

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

R.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lincoln, NE, Employer**

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**Docket No. 09-103
Issued: July 13, 2009**

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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal of a September 24, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of a December 26, 2007 decision denying authorization for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied authorization for lumbar surgery.

FACTUAL HISTORY

The Office accepted that appellant, then a 34-year-old mail handler, sustained a lumbar strain as a result of an employment incident on August 19, 1998.¹ The claim was later accepted

¹ The record reflects that appellant has preexisting conditions which include: obesity, arthritis, depression/bipolar disorder, lumbar degenerative disc disease, plantar facial fibromatosis, and pain in hips, thighs and lower back. She also has a spinal condition caused by or complicated by instability of the feet, lower extremities, pelvis and spine for which she was fitted with bilateral orthotics. Appellant also filed an occupational disease claim for a left foot condition under File No. xxxxxx162 which began on April 18, 2002. However, this claim was denied.

for L5-S1 disc protrusion and an anterior posterior L5-S1 fusion. Appellant missed work intermittently and performed modified duties for certain periods before stopping work on January 13, 2007. She received appropriate compensation and benefits.²

In a January 31, 2007 report, Dr. Robert A. Vande Guchte, a Board-certified orthopedic surgeon and treating physician, advised that appellant continued to have dysfunctional lower lumbar back pain. He noted that her previous fusion at L5-S1 was in December 2002 and was “stable radiographically.” Dr. Vande Guchte explained that appellant had some improvement initially; however, her lower lumbar back pain returned without a radicular component. He determined that appellant was probably starting to show adjacent level degeneration. Dr. Vande Guchte noted that she eventually underwent spinal cord stimulator implants which helped control pain. He assessed post L5-S1 circumferential fusion, L4-5 disc derangement, chronic lumbar back pain, L4-5 discogenic mediated and obesity. Dr. Vande Guchte noted that there appeared to be little option for appellant regarding her L4-5 disc-related pain pattern. He advised that “the remaining alternative from a surgical viewpoint would be to consider a fusion of the L4-5 segment.” In the alternative, appellant would have to live with her discomfort. Dr. Vande Guchte explained that an artificial disc replacement would not be considered due to her weight but advised a fusion of the L4-5 level was possible. He advised that he explained the proposed surgery to appellant and the risks. A request for authorization for the proposed surgery was received by the Office on March 5, 2007. The request included removal of vertebral body, lumbar spine fusions, insert lumbar spine fixation device, application for a spine prosthetics device and spinal bone auto graft.

On April 3, 2007 the Office requested an opinion from an Office medical adviser regarding whether appellant’s degeneration at L4-5 was medically connected to the accepted L5-S1 disc protrusion and subsequent fusion at that level. It also requested that the Office medical adviser provide an opinion on whether the proposed surgery was necessary to treat the accepted injury.

In a report dated April 7, 2007, Dr. Daniel D. Zimmerman, the Office medical adviser, reviewed appellant’s history of injury and treatment and opined that the surgery should not be authorized. He opined that the L5-S1 fusion accelerated degeneration at L4-5. Dr. Zimmerman advised that there was no obvious restriction of flexion or extension of the lower back secondary to pain and explained that normal range of motion at the lumbar level was not supportive of the need for an anterior-posterior lumbar fusion at L4-5. He advised that other forms of treatment approaches were possible, which included reducing her weight.

In a letter dated April 30, 2007, the Office provided Dr. Van Guchte with a copy of the Office medical adviser’s opinion and requested a response.

² On April 30, 2002 appellant filed a claim for a recurrence of injury on April 18, 2002. However, the Office denied her claim in a January 7, 2003 decision. An Office hearing representative affirmed this decision on January 29, 2004. In a May 12, 2004 decision, the Office determined that the permanent modified mail handler position fairly and reasonably represented her wage-earning capacity.

On September 4, 2007 Dr. Van Guchte responded that appellant was a candidate for lumbar discectomy and fusion with spinal instrumentation at L4-5. He also advised that appellant was unable to work in any capacity pending surgery.

In an October 31, 2007 telephone call memorandum, the Office advised appellant that authorization for surgery could not be granted. On November 13, 2007 it referred appellant for a second opinion with Dr. Anil Agarwal, a Board-certified orthopedic surgeon.

In a November 28, 2007 report, Dr. Agarwal reviewed appellant's history of injury and treatment. He stated that there was "no indication for any type of surgery." Dr. Agarwal advised that appellant had no obvious deformity of the vertebral column and that she was able to carry out a full range of motion without much discomfort. He found that appellant's straight leg raising test was negative bilaterally. Dr. Agarwal advised that surgery was not warranted as there was no leg pain. He also noted that appellant's morbid obesity was a contraindication for further surgery.

By decision dated December 26, 2007, the Office denied authorization for the proposed surgery. The Office found the weight of the medical evidence did not establish that surgery was medically necessary.

