United States Department of Labor
Employees' Compensation Appeals Board

JOHN E. BABBAGE, Appellant	)	
and	)	**Docket No. 06-444**
	)	**Issued: May 22, 2006**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Fulton CA, Employer	)	

Appearances:
John E. Babbage, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 19, 2005 appellant filed a timely appeal from a November 28, 2005 decision of the Office of Workers' Compensation Programs denying his request to authorize spinal surgery and denying his claims for left carpal tunnel syndrome and left cubital tunnel syndrome. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly denied reimbursement for a cervical discectomy and fusion; and (2) whether appellant has established that he sustained left carpal tunnel syndrome and left cubital tunnel syndrome in the performance of duty.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated August 5, 2005,[1] the Board remanded the case to the Office for further development regarding whether an accepted cervical strain and aggravation of cervical degenerative disc disease necessitated a requested cervical discectomy and fusion. The Board noted that a cervical discography was recommended by an Office medical adviser to determine if appellant had a pain generating pathology at C5-6 or C6-7. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.[2]

While the prior appeal was pending, a May 2, 2005 discogram showed disc degeneration, osteophytic ridging, annular fissuring and left-sided foraminal stenosis from C2 to C7, with disc bulging at C3-4 and a posterior disc protrusion at C6-7. Based on this result, Dr. John M. Grollmus, an attending Board-certified neurosurgeon, performed a cervical discectomy and fusion at C5-6 and C6-7 in June 2005. Dr. Frederick S. Bennett, an attending Board-certified orthopedic surgeon, submitted progress notes through August 2005.

On remand of the case, the Office conducted additional development to determine whether appellant sustained left carpal tunnel syndrome and left cubital tunnel syndrome in the performance of duty, prior to stopping work in January 2001. Dr. Bennett diagnosed these conditions in reports from April 2002 to May 26, 2004, opining they were due to repetitive motion at work. In a July 22, 2004 letter, the Office advised appellant of the additional medical evidence needed to establish his claim, including a rationalized report from his attending physician explaining how and why the accepted work factors would cause the claimed conditions. In response, appellant submitted periodic progress notes from Dr. Bennett dated from August 2004 through November 8, 2005, noting weakness of the left thumb and interosseous muscles.[3]

The Office obtained a second opinion from Dr. Aubrey Swartz, a Board-certified orthopedic surgeon.[4] In a September 14, 2005 report, he reviewed a statement of accepted facts

[1] Docket No. 05-1069 (issued August 5, 2005).

[2] The prior appeal did not adjudicate whether appellant sustained left carpal or cubital tunnel syndrome in the performance of duty.

[3] An April 27, 2005 electrodiagnostic study showed progressive left median mononeuropathy and a moderate compressive left mononeuropathy at the wrist.

[4] Dr. Swartz noted that he once attended appellant, operating on his left elbow in 1992 to treat left lateral epicondylitis. The Board finds that this prior treatment does not disqualify Dr. Swartz from acting as a second opinion physician in this case. The Office's procedures for selecting a physician to perform a second opinion examination do not preclude medical specialists who may have previously ministered to a claimant or performed a fitness-for-duty evaluation for a federal agency other than the employing establishment. *John Watkins*, 47 ECAB 597 (1996). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, at Chapter 2.810.9 (March 1995) which provides that a "physician who performed a fitness-for-duty examination of the claimant for the employing establishment may not be considered a second opinion specialist for purposes of creating a conflict in medical evidence or for reducing or terminating benefits based on weight of medical evidence."

and the medical record. On examination, Dr. Swartz found objective signs of left carpal and cubital tunnel syndromes. He opined that appellant's left cubital and carpal tunnel syndromes were unrelated to his job duties as a poultry inspector as they appeared and worsened years after he stopped work. Dr. Swartz noted that he could not perform a complete examination of the cervical spine as appellant was recovering from the June 2005 cervical fusion. He opined that there was "no evidence that the need for surgery was work related" and it was "not clear" that appellant required the surgery. Dr. Swartz explained that "[r]epetitive use of his upper extremities" at work would not have caused the degenerative changes that lead to surgery. Also, there were no disc herniations or nerve root compression requiring surgical correction. Dr. Swartz noted that, although appellant underwent a discogram, there were no pain ratings provided to indicate surgical necessity, thus negating the value of the test. In a November 5, 2005 supplemental report, he opined that appellant's multilevel degenerative disc disease was age related and not work related. Dr. Swartz reiterated that appellant's worsening left median and ulnar nerve symptoms were related to his high level of physical activity after January 2001 and had no relationship to his industrial claim.

