United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 10-939**
	)	**Issued: November 23, 2010**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Cherry Point, NJ, Employer	)	

Appearances:
Appellant, pro se
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 February 24, 2010 appellant filed a timely appeal from the January 13, 2010 merit decision of the Office of Workers' Compensation Programs 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 appellant met his burden of proof to establish that the low back surgery for which he requested authorization was necessary to treat his accepted employment injuries.

FACTUAL HISTORY

In early 2009, the Office accepted that appellant, then a 55-year-old hoist mechanic, sustained aggravation of a lumbar strain and aggravation of degenerative disc disease at L3-4 and

L4-5 due to the repetitive duties of his job.[1] Appellant performed limited-duty work for the employing establishment and received compensation from the Office for periods of disability.

The findings of May 7, 2009 magnetic resonance imaging (MRI) scan testing of appellant's lumbar spine was interpreted by a radiological physician as showing lumbar spondylosis at L3-4, L4-5 and L5-S1 without significant interval change. Broad-based disc bulges were observed at L3-4, L4-5 and L5-S1 with mild bilateral foraminal narrowing.

In a May 26, 2009 report, Dr. Brian J. Battersby, Jr., an attending Board-certified orthopedic surgeon, advised that appellant presented with complaints of left-sided lumbar spasms, left-sided lumbar pain, posterior lumbar spasms and posterior lumbar pain. Physical examination revealed moderate generalized tenderness and moderate restricted motion in the lumbar spine, positive straight leg raising testing in both legs and 4/5 strength in the tibialis anterior in both feet. Dr. Battersby diagnosed lumbar strain and sprain, degenerative lumbar disc disease and lumbago and recommended lumbar decompression surgery at L2, L3-4 and L5.

In July 2009, the Office received a request for authorization for low back disc surgery at L2, L3-4 and L5 including spinal disc surgery add-on, lumbar spine fusion, insertion of spine fixation device and application of a spine prosthetic device. On July 31, 2009 an Office medical adviser noted that he was unable to recommend that authorization be given for the treatment in question. In an August 4, 2009 letter, the Office requested that appellant submit additional evidence in support of his request for authorization for surgery.

On August 18, 2009 Dr. Battersby stated that appellant risked permanent damage if his condition was not taken care of very soon. The physical examination findings now showed negative straight leg raising testing results on the left. On August 27, 2009 Dr. Battersby stated that MRI scan test findings showed "severe spinal stenosis, nearly 100 percent occlusion."

In a September 14, 2009 report, Dr. Battersby stated that appellant's low back symptoms had been consistent since his original injury was accepted by the Office. He noted that appellant had low back disc disease with radicular symptoms and that his symptoms had increased over the years to the point that his right leg showed significant radicular symptoms including weakness across the hip, knee and ankle, decreased sensation to sharp and light touch and pain in the lower back, which radiated down the leg. The pain was significant and caused an antalgic gait. Dr. Battersby stated:

> "The surgery should improve [appellant's] quality of life. However, no surgery is guaranteed. Prognosis at this time is good. However, since [w]orkman's [c]ompensation has delayed his treatment for so long, it is quite possible that the surgery will not resolve his symptoms and they will be chronic in nature…. The surgery should help get [appellant] back to his mechanic-type job and hopefully will relieve his pain…. It is necessary because there is no other treatment option for him other than surgery. Symptoms are such that they are progressing in nature and can potentially continue to decrease his quality of life. The results should

[1] Appellant indicated that he first became award of his condition on November 12, 2007.

hopefully improve [appellant's] quality of life, decrease his pain and increase his ability to get back to a regular full-time job with very little to no limitations."

On September 24, 2009 another Office medical adviser found that the expected benefits of the proposed surgery remained unclear and therefore recommended that a second opinion physician address the matter.

The Office referred appellant to Dr. James Maultsby, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding his condition. It asked Dr. Maultsby to answer various questions regarding the existence of work-related residuals and the need for surgery.