The Office found a conflict in the medical opinion regarding the need for surgery. On June 13, 2008 it referred appellant, together with a statement of accepted facts, and the medical record to, Dr. Kral Varhan, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 9, 2008 report, Dr. Varhan reviewed appellant's history of injury and treatment, which included lumbar surgery in December 2001. He advised that appellant's low back pain was alleviated for about six months and then it returned. Appellant received a spinal stimulator in 2004 which helped for about nine months. On examination she had a well-healed scar over her lumbar spine and a normal gait. Dr. Varhan did not find any evidence of spasm in her back and noted that she reported pain with light skin touch diffusely throughout her lumbar spine region which gave her a positive Waddell's test for superficial tenderness. Appellant had normal heel and tiptoe walks and could not extend her lumbar spine; however, she could flex her lumbar spine until her fingertips were just above the knees. Dr. Varhan stated that axial rotational Waddell's test was negative but that a third Waddell's test was positive for nonorganic pain. He observed that appellant did not have much difficulty moving from a sitting to a standing position. Straight leg raising was negative for up to 70 degrees bilaterally, but he noted that appellant reported increasing low back pain rather than leg discomfort. Dr. Varhan also determined that appellant had functional range of motion of her hips, knees and ankles. He determined that appellant had fibromyalgia, which was not work related, a postoperative lumbar spine fusion at L5-S1 which was work related, obesity, which was not work related, and some evidence of nonorganic pain, or symptom-magnification. Dr. Varhan did not believe that appellant would benefit from further spine surgery. He advised that fibromyalgia was not treated with low back surgery and opined that "[e]ven if she had only low back complaints, as opposed to whole body complaints, I still would not recommend surgical treatment of her low back as she has minimal degenerative disc disease and no radicular findings. Especially considering the fact that the previous lumbar spine fusion for degenerative disc disease did not help her, repeating the same

surgery would also end up in failure.” Dr. Varhan advised that surgery would be a mistake and recommended no further treatment for her low back pain other than weight loss for her obesity and exercise or a medication program for her fibromyalgia. He opined that there was no medical reason that appellant could not work a 40-hour week in a limited-duty position.

By letter dated August 6, 2008, the Office advised appellant that Dr. Varhan did not support the requested surgery. Appellant was advised that no further action would be taken and that, if she wished to appeal the December 26, 2007 decision, she should follow her appeal rights.

In a report dated August 11, 2008, Dr. John R. Massey, a Board-certified anesthesiologist and treating physician, advised that appellant was a poor candidate for further fusion due to her expectations as well as her body habitus. He opined that it was “unlikely that they were going to be able to find any good treatment options to adequately diminish the axial component of her spine pain short of increasing her activity level, for muscle strengthening, weight loss and so forth.” Dr. Massey was amenable to removal of the spinal cord stimulator system due to her long-term difficulty with management of the system. However, he did not think there was anything to do to improve the outcome that appellant received with stimulation.

On August 28, 2008 the Office received appellant’s request for reconsideration.

By decision dated September 24, 2008, the Office denied modification of its December 26, 2007 decision.

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.⁴ The only limitation on the Office’s authority is that of reasonableness.⁵

For a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is

³ 5 U.S.C. § 8103(a).

⁴ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that 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).

medically warranted. Both of these criteria must be met in order for the Office to authorize payment.⁶

The Act⁷ provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, it shall appoint a third physician who shall make an examination.⁸ In cases where it has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

ANALYSIS

Appellant's physician, Dr. Vande Guchte requested authorization to perform lumbar spine fusion surgery. However, the Office medical adviser and Dr. Agarwal, the second opinion physician, advised against the recommended surgery as treatment for appellant's accepted back condition. It determined that a conflict of medical opinion arose regarding whether the requested surgery should be authorized. The Office properly referred appellant to an impartial medical examiner, Dr. Varhan, a Board-certified orthopedic surgeon.

Dr. Varhan provided a reasoned medical opinion finding that surgery would not benefit appellant or achieve a beneficial result. In a July 9, 2008 report, Dr. Varhan noted appellant's history of injury and treatment, which included lumbar surgery in December 2001. He reported findings on examination and determined that appellant had other conditions such as fibromyalgia and obesity that were not related to her work. Dr. Varhan also noted some evidence of nonorganic pain or symptom-magnification. He determined that appellant would not achieve any benefit from further surgical treatment of her spine. Dr. Varhan explained that appellant had fibromyalgia, which was not work-related or treatable with low back surgery. Moreover, he did not recommend surgical treatment of her low back as she had minimal degenerative disc disease and no radicular findings. Dr. Varhan noted that the previous lumbar spine fusion for degenerative disc disease did not help her and stated that repeating the same surgery would also end up in failure and would be a mistake. He did not recommend any further treatment for her low back pain other than weight loss and exercise or a medication program for her fibromyalgia.

The Board finds that Dr. Varhan's July 9, 2008 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that the requested surgery was not medically appropriate and necessary for treatment of appellant's work-related condition. Dr. Varhan provided an extensive review of appellant's medical history, reported his examination findings and opined that the surgery would not be beneficial. When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background

⁶ R.C., 58 ECAB ____ (Docket No. 06-1676, issued December 26, 2006).

⁷ 5 U.S.C. §§ 8101-8193, 8123(a).

⁸ *Id.* at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁹ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

must be given special weight.¹⁰ The Board finds that Dr. Varhan's report represents the weight of the medical evidence and establishes that the requested surgery was not medically appropriate and necessary for treatment of her accepted conditions.

Subsequent to the evaluation by Dr. Varhan, the Office received an August 11, 2008 report from Dr. Massey, a treating physician, who also indicated that appellant was a poor candidate for the proposed surgery due to her expectations and her body habitus.

Based on the evidence of record, the Office properly found that the proposed surgery was not medically warranted to treat appellant's work-related conditions. It did not abuse its discretion in denying authorization for the requested surgery.

CONCLUSION

The Board finds that the Office properly exercised its discretion pursuant to 5 U.S.C. § 8103(a) in refusing to authorize appellant's request for lumbar surgery.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2009
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

¹⁰ See *id.*