United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH P. HOFMANN, Appellant	)	
	)	**Docket No. 05-1772**
and	)	**Issued: March 9, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Drexel Hill, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2005 appellant, through his attorney, filed a timely appeal from an August 18, 2005 merit decision of an Office of Workers' Compensation Programs' hearing representative, affirming a March 14, 2005 decision, which denied surgical authorization. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's request for disc replacement surgery.

FACTUAL HISTORY

On September 8, 1998 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that he experienced lower back pain, which radiated down his legs as a result of lifting his mail satchel. By letter dated November 4, 1998, the Office accepted his claim for a lumbosacral strain. The Office later accepted an aggravation of lumbar degenerative disc disease

and phlebitis and authorized an intradiscal electrothermal procedure, which was performed on July 29, 2002.

On February 19, 2004 Dr. L. Mathew Schwartz, a Board-certified physiatrist, diagnosed chronic L3-4, L4-5 and L5-S1 internal disc disruption syndrome. He stated:

> "As there is international scientific evidence of effectiveness of disc replacement surgery and the active performance of this type of procedure is an investigatory manner in this country, the Workers' Compensation Bureau ought to cover the cost or at least share the cost with [appellant] as it is his best opportunity for recovery. Dr. [Paul J.] Marcotte[, a Board-certified neurosurgeon,] was quite guarded in his desire to perform a two[-]level fusion and two other orthopedic surgeons refused to consider it. There have been many reports of pain relief from this surgery and I believe that this is his best chance to keep him at work."

On March 17, 2004 Dr. Richard A. Balderston, a Board-certified orthopedic surgeon, stated that appellant was not a candidate for disc replacement surgery in the United States given current federal Food and Drug Administration (FDA) regulations. He recommended that appellant go to Europe to pursue this procedure.

In a March 25, 2004 letter, appellant requested that the Office pay for his artificial disc replacement surgery scheduled to take place on April 1, 2004 in Germany. He underwent implantation of artificial discs at L3-4, L4-5 and L5-S1 in Stenum, Germany on April 1, 2004.

On April 11, 2004 an Office medical adviser reviewed the case record and opined that appellant's artificial disc replacement surgery was 100 percent experimental in the United States and it was not considered to be the normal standard of care.

In a July 23, 2004 medical report, Dr. Schwartz found that appellant experienced worsening chronic pain associated with his L3-4, L4-5 and L5-S1 disc replacement surgery, anxiety and depression. He also had fibromyalgia secondary to depression and a sleep disorder and chronic pain as a direct result of his September 8, 1998 employment injury. In addition, Dr. Schwartz found that appellant had an occupational dysfunction.

By letter dated December 29, 2004, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a January 26, 2005 report, Dr. Hanley provided a history of appellant's September 8, 1998 employment injury and medical treatment.[1] On physical examination, he reported that appellant walked with a cane and that he had limited range of motion of the lumbar spine to about 50 degrees and a large scar anteriorly where he underwent surgery. Otherwise the examination was unremarkable. Dr. Hanley reviewed diagnostic studies, which showed artificial discs in place and the development of some instability and malalignment of the spine since the surgical procedure. He diagnosed degenerative disc disease of the lumbosacral spine.

[1] Dr. Hanley noted that appellant retired from the employing establishment in October 2004.

Dr. Hanley opined that appellant experienced an aggravation of the underlying degenerative disc disease of the lumbosacral spine. He stated:

> "Artificial disc replacement surgery is never considered medically necessary since [appellant] is not at risk of life or limb. However, it is a new procedure at this point that has been developed to address a problem with patients who undergo lumbar fusion for degenerative disc disease. If one can maintain motion at the affected level, then the chances of success on a long-term basis are somewhat greater. In this particular case, [appellant] underwent a three-level replacement. This is a very rare undertaking and unlikely to be fully successful at all three levels simply because of the complexity of the surgery.
>
> "[Appellant] had to go to Germany and have this particular procedure done as he could not have had it done in the United States, since during its experimental phase, I believe that it was approved only for one, at most two levels. So in answer to the question, this was not a medically necessary procedure to treat the accepted condition."

By decision dated March 14, 2005, the Office denied authorization for lumbar artificial disc replacement surgery based on Dr. Hanley's January 26, 2005 report.

