

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

J.Z., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 10-657
Issued: November 2, 2010**

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 January 13, 2010 appellant filed a timely appeal from a December 14, 2009 merit 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 abused its discretion by denying authorization for cervical fusion surgery.

FACTUAL HISTORY

On August 18, 2004 appellant, then a 47-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 17, 2004 she was pushing a bulk mail container and felt a "pop" in her neck. The Office accepted the claim for cervical and trapezius strain. Appellant received compensation for wage loss from October 3 to November 2, 2004 and returned to a light-duty position.

In a form report dated February 15, 2006, Dr. Faisal Albanna, the attending neurosurgeon, requested authorization for an anterior cervical discectomy fusion at C3-7. The Office referred appellant for a second opinion examination by Dr. Donald Brancato, an orthopedic surgeon. In a report dated March 2, 2006, Dr. Brancato provided a history of injury and results on examination. With respect to the cervical spine, he opined that any cervical strain from the August 17, 2004 injury had resolved and appellant did not have a residual employment injury. As to the proposed cervical surgery, Dr. Brancato advised that any surgery would not be related to the August 17, 2004 employment injury.

In a report dated March 3, 2006, Dr. Albanna stated the diagnosis of cervical spondylosis was secondary to osteophyte formation. He noted that, although the osteophyte condition was preexisting, it was asymptomatic prior to the August 17, 2004 injury and was most likely aggravated by the employment injury.

The Office found a conflict in medical opinion between Dr. Albanna and Dr. Brancato. Appellant was referred to Dr. James Emanuel, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated May 1, 2006, Dr. Emanuel reviewed a history of injury and medical treatment and results on examination. He diagnosed degenerative disc disease C4-7. Dr. Emanuel stated, "The patient may have sustained a cervical neck strain as the result of the August 17, 2004 injury, but I do not believe by the nature of that injury that it altered the natural course of the underlying significant degenerative changes noted in the cervical spine by x-rays, CAT scan, myelogram and MRI scan." With respect to the need for surgery, Dr. Emanuel reported that the examination was exaggerated and inconsistent. He stated that there was abundant evidence that degenerative changes existed at the time of the August 17, 2004 injury and he could not relate the need for surgery to the employment injury.

The record establishes that appellant underwent cervical fusion surgery on August 3, 2006. By report dated August 12, 2007, an Office medical adviser reviewed the medical evidence and opined that the cervical surgery was not necessitated by the employment injury.

In a decision dated August 27, 2007, the Office denied authorization for the cervical surgery.

By letter dated September 17, 2007, appellant requested reconsideration, arguing that Dr. Albanna's opinion should be the weight of the medical evidence. By decisions dated October 12, 2007 and April 18, 2008, the Office denied merit review of the claim.

Appellant again requested reconsideration and submitted an August 11, 2008 report from Dr. Albanna, who stated that he disagreed with Dr. Emanuel. Dr. Albanna opined that the August 17, 2004 employment incident aggravated appellant's condition and her complaints were not a natural progression of the underlying degenerative disease.

In a September 19, 2008 decision, the Office denied modification of its prior decisions.

By letter dated September 17, 2009, appellant requested reconsideration. In a September 11, 2009 report, Dr. Naseem Shekhani, a physiatrist, provided results on examination and diagnosed cervicalgia. He stated, "Based on medical records and history and examination of

the rendered incidence of August 17, 2004 is the prevailing factor in causing the surgery for the preexisting condition of an occupational condition that was aggravated by the duties of her job description at that time.”

By decision dated December 14, 2009, the Office denied modification of its decisions denying authorization for appellant’s cervical injury.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees’ Compensation Act provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which the Office, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.¹ In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.² The Office has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office’s authority is that of reasonableness.³

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁴ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁵ Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.⁶

It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁷

¹ 5 U.S.C. § 8103(a).

² *Dale E. Jones*, 48 ECAB 648, 649 (1997).

³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

⁴ *See Debra S. King*, 44 ECAB 203, 209 (1992).

⁵ *Id.*; *see also Bertha L. Arnold*, 38 ECAB 282 (1986).

⁶ *See Cathy B. Millin*, 51 ECAB 331, 333 (2000).

⁷ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

ANALYSIS

In the present case, the Office found a conflict under 5 U.S.C. § 8123(a) as to whether the recommended cervical surgery should be authorized.⁸ Dr. Albanna, the attending neurosurgeon, recommended a cervical discectomy fusion surgery for treatment of the August 17, 2004 employment injury. Dr. Brancato, a second opinion physician, opined that the employment injury had resolved and that the proposed surgery was not related to the employment injury.

To resolve the conflict, appellant was referred to Dr. Emanuel, who provided a rationalized medical opinion on the issue. Dr. Emanuel stated there was abundant evidence that a degenerative condition existed on August 17, 2004. He found that the employment injury was a strain that did not alter the underlying degenerative disease process. He noted an exaggerated and inconsistent examination. Dr. Emanuel found that the proposed surgery was not warranted by the employment injury.

As noted, a rationalized medical opinion from a referee physician is entitled to special weight. The Board finds Dr. Emanuel's opinion is entitled to special weight and represents the weight of medical evidence in this case. Dr. Albanna submitted a supplemental report that he disagreed with Dr. Emanuel, but Dr. Albanna was on one side of the conflict and his report is not sufficient to overcome the weight of the referee physician.⁹ Appellant also submitted a report from Dr. Shekhani dated September 11, 2009. Dr. Shekhani did not provide a complete and accurate history or a fully rationalized medical opinion relating the cervical surgery to the August 17, 2004 employment injury. He referred to the August 17, 2004 incident, but also refers to an aggravation by job duties and "the preexisting condition of an occupational condition" without providing additional explanation.

The Office has discretion in authorizing surgery. Based on the weight of the medical evidence, as represented by Dr. Emanuel, the Office did not abuse its discretion by denying authorization for cervical surgery under 5 U.S.C. § 8103(a).

CONCLUSION

The Board finds the Office properly denied authorization for appellant's cervical fusion surgery.

⁸ 5 U.S.C. § 8123(a) provides that, if there is a 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 the 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. 20 C.F.R. § 10.321.

⁹ Additional reports from a physician on one side of the conflict that is properly resolved by an referee physician are generally insufficient overcome the weight accorded the referee's report or create a new conflict. *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 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