

**United States Department of Labor
Employees' Compensation Appeals Board**

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R.B., Appellant)	
)	
and)	Docket No. 06-1002
)	Issued: August 2, 2006
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer)	
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Appearances:
R.B., *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 23, 2006 appellant filed a timely appeal from the December 19, 2005 merit decision of the Office of Workers' Compensation Programs which denied authorization for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the authorization issue.

ISSUE

The issue is whether the Office abused its discretion in denying authorization for the proposed surgery.

FACTUAL HISTORY

On June 8, 2004 appellant, then a 45-year-old mail processor, sustained an injury in the performance of duty while lifting heavy boxes. The Office accepted her claim for a lumbar strain.

On March 16, 2005 appellant's physician requested authorization for a lumbar fusion at the L4-5 and L5-S1 levels. On June 6, 2005 an Office second opinion physician reported that she was no candidate for surgery. To resolve this conflict, the Office referred appellant, together

with the medical record and a statement of accepted facts, to an impartial medical specialist, Dr. E. Robert Schultz, a Board-certified neurologist.

In a report dated November 17, 2005, Dr. Schultz stated that he examined appellant that day. He related her history, reviewed a number of medical records and described his findings on physical examination. Dr. Schultz then offered his opinion on the requested surgery:

“I have reviewed [appellant’s] lumbar myelogram, MRI [magnetic resonance imaging] scan, [d]iscogram and EMG [electromyogram]. I find no evidence convincingly of a surgical lesion. I do not believe that fusion would be of value here. Many of her findings are not keeping with any local lumbar pathology. Her EMG fails to confirm any peripheral neuropathic problems. Her diagnosis would be low back pain with diffuse radiation in a nonradicular pattern. I believe with [the second opinion physician] that a work hardening program might be of benefit.

“In addition, one must certainly agree with [appellant’s attending physician] that he has offered this lady numerous choices. I would not recommend surgical intervention based on this data and this examination.”

In a decision dated December 19, 2005, the Office denied authorization for the proposed surgery. The Office found that the opinion of Dr. Schultz, the impartial medical specialist, represented the weight of the medical evidence and established that the proposed surgery was not medically indicated for treatment of appellant’s accepted work-related condition and was not likely to cure or to give relief.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees’ Compensation Act¹ 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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability, or aid in lessening the amount of any monthly compensation. The Office must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in the Act.²

Section 8123(a) of the Act provides in part: “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.”³ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an

¹ 5 U.S.C. § 8103(a).

² *Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

³ 5 U.S.C. § 8123(a).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁴

ANALYSIS

The Office properly referred appellant to Dr. Schultz, a Board-certified neurologist, to resolve the conflict that arose between her attending physician and the Office second opinion physician on the need for the proposed surgery. The Office provided Dr. Schultz with appellant's medical records and a statement of accepted facts so that he could base his opinion on a proper factual and medical background. He personally examined her and reviewed her radiographic and electrodiagnostic test results. Dr. Schultz reported that he would not recommend surgical intervention based on appellant's data and examination. He explained that he could find no evidence of a surgical lesion, that many of her findings were not in keeping with any local lumbar pathology and that appellant's EMG failed to confirm any peripheral neuropathic problems. Dr. Schultz concluded that appellant's diagnosis was low back pain with diffuse radiation in a nonradicular pattern. He stated: "I do not believe that fusion would be of value here."

The Board finds that the opinion of the impartial medical specialist is based on a proper factual and medical background and is sufficiently well rationalized that it carries special weight in resolving the conflict in this case. Dr. Schultz's opinion constitutes the weight of the medical evidence and establishes that the proposed surgery is not likely to effect the purposes specified in the Act.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying authorization for the proposed surgery.

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board