United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant **and** **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Big Beaver, MI, Employer**	)	**Docket No. 06-1561** **Issued: December 27, 2006**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 30, 2006 appellant, through his representative, filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 20 and April 24, 2006 denying his request for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the authorization of surgery decision.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for authorization of spinal surgery.

FACTUAL HISTORY

On May 24, 2002 appellant, a 39-year-old small parcel bundler and sorter, filed a traumatic injury claim alleging that on that date he injured his left inner thigh while pushing a

bulk mail container.[1] The Office accepted the claim for an inguinal trunk strain. Appellant stopped work on May 27, 2002 and was paid appropriate compensation.

By decision dated May 22, 2003, the Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).[2] Appellant requested an oral hearing on May 31, 2003 which was held on November 6, 2003. By decision dated February 4, 2004, an Office hearing representative affirmed the May 22, 2003 decision. In a decision dated June 15, 2004, the Office denied appellant's request for modification of the termination of his benefits. It noted that he was eligible for continuing medical benefits.

In a February 25, 2004 report, Dr. Fernando G. Diaz, a treating Board-certified neurological surgeon, reviewed the history of injury and conducted a physical examination. He recommended spinal surgery. Dr. Diaz diagnosed a L5-S1 herniated disc "causing compression of the nerve root and radicular symptoms." He attributed this condition to appellant's May 24, 2002 employment injury as his complaints had been present since the injury.

In a decision dated May 24, 2004, the Office denied appellant's request for authorization for spinal surgery.

On May 30, 2004 appellant requested an oral hearing of the May 24, 2004 decision denying authorization for spinal surgery, which was held on January 19, 2005.

Dr. Diaz, in a July 28, 2003 report, noted the employment injury history. He found that appellant had pain radiating from his back to his left lower extremity since the injury. Dr. Diaz diagnosed an L5-S1 herniated disc on the left.

In a November 10, 2003 follow-up note, Dr. Diaz opined that appellant would benefit from a simple laminectomy and discectomy. Appellant related that another physician recommended "lumbar interbody fusion with instrumentation at the L5-S1 level for a herniated disc." A physical examination revealed a limp gait while ambulating, normal lower and upper extremities strength and left leg straight raising of 70 degrees. Dr. Diaz noted that appellant "has been complaining of low back and left lower extremity pain" since his May 24, 2002 employment injury.

In a March 9, 2004 report, Dr. Peter L. Bono, a treating physician, also recommended lumbar spinal surgery. He noted that appellant sustained an employment injury, which was not reported in January 1999. A January 13, 1999 magnetic resonance imaging (MRI) scan revealed L5-S1 discogenic changes. Appellant then sustained another work injury in May 2002. An MRI scan performed in April 2003 revealed L5-S1 discogenic changes "with a broad paramedian

[1] Appellant was removed from the employing establishment rolls effective July 6, 2004 due to his being in a nonpay status for a year.

[2] On January 31, 2003 the Office informed appellant that the position offered by the employing establishment was suitable and was given 30 days to accept or provide reasons for his refusal. On March 2, 2003 the Office informed him that he had 15 days to accept the offered position or his wage-loss compensation would be terminated pursuant to 5 U.S.C. § 8106(c).

foraminal disc herniation." Dr. Bono reported a clear change in both the MRI scan appearance and appellant's symptomatology. He noted that appellant recovered from his 1999 back injury and, subsequent to the May 2002 employment injury, he "has been suffering with pain" and there are clear definite signs of change on the MRI scan.

In September 8, 2004 progress notes, Dr. Frederick C. Rosin, a treating Board-certified family practitioner, noted that appellant had constant lower left back pain "with severe, intermittent shooting, stabbing pains down the left leg." He reported that he had difficulty walking and noted the history of injury. Examination revealed that appellant had a marked limp and that he was wearing a lumbar brace at the time of the examination. A physical examination of the upper extremities was normal, motor strength in the legs was good, normal deep knee tendon reflexes, 75 degrees left straight leg raising and "[e]xam[ination] of the lower extremities does not reveal appreciable quadriceps atrophy." Based upon his examination, Dr. Rosin diagnosed "severe chronic pain and limitation of physical movement secondary to L5-S2 lumbar disc herniation." Dr. Rosin attributed appellant's condition to the May 24, 2002 employment injury and yielded to the opinions that he required spinal surgery.

