United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, ONTARIO INTERNATIONAL AIRPORT, Ontario, CA, Employer	)	**Docket No. 09-1136** **Issued: January 13, 2010**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2009 appellant filed an appeal from a January 23, 2009 decision of the Office of Workers' Compensation Programs. 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 back surgery. On appeal appellant, through her attorney, argues that the decision is contrary to fact and law.

FACTUAL HISTORY

On January 26, 2005 appellant, then a 35-year-old supervisory transportation security screener, filed a Form CA-1, traumatic injury claim, alleging that she hurt her lower back that day loading luggage onto an x-ray machine. On April 18, 2005 the Office accepted that she

sustained employment-related lumbar sprain/strain.[1] Appellant did not stop work but missed intermittent periods for doctor's appointments and physical therapy. An August 23, 2004 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a small herniation at L3-4. An April 27, 2005 lumbar spine MRI scan demonstrated a disc protrusion at L3-4 with probable left L3 nerve impingement, and a July 15, 2005 discogram was negative at L2 through L4 and positive at L5-S1.[2] The accepted condition was later expanded to include displacement of lumbar intervertebral disc without myelopathy.

On September 29, 2006 appellant filed a Form CA-2a, notice of recurrence, stating that she stopped work on September 21, 2006 based on her doctor's recommendation. She stated that she was trying to adhere to her restrictions but that it was impossible and her condition worsened. In an October 24, 2006 report, Dr. G. Sunny Uppal, an attending physician, noted appellant's complaint of back and leg pain, physical findings of lower back spasms, decreased range of motion, and a positive straight leg raising examination, and recommended anterior posterior decompression and fusion at L5-S1 surgery. He advised that appellant was totally disabled. The Office accepted the recurrence and paid appropriate wage-loss compensation.[3] Dr. Uppal continued to submit reports reiterating his findings and conclusions.

On January 26, 2007 the Office referred appellant to Dr. Paul Bouz for a second opinion evaluation. In a February 23, 2007 report, Dr. Bouz noted the history of injury, his review of the medical record including MRI scan and discogram studies and appellant's complaints of low back pain radiating into both legs, more on the left. He provided examination findings and diagnosed a protruded disc at L5-S1. Dr. Bouz advised that, although appellant could continue to have back pain, she had reached maximum medical improvement, that she should be restricted from heavy lifting and repetitive bending and stooping at work, and that, under Table 15-3 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, she had a five percent whole person impairment. He concluded that, based on his physical examination and objective studies, appellant should be able to live with her symptoms, and opined that she did not need to undergo the fusion surgery because it would not guarantee elimination of her symptoms.

On April 13, 2007 appellant accepted a modified supervisory position as an exit lane monitor with physical requirements that she could intermittently stand or sit and that a chair would be provided. She was to complete on-line computerized training. Appellant returned to work but stopped on April 17, 2007, stating that she could not work within the restrictions of the

[1] The record indicates that appellant previously injured her back on May 18, 2004 that was also accepted for lumbar sprain and is in closed status.

[2] On April 20, 2006 appellant rejected a modified supervisory position job offer dated April 19, 2006. The physical requirements were no pushing, no pulling, and no lifting beyond 25 pounds on an intermittent basis and very little bending. The record does not indicate that she stopped work.

[3] On November 27, 2006 the Office requested that an Office medical adviser provide an assessment of the requested surgery. The record does not indicate that the Office medical adviser responded. By decision dated February 6, 2007, the Office found that appellant was not at fault in the creation of an overpayment in compensation in the amount of $1,147.74 and denied waiver. Appellant repaid the overpayment. A second overpayment of $201.53 was administratively terminated.

second-opinion doctor. She thereafter filed CA-7 forms, claims for compensation, beginning on April 17, 2007. In reports dated April 17 and May 2, 2007, Dr. Uppal again recommended surgery and advised that appellant was totally disabled, noting that he had reviewed Dr. Bouz's report and disagreed with his findings and conclusions.