By decision dated November 28, 2005, the Office affirmed its denial of appellant's request for a cervical discectomy and fusion and denied his claim for left carpal and cubital tunnel syndromes. The Office found that Dr. Swartz provided a well-rationalized report, based on a complete medical history and statement of accepted facts, explaining that the requested surgery was not medically necessary. The Office further found that Dr. Swartz provided sufficient rationale explaining that the claimed left carpal tunnel and left cubital tunnel syndromes were not work related. The Office also found that Dr. Swartz's opinion outweighed that of Dr. Bennett, appellant's attending physician.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of the Federal Employees' Compensation Act[5] 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.[6] In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.[7] 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.[8]

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[7] *Mira R. Adams*, 48 ECAB 504 (1997).

[8] *Daniel J. Perea*, 42 ECAB 214 (1990).

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.[9] This burden of proof includes providing supporting rationalized medical evidence. Thus, in order for surgery to be authorized, appellant must submit evidence to show that these are for a condition causally related to the employment injury and that these were medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a cervical strain and aggravation of cervical disc disease. Appellant's physicians requested that the Office authorize a cervical discectomy and fusion. To determine whether this procedure was work related, the Office authorized a May 2, 2005 discogram and referred appellant to Dr. Swartz, a Board-certified neurosurgeon, for a second opinion examination.

Dr. Swartz submitted September 14 and November 5, 2005 reports explaining that the May 2, 2005 discogram did not demonstrate disc herniations or nerve root compression requiring surgical correction. He therefore opined that the June 2005 surgery was not medically necessary. Dr. Swartz also explained that appellant's degenerative disc disease was age related and not due to factors of his federal employment. The Board finds that Dr. Swartz's opinion is thorough, well rationalized and based on a complete, accurate factual and medical history. His opinion establishes that the June 2005 cervical fusion was neither work related nor medically necessary. Therefore, the Office did not abuse its discretion in denying reimbursement for the June 2005 cervical fusion.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act[11] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[12] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[13]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual

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

[10] *Id*.

[11] 5 U.S.C. §§ 8101-8193.

[12] *Joe D. Cameron*, 41 ECAB 153 (1989).

[13] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[14]

ANALYSIS -- ISSUE 2

Appellant alleged that he developed left carpal tunnel syndrome and left cubital tunnel syndrome as a result of repetitive motion while inspecting chicken carcasses. The Office denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that these conditions were causally related to his employment.

In support of his claim, appellant submitted several reports from Dr. Bennett, an attending Board-certified orthopedic surgeon, opining that appellant's left carpal and cubital tunnel syndromes with objective left hand weakness were precipitated by repetitive motion at work. However, Dr. Bennett did not provide medical rationale explaining how and why appellant's work duties would cause the claimed conditions.

The Office referred appellant to Dr. Swartz for a second opinion examination. In September 14 and November 5, 2005 reports, Dr. Swartz noted that appellant's left carpal and cubital tunnel syndromes appeared only after he stopped work in January 2001, with significant worsening as late as November 2004. He explained that this sequence of events indicated that the left arm conditions were due to appellant's high level of physical activity after stopping work. Dr. Swartz provided medical rationale, based on a complete, accurate factual and medical history, explaining how and why work factors could not have caused the claimed left carpal and cubital tunnel syndromes. In contrast, Dr. Bennett did not provide a medical explanation supporting causal relationship. Therefore, his opinion is of diminished probative value.[15] In a July 22, 2004 letter, the Office advised appellant of the necessity of providing a rationalized statement from his attending physician supporting causal relationship. However, appellant did not submit such evidence. The Board therefore finds that Dr. Swartz's opinion is sufficiently rationalized to outweigh that of Dr. Bennett and to negate the causal relationship asserted in this case.

[14] *Solomon Polen*, 51 ECAB 341 (2000).

[15] *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

CONCLUSION

The Board finds that the Office properly denied appellant's request for a cervical discectomy and fusion. The Board further finds that appellant has not established that he sustained left carpal tunnel syndrome or left cubital tunnel syndrome in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 28, 2005 is affirmed.

Issued: May 22, 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