

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

B.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
NATIONAL GUARD, Lincoln, NE, Employer**

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**Docket No. 06-901
Issued: November 8, 2006**

Appearances:
Darrell K. Stock, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 26, 2006 which denied modification of a June 22, 2004 decision denying his request for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.¹

¹ The Office issued a merit decision dated September 21, 2005 which denied modification of its December 14 and June 7, 2004 decisions denying wage-loss benefits to appellant. On January 31, 2006 appellant requested reconsideration of the September 21, 2005 decision. The Office has not issued a final decision on his request for reconsideration. As this matter is in an interlocutory posture, it is not before the Board on this appeal. See 20 C.F.R. § 501.2(c).

Appellant also filed a claim for a recurrence of disability as a result of his August 9, 2005 surgery. In an informational letter dated October 3, 2005, the Office stated that it had denied the requested surgery by decision dated June 22, 2004 and would not take any further action on the recurrence claim based on this surgery. Its October 3, 2005 letter is not a final decision with appeal rights over which the Board has jurisdiction.

ISSUE

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

FACTUAL HISTORY

On April 18, 2003 appellant filed a traumatic injury claim alleging that he injured his upper back, left arm and left leg at work on April 17, 2003 when he picked up a crane and set it on the ground.² He underwent an anterior cervical discectomy and fusion at C5-6 levels on June 4, 2003 and returned to restricted duty on July 22, 2003. On August 19, 2003 the Office accepted appellant's claim for C5-6 herniated disc and anterior cervical discectomy and fusion of C5-6.

The record contains an unsigned report dated June 20, 2003 from Dr. Jonathan E. Fuller, a Board-certified orthopedic surgeon, who indicated that appellant was doing quite well after his surgery until June 13, 2003 when he slipped on some steps, jerked his neck and felt a snap or pop in his neck. After the June 13, 2003 incident he experienced an increase in neck and left arm pain radiating down the left arm to the dorsal hand. An October 7, 2003 report of a computerized tomography (CT) scan of the cervical spine revealed a mild disc protrusion at C4-5; moderate to severe degenerative disc disease; and solid interbody fusions at C5-6. The record also contains an August 8, 2003 report of a magnetic resonance imaging (MRI) scan of the right shoulder. In an unsigned report dated October 7, 2003, Dr. Fuller diagnosed spondylosis at the C6-7 level and indicated that appellant's shoulder remained a significant source of pain. He stated that, while it was difficult to understand the source of appellant's symptoms, it was "possible that this level [C6-7] should also have been fused in retrospect." Dr. Fuller further indicated that it was "difficult to demonstrate [conclusively] that fusing this level would improve [appellant's] pain." In an unsigned note dated October 30, 2003, he recommended anterior cervical fusion at C6-7.

At the recommendation of the district medical director, the Office referred appellant to Dr. Lonnie Mercier, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether additional surgery at the C6-7 level was medically warranted and beneficial and if so, whether the need for surgery was the result of the accepted April 17, 2003 work injury. In a January 8, 2004 report, he opined that he had "great uncertainty" as to whether surgery at the C6-7 level was warranted or beneficial and that any need for surgery was not the result of the April 17, 2003 work injury. Dr. Mercier indicated that appellant's C6-7 abnormalities were fairly minor and that he might undergo "successful" cervical disc excision and fusion, but have no change in his pain status. He stated that he had a global cervical spine and left arm pain of uncertain origin.

The Office found a conflict between the opinions of Dr. Fuller and Dr. Mercier. To resolve the conflict, the Office referred appellant, along with the entire medical record and

² Appellant's November 9, 1989 traumatic injury claim was accepted for a lumbar strain, aggravation of preexisting degenerative disc disease at L4-5 and transversal process fusion performed on July 18, 1990.

statement of accepted facts, to Dr. Michael J. Morrison, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion as to whether additional surgery at the C6-7 level would be medically beneficial and warranted and if so, whether the need for the surgery was a result of the April 17, 2003 injury.