On May 22, 2007 the Office referred appellant to Dr. William C. Boeck, Jr. for a second opinion evaluation regarding whether she had residuals of the January 25, 2005 work injury and regarding the requested surgery.[4] By report dated June 11, 2007, Dr. Boeck noted the history of injury, his review of the medical record, and appellant's complaints of radiating back pain with numbness and tingling of the foot and hypersensitivity of the legs. He provided examination findings and diagnosed lumbosacral disc protrusion with left-sided radiculitis as a residual of the January 25, 2005 employment injury. Dr. Boeck opined that appellant's prognosis was guarded but that he did not feel there was a sufficient indication that she should have the proposed surgery. In an attached work capacity evaluation, he advised that appellant could not perform her usual job due to persistent low back pain with radiculopathy and provided restrictions of one hour walking, standing, bending, stooping, pushing, pulling and lifting with a 10-pound weight restriction and no restrictions on sitting, reaching, reaching above shoulder, twisting, operating a motor vehicle, repetitive wrist movements, squatting, kneeling or climbing.

By letter dated June 20, 2007, the Office informed appellant that a conflict in medical evidence had been created between the opinions of Drs. Uppal and Boeck regarding the need for surgery and whether she could perform the April 12, 2007 limited-duty position that required no lifting. In a supplemental report dated July 12, 2007, Dr. Boeck advised that appellant could perform the limited-duty position. Dr. Uppal continued to submit reports in which he reiterated his findings and conclusions, and an operative report dated September 17, 2007, indicated that he performed internal fixation, decompression and fusion surgery at L5-S1. A second September 17, 2007 operative report indicated that appellant had decompression and fusion surgery at L4-5.

On February 6, 2008 the Office referred appellant to Dr. Anthony Fenison, for an impartial evaluation regarding whether appellant was capable of performing the light-duty position described in the April 12, 2007 job description and regarding the necessity for the low back surgery.[5] In a March 17, 2008 report, Dr. Fenison noted the history of injury, his review of the medical record, and appellant's complaint of low back and buttocks pain radiating down her legs with back stiffness and leg numbness and weakness and that her condition was about the same despite the surgery. Findings on physical examination of the lumbar spine included tenderness across the lower back and surgical site with no acute muscle spasm noted. Straight leg raising was negative in both sitting and supine positions and Laseque sign was negative. Motor examination was grossly intact and sensation was intact to soft touch. Upper and lower extremity measurements were symmetrical. Dr. Fenison diagnosed status post L5-S1 fusion in September 2007, and opined that it was difficult for him to make any final recommendations regarding her current status because she was still in rehabilitation following the surgery. He

[4] The Office found that a conflict in medical evidence had been created between the opinions of Drs. Uppal and Bouz. Its letter notifying appellant of the appointment, however, did not inform her that a conflict had been found.

[5] Drs. Uppal, Bouz, Boeck and Fenison are Board-certified in orthopedic surgery.

noted that appellant brought some preoperative x-rays that revealed some mild degenerative changes and that postoperative x-rays from December 2007 and films taken by him revealed postsurgical changes. Dr. Fenison opined that appellant's diagnostic studies did not appear to correlate with the ultimate surgical procedure, noting that the MRI scans of August 2004 and April 2005 demonstrated a disc herniation at L3-4 and that no comments were made regarding the L5-S1 level, and that a September 2007 x-ray of the lumbar spine was normal, which again made it difficult to explain why she had disc pathology at L5-S1. He also noted that the record contained two operative reports, with one stating that she had surgery at the L4-5 level and another at the L5-S1 level, opining that this must be a typographical error. Regarding the need for surgery, Dr. Fenison agreed with the comments made by Dr. Bouz and Dr. Boeck that the initial injury did not correlate with appellant's subjective complaints and, more importantly, that the radiographic evidence did not document the need for such aggressive surgical intervention. He concluded that appellant's condition was not yet permanent and stationary but that she could return to some form of modified duty. In an attached work capacity evaluation, Dr. Fenison advised that appellant could work eight hours daily with restrictions for three to four months of six hours sitting, operating a motor vehicle, twisting and kneeling, two hours walking, three hours standing, bending and stooping, four hours lifting 10 pounds, squatting and climbing and eight hours of repetitive wrist and elbow movements, pushing and pulling 50 pounds. He advised that she should have a 10-minute break every 45 minutes.

By report dated June 4, 2008, Dr. Uppal noted his review of and disagreement with Dr. Fenison's conclusions. He advised that mention of surgery at L4-5 was a clerical error and that appellant's condition had improved. Physical examination included a negative straight leg raising and Faber's test. Dr. Uppal diagnosed L5-S1 decompression and fusion and advised that appellant could return to work on August 4, 2008 with limitations of no heavy lifting, bending or stooping. In a July 2, 2008 decision, the Office denied appellant's claim for disability compensation for the period April 17, 2007 to August 3, 2008 and continuing and that the Office properly denied authorization for the September 17, 2007 lumbar spine surgery. On July 9, 2008 appellant, through counsel, requested a hearing. In a September 9, 2008 report, Dr. Uppal advised that appellant had returned to work and was doing remarkably well with a negative straight-leg raising examination.