Appellant, through his attorney, disagreed with the decision and by letter dated March 16, 2005, requested a review of the written record by an Office hearing representative. Counsel argued that Dr. Hanley had no knowledge of the specific nature of the surgical procedure and requested that the March 14, 2005 decision be set aside. He contended that the Office should be instructed to obtain an opinion from a physician who was associated with a facility in the United States that performed artificial disc replacement procedures. He contended that Dr. Hanley's statement that the requested procedure was never medically necessary since appellant was not at risk of life or limb was not a standard applicable to a case under the Federal Employees' Compensation Act. Counsel cited Board precedent which he asserted found that certain experimental and nonmainstream medical treatments must be considered and approved in certain cases.

In a May 12, 2005 report, Dr. Schwartz noted appellant's medical treatment and Dr. Balderston's belief that his hips were deteriorating and that the lumbar disc replacement surgery was not successful. He reported findings on physical examination and found that appellant was status post surgery for his degenerative disc disease and that his anxiety, depression and fibromyalgia were somewhat under control. Dr. Schwartz opined that the above conditions were secondary to the September 8, 1998 employment injury with continued occupational dysfunction. He noted that appellant would be pursuing reeducation and he doubted that there was any pathology in his right hip joint.

By decision dated August 18, 2005, an Office hearing representative affirmed the March 14, 2005 decision on the grounds that the requested surgery was not necessary to treat the accepted employment-related injury. He found that appellant underwent experimental surgery for a nonlife-threatening condition, which had not been approved in the United States. Further, the hearing representative found that the surgery did not relieve appellant's condition as stated by

Dr. Schwartz in July 2004 and Dr. Balderston in May 2005. In addition, the hearing representative found that contrary to appellant's contention, Dr. Hanley was qualified to assess the appropriateness of the necessity for back surgery.

LEGAL PRECEDENT

Section 8103 of the Act[2] 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 monthly compensation.[3] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority begin that of reasonableness.[4] 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.[5] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[6]

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence. Thus, in order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[7]

ANALYSIS

The Office accepted that appellant sustained an employment-related lumbosacral strain, an aggravation of lumbar degenerative disc disease and phlebitis. On February 19, 2004 Dr. Schwartz requested that the Office authorize disc replacement surgery. Dr. Balderston stated that appellant should undergo the recommended surgery in Germany since FDA regulations in place at that time did not allow him to do so in the United States. Neither, Dr. Schwartz nor Dr. Balderston adequately address the medical evidence of record to establish that the surgical procedure, not routinely performed in this country, was warranted as treatment for appellant's accepted back condition. Thus, their opinions are of diminished probative value.[8] The Board

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[4] *James R. Bell*, 52 ECAB 414 (2001).

[5] *Claudia L. Yantis*, 48 ECAB 495 (1997).

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

[7] *Id.*

[8] *Willie E. Miller*, 53 ECAB 697 (2002).

notes that Dr. Schwartz later stated that appellant's anxiety and depression associated with his fatigue from chronic pain were worsening and had not abated following surgery in Germany.

An Office medical adviser reviewed appellant's case record and determined that artificial disc replacement surgery was considered an experimental procedure in the United States and that it was not considered to be the standard of care.

The Office determined that a second opinion medical evaluation was necessary and referred appellant to Dr. Hanley. The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Hanley. After reviewing appellant's medical history, the medical records and conducting a physical examination, he opined that appellant sustained an aggravation of underlying degenerative disc disease of the lumbosacral spine. Dr. Hanley stated that artificial disc replacement surgery is never considered medically necessary since appellant was not at risk of life or limb. He further stated that the procedure was new and addressed patients who underwent lumbar fusion for degenerative disc disease. Dr. Hanley related that, if motion could be maintained at the affected level, then the chances of success on a long-term basis were somewhat greater, but indicated that appellant underwent a three-level replacement, which was rare and unlikely to be fully successful at all three levels due to the complexity of the surgery. He noted that the surgery was not allowed to be performed in the United States and that, during its experimental phase, it was approved only for one or, at most, two levels. Dr. Hanley opined that appellant's surgery was not a medically necessary procedure to treat his accepted employment-related condition.

The Board finds that Dr. Hanley's report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to greater weight and establishes that the surgical procedure at issue in this case was not necessary treatment for the accepted employment injury. The Office did not abuse its discretion under section 8103 in denying approval of medical services considered experimental and not routinely performed as treatment for appellant's accepted condition.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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