In a report dated February 20, 2004, Dr. Morrison indicated that he reviewed the records provided and performed a physical examination. He noted a history of appellant's work-related injury. Physical examination of the left shoulder revealed no tenderness over the acromioclavicular (AC) joint, the subacromial bursal space or the long head of the biceps. Dr. Morrison noted that passively appellant could obtain almost full abduction and flexion and that he "has giving way" with passive motion of the shoulder. He opined that his complaints of pain were inconsistent with his physical findings and that there were no changes shown on CT scans of the cervical spine that would warrant surgery. Dr. Morrison recommended an electromyogram (EMG) and nerve conduction study to resolve the inconsistency.

The record contains an April 1, 2004 report of an EMG and nerve conduction study. Dr. Bernadette A. Hughs, a treating physician, concluded that there was no evidence of a left-sided cervical radiculopathy, plexopathy or mononeuropathy and that otherwise the study was normal. In a supplemental report dated April 21, 2004, Dr. Morrison stated that the April 1, 2004 report of the EMG and nerve conduction study did not clarify any objective findings regarding the predictability of appellant undergoing further neck surgery. In a letter dated May 11, 2004, the Office asked him to clarify his opinion as to whether additional surgery was warranted. In a supplemental report dated June 8, 2004, Dr. Morrison stated that he could not opine within a reasonable degree of medical certainty that a cervical discectomy and fusion at the C6-7 level would be beneficial.

In a decision dated June 22, 2004, the Office denied appellant's claim for anterior cervical discectomy and fusion at C6-7 level.

In an unsigned report dated July 22, 2004, Dr. Timothy Burd, a Board-certified orthopedic surgeon, opined that C6-7 level anterior cervical discectomy and fusion would be beneficial. Examination revealed 5/5 upper extremity strength at C5-T1, except for his bilateral triceps (graded at 4/5) and his left wrist flexors at 3+/5. Dr. Burd noted that appellant had easy give-away weakness to his wrist flexors, but that otherwise his intrinsic were intact. Appellant's sensation was diminished to pin prick and light touch to his index fingers bilaterally. Reflexes were intact.

Appellant submitted an August 31, 2004 report from Dr. Fuller reflecting that on August 9, 2004 he had undergone anterior cervical discectomy and fusion at C6-7 level, with left-sided foraminal decompression of C5-6. He stated that appellant's arm pain had improved, but that he noted increased neck and shoulder pain. On September 23, 2004 Dr. Fuller reported that appellant's symptoms of arm pain had substantially improved.

In a narrative report dated September 7, 2004, Dr. Fuller stated that appellant had cervical radiculopathy, which persisted after he underwent anterior cervical discectomy and fusion on June 4, 2003. He noted that, although appellant achieved relief for several weeks after surgery,

his symptoms returned. Work-up revealed adjacent segment disease and after lengthy delay, he underwent fusion of the subadjacent level on August 9, 2004. On November 4, 2004 Dr. Fuller stated that appellant had no functional limitations.

In a November 23, 2004 letter to appellant's representative, Dr. Fuller stated that in retrospect he believed appellant should have undergone an anterior cervical discectomy and fusion at C6-7 at the time of his initial June 4, 2003 surgery. He further indicated that it was "likely that because he achieved pain relief for only one week after his surgery at C5-6, that his ongoing pain represented failure to successfully treat his condition at the time of his first surgery" and that he would, therefore, consider appellant's ongoing pain to represent continuation of his original condition. Dr. Fuller stated that appellant had achieved "good relief" from his neck and arm pain as a result of the cervical fusion at C6-7, with revision decompression at C5-6.