By decision dated August 23, 2005, the Office hearing representative vacated the May 24, 2004 decision and remanded the case for referral to a second opinion physician. The hearing representative found that the medical evidence from appellant's treating physicians was sufficient to warrant further development of the record.

Subsequent to the hearing representative's decision, the Office received an August 25, 2005 report by Dr. Eric A. Kovan, a treating Board-certified physiatrist, who diagnosed radicular and back pain consistent with L5 radiculopathy. He stated that appellant injured himself in May 2002 while pushing a large container of mail. Dr. Kovan reported that an MRI scan revealed L5-S1 radiculopathy and that the" past medical history is significant for herniated disc."

In a September 12, 2005 report, Dr. Maury R. Ellenberg, a Board-certified internist and physiatrist, diagnosed an L5-S1 central disc herniation and upper extremity numbness with severe generalized pain, ambulation difficulty and lower extremity pain. He was "unable to explain all of this current reaction pattern as a result of that." Appellant related that he sustained an injury in 2002 while unloading a mail truck and that surgery had been recommended for his back by Dr. Bono and Dr. Diaz.

Appellant was referred to Dr. Bruce D. Abrams, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 17, 2005, Dr. Abrams noted the employment injury history, reviewed the medical records and a statement of accepted and performed a physical examination. Examination revealed 15 to 20 degrees forward flexion, no paraspinal spasm, intact sensation in the lower extremity and negative straight leg raising. Tenderness was reported on "palpation on the left sacroiliac and left sciatic notch." Tenderness was also reported by appellant in his lower back and the thoracic region "significantly out of proportion to the examination." Dr. Abrams observed him moved slowly "with his wheeled walker and exhibiting obvious exaggerated pain behavior" when leaving the office. Appellant was observed getting into his automobile, twisting and putting on his seatbelt. Dr. Abrams diagnosed left L5-S1 low back pain, radiculitis, positive Waddell's sign and "normal neurologic examination with gross symptom magnification." He concluded that appellant's back condition

was unrelated to his accepted May 24, 2002 employment injury. In support of this conclusion, Dr. Abrams stated:

> "It is difficult to accept with medical certainty that the present condition of [appellant's] back is related to the work incident in 2002, especially noting the alteration in the pain behavior and attitude upon exiting this clinic and during the observation by [employing establishment] on September 3, 4 and 18, 2002."

Dr. Abrams noted that, while appellant had lower back discomfort of some degree with radicular symptoms, there were no "consistent neurologic findings in the left lower extremity."

The Office received an August 25, 2005 report by Dr. Kovan who diagnosed L5-S1 radiculopathy and a December 22, 2005 report from Dr. Rosin who recommended further testing. Dr. Rosin reviewed Dr. Abrams' report and noted disagreement with the second opinion. He stated that he "would offer an opinion, but cannot do so without additional objective evidence."

By decision dated January 20, 2006, the Office denied appellant's request for spinal surgery.

In a February 7, 2006 report, Dr. Bono reviewed two January 17, 2006 MRI scans which revealed an L5-S1 disc herniation and a C4-5 and C5-6 disc herniation. He recommended that appellant undergo L5-S1 spinal fusion with decompressive discectomy and laminectomy as he had "undergone conservative treatment without any improvement." A physical examination of the lumbar spine showed no tenderness, normal range of motion and normal spinal balance.

In a February 21, 2006 report, Dr. Diaz opined that appellant sustained a disc herniation due to his May 24, 2002 employment injury "superimposed on the preexisting disc bulge that he had at the level from a previous injury in 1999." He recommended decompressive laminectomy, posterolateral arthrodesis, posterior segmental instruction, anterior instrumentation, posterior radical discectomy and anterior arthrodesis at the L5-S1 levels.

On March 15, 2006 appellant requested reconsideration.