At the hearing, held telephonically on November 3, 2008, appellant described the employment injury and testified that when she returned to work in April 2007 she was not working as an exit lane monitor but was sitting for eight hours a day at a computer terminal, catching up on her online learning, and that, after two days, her back pain became too severe to continue. She stated that she did not return to work until August 4, 2008 when she began administrative duties and that she had a good result from her September 17, 2007 surgery. On November 10, 2008 appellant filed a schedule award claim,[6] and on November 10, 2008 accepted a light-duty assignment with no heavy lifting, bending or stooping. In a November 13, 2008 work capacity evaluation, Dr. Uppal advised that these were permanent restrictions and also provided a 25-pound lifting restriction.

[6] The record does not indicate that a schedule award decision has been issued.

By decision dated January 23, 2009, an Office hearing representative reversed the finding that appellant was not entitled to wage-loss compensation for the period April 17, 2007 to August 3, 2008 on the grounds that the medical evidence failed to support that she could perform the limited-duty job at the time the offer was made.[7] The hearing representative affirmed the July 2, 2008 Office decision with regard to the necessity for the lumbar spine surgery.

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation Act[8] 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.[9] While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[10]

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 being that of reasonableness.[11] 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.[12] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[13] In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[14]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

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[7] Appellant subsequently received retroactive wage-loss compensation.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id*. at § 8103; *see L.D.*, 59 ECAB ___ (Docket No. 08-966, issued July 17, 2008).

[10] *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[11] *See D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

[12] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[13] *M.B.*, 58 ECAB 588 (2007).

[14] *R.C.*, 58 ECAB 238 (2006).

shall appoint a third physician who shall make an examination.[15] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination, and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] 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.[17]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Fenison who opined that the surgery at L5-S1 was not medically warranted. In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[18] Dr. Fenison provided a comprehensive report dated March 17, 2008 in which he noted his review of the record and provided examination findings. Regarding the need for surgery, he stated that the August 2004 and April 2005 MRI scans demonstrated a disc herniation at L3-4 but made no mention of a condition at the L5-S1 level, and that a September 2007 x-ray was essentially normal. Dr. Fenison advised that he agreed with the comments made by Drs. Bouz and Boeck regarding the need for surgery and opined that the employment injury did not correlate with appellant's subjective complaints and, more importantly, that the radiographic evidence did not document the need for such aggressive surgical intervention. Dr. Bouz advised that appellant did not need to undergo fusion surgery because it would not guarantee elimination of her symptoms, and Dr. Boeck opined that he did not feel there was a sufficient indication that appellant should have the proposed surgery.

As noted above, a reasoned opinion from a referee examiner is entitled to special weight.[19] The Board finds that Dr. Fenison provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record including the August 2004 and April 2005 MRI scans and his examination findings. Dr. Fenison's opinion that the surgery at L5-S1 was not medically warranted is entitled to special weight and represents the weight of the evidence.[20]

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[15] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008).

[16] 20 C.F.R. § 10.321.

[17] *V.G.*, 59 ECAB ____ (Docket No. 07-2179, issued July 14, 2008).

[18] *R.C., supra* note 14.

[19] *V.G, supra* note 17.

[20] *Id*.

Appellant subsequently submitted reports dated June 4 and September 9, 2008 in which Dr. Uppal noted his disagreement with the Dr. Fenison's conclusion regarding the need for surgery and reiterated his findings and conclusions. Dr. Uppal, however, was on one side of the conflict in medical evidence resolved by Dr. Fenison, and the Board has long held that an additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is insufficient to overcome the weight accorded to an impartial medical specialist's report.[21] The Board therefore finds that Dr. Uppal's reports are insufficient to overcome or to create a new conflict with the well-rationalized opinion of Dr. Fenison. The evidence of record thus does not establish that the surgery at L5-S1 was medically necessary.[22]

CONCLUSION

The Board finds that the Office properly denied authorization for the recommended surgical procedure to appellant's lumbar spine.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2009 be affirmed.

Issued: January 13, 2010
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

[21] *M.S.*, 58 ECAB 328 (2007).

[22] *R.C.*, *supra* note 14.