By letter dated January 18, 2005, appellant's representative requested reconsideration of the June 22, 2004 decision, contending that his condition requiring the requested surgery actually existed at the time of the original surgery. In support of the request for reconsideration, appellant submitted copies of previously submitted documents, including letters from Dr. Fuller dated September 7 and November 28, 2004 and January 5, 2005; July 22, 2004 notes from Dr. Burd; an August 9, 2004 operative report and a copy of the June 22, 2004 decision. Appellant also submitted an unsigned report from Dr. Fuller dated August 3, 2004, which provided a diagnosis of pseudoarthritis and indicated that appellant was scheduled to undergo anterior cervical discectomy and fusion at C6-7. He noted that appellant had experienced persistent left arm pain since one week after his June 2003 surgery and that it had been "difficult to uncover an explanation for these symptoms." Dr. Fuller indicated that the basis for the upcoming surgery was appellant's positive response to the selective C6-7 nerve root injection, which he received on October 20, 2003.

In a letter dated November 4, 2005, appellant reiterated his request for reconsideration and inquired as to the status of his request. By letter dated November 28, 2005, the Office informed him that it considered his November 4, 2005 letter to be appellant's request for reconsideration of the June 22, 2004 decision.

In a merit decision dated January 26, 2006, the Office denied modification of the June 22, 2004 decision. The Office found that the medical evidence submitted by appellant was insufficient to overcome the weight of medical evidence contained in the reports of Dr. Morrison.

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

When there exist 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 upon a proper factual background, must be given special weight.⁶

ANALYSIS

The Office accepted appellant's claim for C5-6 herniated disc and anterior cervical discectomy and fusion of C5-6. It determined that a conflict of medical opinion arose over whether anterior cervical fusion at the C6-7 level was warranted and causally related to the accepted condition. Dr. Fuller, appellant's physician, recommended the surgery, indicating that he suffered from spondylosis at the C6-7 level. By contrast, Dr. Mercier, the Office's second opinion physician, stated that he had great uncertainty as to whether surgery at the C6-7 level was warranted or beneficial and that any need for surgery was not the result of the April 17, 2003 work injury. He indicated that appellant's C6-7 abnormalities were fairly minor and that he might undergo "successful" cervical disc excision and fusion, but have no change in his pain status. The Office properly referred appellant to Dr. Morrison, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently

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 *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

well rationalized and based upon a proper factual background, is entitled to special weight.⁷ The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Morrison. After conducting a physical examination and reviewing appellant's complaints, medical and factual history and the medical records, Dr. Morrison opined that his complaints of pain were inconsistent with physical findings and that there were no changes shown on CT scans of the cervical spine that would warrant surgery. Physical examination of the left shoulder revealed no tenderness over the AC joint, the subacromial bursal space or the long head of the biceps. Dr. Morrison noted that passively appellant could obtain almost full abduction and flexion and that he "has giving way" with passive motion of the shoulder. He recommended an EMG and nerve conduction study to resolve the inconsistency. In his April 21, 2004 supplemental report, Dr. Morrison stated that the April 1, 2004 report of the normal EMG and nerve conduction study did not clarify any objective findings regarding the predictability of appellant's undergoing further neck surgery. In a second supplemental report dated June 8, 2004, Dr. Morrison stated that he could not opine within a reasonable degree of medical certainty that a cervical discectomy and fusion at the C6-7 level would be beneficial. The Board finds that his combined reports are sufficiently well rationalized and based upon a proper factual background such that they are entitled to special weight. The Board further finds that Dr. Morrison's reports represent the weight of the medical opinion evidence and establish that the surgical procedures at issue were not necessary treatment for the accepted work injury.⁸

Appellant submitted an unsigned report dated July 22, 2004 from Dr. Burd who opined that C6-7 level anterior cervical discectomy and fusion would be beneficial. In that it is unsigned, this report lacks proper identification and, therefore, cannot be considered as probative evidence.⁹ Moreover, Dr. Burd's report failed to provide a rationalized opinion regarding the causal relationship of the cervical surgery to the employment injury or explain why this procedure was medically warranted. Medical conclusions unsupported by rationale are of little probative value.¹⁰

