medical examiner, who found that the requested surgery was not necessary at this time. The Office further noted that the work limitations noted in Dr. Auerbach's report would be provided to rehabilitation services.

In a letter dated June 11, 2004, appellant requested an oral hearing, which was held on November 17, 2004. She submitted a May 13, 2004 x-ray of the lumbosacral spine, an April 24, 2004 MRI scan of the lumbar spine and treatment notes from Dr. Nelson dated August 14, 2004 to February 5, 2005. In a November 29, 2004 report, Dr. Nelson advised that he was now recommending that appellant have a simple left L4-5 hemilaminectomy and partial facetectomy.

By decision dated March 4, 2005, an Office hearing representative affirmed the May 13, 2004 decision, finding that the weight of the medical opinion evidence rested with Dr. Auerbach, the impartial medical specialist.

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, to give relief, reduce the degree or the period of disability or aid in lessening the amount of 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

¹ 5 U.S.C. § 8103(a).

established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²

Proof of causal relationship must include supporting rationalized medical evidence. In order for back surgery to be authorized, a claimant must submit medical evidence to show the necessity for surgery as treatment for a condition causally related to the employment injury and that surgery is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.³

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.⁴

ANALYSIS

The Office accepted that appellant had a low back strain and aggravation of preexisting degenerative changes in the spine. Dr. Nelson, appellant's treating physician, requested authorization to perform an anterior interbody fusion at L3-4 and L4-5 followed by a posterior L4-5 hemilaminectomy. A conflict in medical opinion evidence was created between Dr. Nelson and Dr. Chu, an Office referral physician, on the issue of whether the requested back surgery was medically necessary as a result of the accepted work injury. Dr. Nelson opined that appellant should undergo the proposed back surgery while Dr. Chu opined that not all nonoperative treatment options had been exhausted.

The Office referred appellant to Dr. Auerbach, selected as the impartial medical specialist. In a detailed report dated February 3, 2004, he reviewed the evidence of record and presented his findings upon physical examination. Dr. Auerbach opined that although appellant continued to suffer residuals of her March 9, 2000 work injury, her condition has stabilized and maximum medical improvement was reached. He opined that appellant should not have any aggressive back surgery as a result of the March 9, 2000 work injury as other nonsurgical opinions could be pursued. He recommended appellant lose weight, perform certain exercises and pursue other nonsurgical options, such as a series of epidural injections.

Dr. Nelson subsequently recommended, in his November 29, 2004 report, that appellant have a simple left L4-5 hemilaminectomy and partial facetectomy. However, he failed to provide a rationalized medical opinion to support the need for the requested back surgery or any back surgery as a result of the March 9, 2000 work injury.⁵

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

³ *Cathy B. Mullin*, 51 ECAB 331 (2000).

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001). *See* 5 U.S.C. § 8123(a).

⁵ Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB ____ (Docket No. 03-1327, issued January 5, 2004).

As the report from the impartial medical examiner, Dr. Auerbach, was based on an accurate factual and medical background, and was comprehensive, complete and well rationalized, Dr. Auerbach's opinion is entitled to special weight and establishes that appellant should not undergo any aggressive back surgery due to the March 9, 2000 work injury. Accordingly, the Board finds that the Office properly denied authorization of a back surgery.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for authorization of a back surgery.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board