By decision dated April 24, 2006, the Office denied modification of the January 20, 2006 decision. It found the medical evidence insufficient to establish a causal relationship between appellant's back condition and his accepted May 24, 2002 employment injury. The Office noted that at the time of the May 24, 2002 injury there was no mention of a back condition. It also noted that, at the time appellant's wage-loss benefits were terminated in May 12, 2003, both his treating physician and an Office referral physician found no evidence of an employment-related work condition and released him to work with restrictions.

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.[3] 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. It, 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]

Proof of causal relationship must include supporting rationalized medical evidence. In order for cervical 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.[5]

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[6]

ANALYSIS

The Office accepted the May 24, 2002 claim for an inguinal trunk strain. The issue is whether authorization for spinal surgery is warranted and causally related to the accepted May 24, 2002 employment injury. In an August 23, 2005 decision, an Office hearing representative vacated the May 24, 2004 decision denying authorization for spinal surgery and remanded the case for referral to a second opinion physician. In reaching this conclusion, the hearing representative found that the reports of Dr. Rosin, Dr. Bono and Dr. Diaz were sufficient to warrant further development of the claim.

Appellant's attending physicians diagnosed a back condition due to the May 24, 2002 employment injury. Dr. Ellenberg, in a September 12, 2005 report, diagnosed L5-S1 central disc herniation and noted that appellant related sustaining an injury in 2002 while unloading mail. In an October 17, 2005 report, Dr. Kovan diagnosed L5 radiculopathy with back and radicular pain. He noted that appellant stated that he injured himself in May 2002 while pushing a large container of mail. Dr. Rosin, in a December 8, 2004 progress note, diagnosed an L5-S2 lumbar disc herniation which he attributed to the May 24, 2002 employment injury.

In a February 7, 2006 report, Dr. Bono diagnosed an L5-S1 disc herniation and a C4-5 and C5-6 disc herniation after reviewing MRI scans obtained January 17, 2006. He recommended that appellant undergo L5-S1 spinal fusion with decompressive discectomy and

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[3] 5 U.S.C. § 8103(a).

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

[5] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[6] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

laminectomy surgery since he had "undergone conservative treatment without any improvement." A physical examination of the lumbar spine showed no tenderness, normal range of motion and normal spinal balance. On March 9, 2004 Dr. Bono attributed appellant's back condition to his employment injury. He noted that he sustained a prior back injury in 1999 from which he recovered and subsequent to the May 2002 injury, appellant "has been suffering with pain." In a February 21, 2006 report, Dr. Diaz opined that appellant's disc herniation was sustained as a result of the May 24, 2002 employment injury as this injury aggravated a preexisting disc bulge sustained in 1999 injury. He recommended spinal surgery.

The Board noted that a back condition was not accepted by the Office as related to the May 24, 2002 injury. Dr. Diaz supported causal relationship by noting that this injury had aggravated a preexisting disc bulge which had been sustained in 1999. Dr. Bono also concluded that appellant's 1999 back injury had been aggravated by the May 24, 2002 employment injury. Dr. Rosin attributed appellant's L5-S2 lumbar disc herniation to his May 24, 2002 employment injury. The physicians failed to provide sufficient medical rationale to explain how appellant's back condition was caused by the accepted injury particularly as he did not claim back condition on his traumatic injury claim. The medical reports contemporaneous with the May 24, 2002 employment injury made no mention to treatment of any back condition. The Board has held that medical reports not containing rationale on causal relation are of diminished probative value and are insufficient to meet an employee's burden of proof.[7]

Dr. Abrams provided a second opinion examination for the Office. In an October 17, 2005 report, he reviewed appellant's history and conducted a thorough examination. In his assessment, Dr. Abrams reported no basis on which a back condition could be attributed to the accepted injury. He stated that he was unable to "accept with medical certainty" that the May 24, 2002 injury caused appellant's back condition, particularly in view of the employing establishment's observation and "the alteration in the pain behavior and attitude" he observed.

The Board finds that appellant has not established through rationalized medical evidence that the May 24, 2002 employment injury caused or contributed to his back condition. As such, the Office properly denied authorization for the spinal surgery.

[7] *See Lois E. Culver (Clair L. Culver),* 53 ECAB 412 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 24 and January 20, 2006 are affirmed.

Issued: December 27, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board