On August 3, 2004 Dr. Fuller provided a diagnosis of pseudoarthritis and indicated that appellant was scheduled to undergo anterior cervical discectomy and fusion at C6-7. He noted that he had experienced persistent left arm pain since one week after his June, 2003 surgery and that it had been "difficult to uncover an explanation for these symptoms." Dr. Fuller indicated that the basis for appellant's upcoming surgery was his positive response to the selective C6-7 nerve root injection, which he received on October 20, 2003. He did not provide an unequivocal opinion that the scheduled procedure was medically warranted for a condition causally related to the employment injury. Therefore, this report lacks probative value. On August 31, 2004 Dr. Fuller stated that appellant had undergone anterior cervical discectomy and fusion at C6-7 level, with left-sided foraminal decompression of C5-6; that his arm pain had improved; but that

⁷ *Solomon Polen*, 51 ECAB 341 (2000).

⁸ *David Alan Patrick*, 46 ECAB 1020, 1023 (1995) (impartial medical examiner's opinion was based on a complete review of the medical record and a thorough examination and was sufficiently rationalized to establish that appellant had no work-related residuals of his diagnoses; thus his opinion was entitled to special weight).

⁹ *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁰ *Willa M. Frazier*, 55 ECAB ____ (Docket No. 04-120, issued March 11, 2004).

appellant had increased neck and shoulder pain. On September 23, 2004 Dr. Fuller reported that his symptoms of arm pain had substantially improved. On September 7, 2004 he stated that appellant had cervical radiculopathy, which persisted after he underwent anterior cervical discectomy and fusion on June 4, 2003. Dr. Fuller noted that, although he achieved relief for several weeks after surgery, his symptoms returned. Work-up revealed adjacent segment disease and, after lengthy delay, appellant underwent fusion of the subadjacent level on August 9, 2004. On November 4, 2004 Dr. Fuller stated that he had no functional limitations. None of these reports explained how appellant's current condition was causally related to the accepted injury or provided a clear opinion as to whether the anterior cervical discectomy and fusion at C6-7 level was warranted by appellant's accepted injury. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹¹ On November 23, 2004 Dr. Fuller stated that, in retrospect, he believed that appellant should have undergone an anterior cervical discectomy and fusion at C6-7 at the time of his initial June 4, 2003 surgery. He further indicated that it was "likely that because [he] achieved pain relief for only one week after his surgery at C5-6, that[appellant's] ongoing pain represented failure to successfully treat his condition at the time of his first surgery" and that he would, therefore, consider appellant's ongoing pain to represent continuation of his original condition. Dr. Fuller stated that appellant had achieved "good relief" from his neck and arm pain as a result of the cervical fusion at C6-7, with revision decompression at C5-6. His opinion that it was "likely" that appellant's "ongoing pain" represented continuation of his original condition, was equivocal at best. Moreover, the report failed to provide a rationalized explanation regarding the causal relationship of the cervical surgery to the employment injury or address whether this procedure was medically warranted by the accepted condition.¹² The Board finds, therefore, that these reports were insufficient to overcome the special weight accorded to the well-rationalized opinion of Dr. Morrison or to create a new medical conflict.¹³

Accordingly, the Board finds that the Office did not abuse its discretion in denying authorization for the requested surgery.¹⁴

¹¹ *Ellen L. Noble*, 55 ECAB ____ (Docket No. 03-1157, issued May 7, 2004).

¹² *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹³ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁴ The Board notes that, by letter dated January 18, 2005, appellant's representative requested reconsideration of the Office's June 22, 2004 decision. On November 4, 2005 he reiterated his request for reconsideration and inquired as to the status of his request. By letter dated November 28, 2005, the Office informed appellant that it considered his November 4, 2005 letter to be his request for reconsideration of the June 22, 2004 decision. The Board finds that he requested reconsideration of the June 22, 2004 decision on January 18, 2005. However, the determination that the request was made on November 4, 2005 was harmless error, in that the Office conducted a merit review and issued a merit decision with rights of appeal on January 26, 2006.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's claim for authorization of surgery.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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