United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 09-1757**
	)	**Issued: March 18, 2010**
DEPARTMENT OF THE AIR FORCE, EILSON AIR FORCE BASE, AK, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2009 appellant filed an appeal from the October 10, 2008 and May 20, 2009 decisions 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 appellant's request for authorization of cervical surgery.

On appeal, appellant's attorney asserts that the decisions are contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated July 15, 2009, the Board remanded the case to the Office to develop whether appellant sustained an emotional

condition as a consequence of his accepted cervical condition.[1] The law and the facts of the previous Board decision are incorporated herein by reference. After further development of the claim, on November 2, 2009, the Office accepted that appellant sustained an employment-related depressive disorder.

Concurrently with the development of the emotional condition claim, Dr. Brian V. Curtis, an attending Board-certified neurosurgeon, requested authorization for posterior cervical decompression surgery with lateral mass instrumentation and fusion from C3 to C5. He provided a May 22, 2008 computerized tomography (CT) scan of the cervical spine that demonstrated spondylitic and discogenic changes throughout the spine causing various degrees of osseous foraminal narrowing except at C6-7. A June 25, 2008 magnetic resonance imaging (MRI) scan study revealed evidence of focal myelopathy involving the upper cervical cord at the C3-4 level with evidence of cord volume loss and cervical spondylosis with moderate regions of spinal stenosis. In a July 11, 2008 treatment note, Dr. Curtis listed appellant's complaints of numbness, tingling, and weakness in his hands and increasing urinary urgency and intermittent incontinence. He reviewed the CT and MRI scan studies, stating that the MRI scan showed posterior impingement on the cervical cord and that the CT scan showed an area of either fracture or incomplete fusion. Dr. Curtis provided physical examination findings, noting diffuse decreased sensation across the hands, diagnosed slowly progressive cervical myelopathy with cervical cord injury and impingement. He recommended a decompression surgical procedure, stating that he believed it was necessary to help prevent further progression.

In reports dated July 19 and August 9, 2008, an Office medical adviser reviewed the medical record. He advised that the June 25, 2008 MRI scan study provided no reason for the Office to authorize the recommended surgical procedure, stating that more cervical operative intervention should be based on a thorough history and a thorough physical examination germane to the condition for which the operative procedure was being proposed.

The Office found a conflict in medical opinion between Dr. Curtis and the Office medical adviser regarding the need for additional cervical surgery. On August 18, 2008 it referred appellant to Dr. Hisham Majzoub, a Board-certified neurosurgeon, for an impartial evaluation. By report dated September 18, 2008, Dr. Majzoub reviewed the medical record and appellant's complaints, stating that he reported no change in his left arm symptoms of numbness and burning in the prior three months, no change in left arm weakness in the last six months, and no weakness in the right arm and that his walking had improved over the past six months. Appellant had a slow but steady gait with minimal clumsiness on rapid rhythmic movements. Motor examination revealed minimal clumsiness of fine movements in the hands and no arm drift or spasticity, difficulty rotating his shoulders and that he could not put his arms behind his back. Appellant had no weakness in the upper arms and minimal clumsiness of fine movements in the hands. There was no drift and Grade 2 to 3 spasticity in both legs. Sensory examination revealed normal position sense and vibration in both the arms and legs with decreased pinprick sensation in both arms up to the shoulders, in the right leg up to the groin and in the left leg up to the knee.

[1] Appellant was injured on June 18, 2007 when he fell down a flight of stairs at work. The accepted conditions are back contusion, cervical spinal stenosis, cervical spinal cord contusion, traumatic right subarachnoid hemorrhage, concussion with brief loss of consciousness and neurogenic bladder. Appellant underwent cervical spine fusion surgery on October 31, 2007.

Reflexes were 3 to 4+ with positive Hoffman and Babinski signs bilaterally, right worse than left. Dr. Majzoub reviewed the June 25, 2008 MRI scan, stating that it revealed a stable previous fusion and what appeared to be a syrinx at C2-3. He advised that appellant had no canal stenosis of the cervical spine *per se* to require surgery at the present time and should continue therapy and conservative treatment. Dr. Majzoub concluded that appellant could not return to his previous position of transportation assistant or other work to speak of due to the clumsiness of fine movements of the hands and spasticity and clumsiness that affected his ability to walk. In a supplementary report dated October 1, 2008, he advised that appellant could not work eight hours daily, even with restrictions.

By decision dated October 10, 2008, the Office found that Dr. Majzoub's opinion represented the weight of medical evidence and denied authorization for posterior cervical decompression surgery.

Appellant, through his attorney, requested a hearing. In an October 16, 2008 report, Dr. Curtis noted appellant's report that his condition has worsened over the prior six months. Physical examination findings included a spastic gait, moderate difficulty rising from a sitting position and anxiousness. Dr. Curtis diagnosed spinal cord injury with no further progression on neurological determination and recommended a physiatrist referral. At the hearing, held on February 24, 2009, appellant and his wife stated that his condition had worsened. The hearing representative advised appellant that he should provide a clear report from Dr. Curtis regarding the need for surgery. The record was left open for 30 days.

In reports dated March 4 and April 3, 2009, Dr. Shan-Liang Liu, a Board-certified physiatrist, noted many years of history of burning, pain and spasticity in both arms and legs. He provided examination findings and diagnosed status post-traumatic cervical spinal cord injury with dysesthesia and spasticity in all extremities. Dr. Liu recommended physical therapy and a functional capacity evaluation.

In a May 20, 2009 decision, an Office hearing representative affirmed the October 10, 2008 decision.

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation 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 the monthly compensation.[3] While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the

[2] 5 U.S.C. §§ 8101-8193.

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

expenditure is incurred for treatment of the effects of an employment-related injury or condition.[4]

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.[5] 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.[6] 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.[7] 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.[8]

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 shall appoint a third physician who shall make an examination.[9] 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.[10] 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.[11]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Majzoub, the impartial referee physician, who examined appellant, reviewed the medical

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

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

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

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

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

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

[10] 20 C.F.R. § 10.321.

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

evidence of record and found that the cervical surgery 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.[12] Dr. Majzoub provided a comprehensive report in which he reviewed the history of medical treatment and diagnostic studies. Regarding the need for surgery, he stated that the June 25, 2008 MRI scan demonstrated that the previous fusion was stable. As appellant had no canal stenosis *per se* additional surgery was not needed. Dr. Majzoub recommended therapy and conservative treatment.

As noted, a reasoned opinion from a referee examiner is entitled to special weight.[13] The Board finds that Dr. Majzoub provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record including the June 25, 2008 MRI scan and his examination findings. Dr. Majzoub's opinion that the cervical spine surgery was not medically warranted is entitled to special weight and represents the weight of the evidence.[14]

While appellant submitted an October 10, 2008 report in which Dr. Curtis advised that appellant reported that this condition had worsened, the physician did not address the requested surgical procedure and recommended referral to a physiatrist. Dr. Curtis was on one side of the conflict in medical evidence resolved by Dr. Majzoub. His additional report did not address the issue relevant to this appeal and is insufficient to overcome the weight accorded to the impartial medical specialist's report.[15] In his March 4 and April 3, 2009 reports, Dr. Liu did not discuss the need for surgery. His reports are therefore not relevant to the issue in this case. The only limitation on the Office authority is approving or disapproving service under the Act is one of reasonableness.[16] In the instant case, appellant requested surgery. The Office obtained an independent medical examination through Dr. Majzoub who clearly found the surgery unnecessary. It therefore had sufficient evidence upon which it made its decision to deny surgery, and did not abuse its discretion.[17]

CONCLUSION

The Board finds that the Office properly exercised its discretion when it denied authorization for the recommended surgical procedure to appellant's cervical spine.

[12] *R.C., supra* note 8.

[13] *V.G., supra* note 11.

[14] *Id.*

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

[16] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[17] *R.C., supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 20, 2009 and October 10, 2008 be affirmed.

Issued: March 18, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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