In a December 4, 2009 report with a December 5, 2009 addendum, Dr. Maultsby discussed appellant's medical history and reported findings on physical examination. He diagnosed degenerative arthritis of the lumbosacral spine with some degree of stenosis of a mild degree.[2] Dr. Maultsby stated that it was his impression that appellant's current condition, including a mild degree of spinal stenosis, were present at the time he injured himself in 2007. Appellant's condition was aggravated by the activity at work and that the aggravation had not yet subsided. He continued to require medical treatment for his back condition.[3] Dr. Maultsby responded to a question the Office asked regarding whether the proposed surgery of lumbar fusion at L1-2, L3-4 and L4-5 was recommended for treatment of the conditions he believed were caused or aggravated by the work injuries sustained in 2007. He stated:

"Definitely not. The medical records that were reviewed from Dr. Battersby's office appeared to be even another person, as his physical findings definitely were not the same as physical therapy findings recently observed or dictated by [Dr.] Battersby. That is, [appellant] had negative straight leg raising tests. The MRI [scan] report did not indicate anything but a mild degree of spinal stenosis; certainly not the 100 percent. I also feel that [appellant's] condition is not being placed at risk because of delayed and proposed surgery…."

In a January 13, 2010 decision, the Office denied appellant's request for authorization for low back surgery. It found that he had not submitted sufficient medical evidence to establish that the requested surgery was necessary to treat his accepted employment injuries and stated that the weight of medical evidence rested with Dr. Maultsby regarding whether surgery was necessary to treat a work-related condition.

[2] Dr. Maultsby also diagnosed diabetes mellitus with possible diabetic neuritis and status postoperative prostatectomy and transurethral resection of a relatively asymptomatic nature.

[3] Dr. Maultsby noted that electromyogram and nerve conduction studies obtained on December 4, 2009 showed a mild degree of radiculopathy in both legs probably due to L5-S1 stenosis but possibly due to diabetes. A December 4, 2009 functional capacity evaluation showed self-limited behavior on a third of the task but also showed the ability to perform sedentary work. Dr. Maultsby completed a form indicating that appellant could work with restrictions.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation."[4] In order to be entitled to reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[5] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[6]

ANALYSIS

The Office accepted that appellant sustained aggravation of a lumbar strain and aggravation of degenerative disc disease at L3-4 and L4-5 due to the repetitive duties of his job. In a May 26, 2009 report, Dr. Battersby, an attending Board-certified orthopedic surgeon, diagnosed lumbar strain and sprain, degenerative lumbar disc disease and lumbago and recommended lumbar decompression surgery at L2, L3-4 and L5. In July 2009, the Office received a request for the authorization for low back disc surgery at L2, L3-4 and L5, including spinal disc surgery add-on, lumbar spine fusion, insertion of spine fixation device and application of a spine prosthetic device.

The Board finds that appellant has not submitted sufficient medical evidence to establish that the requested surgery was necessary to treat his accepted employment injuries.

In a September 14, 2009 report, Dr. Battersby stated that appellant's low back symptoms had been consistent since his original injury was accepted by the Office and had increased over time. He noted that appellant had low back disc disease with radicular symptoms and stated that his right leg showed significant radicular symptoms including weakness across the hip, knee and ankle, decreased sensation to sharp and light touch and pain in the lower back, which radiated down the leg. Dr. Battersby indicated that other treatments had been exhausted and posited that surgery might significantly improve appellant's condition.

Although Dr. Battersby suggested that appellant's current condition and need for surgery were related to his work-related condition, he did not provide a probative, rationalized opinion addressing how the requested low back surgery was necessary to treat appellant's accepted employment injuries. He did not describe the accepted employment injuries in any detail or explain how these aggravation-type injuries were still producing significant residuals. Dr. Battersby did not address how the accepted aggravation of degenerative disc disease would cause or contribute to the need for surgery to correct spinal stenosis residuals that would contribute to the need for surgery. He described appellant as having significant radicular

[4] 5 U.S.C. § 8103.

[5] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[6] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

symptoms but his assessment of his condition seems to be out of proportion to the findings of diagnostic testing. For example, the findings of May 7, 2009 MRI scan testing of appellant's lumbar spine was interpreted by a radiological physician as showing lumbar spondylosis at L3-4, L4-5 and L5-S1 without significant interval change. However, on August 27, 2009 Dr. Battersby stated that MRI scan test findings showed "severe spinal stenosis, nearly 100 percent occlusion."[7] He noted in May 2009 that appellant reported mostly left-sided symptoms, but in September 2009 he found that appellant reported mostly right-sided symptoms.

The record contains evidence showing that the requested surgery is not recommended or deemed to be necessary to treat the accepted employment injuries. In a December 4, 2009 report with a December 5, 2009 addendum, Dr. Maultsby, a Board-certified orthopedic surgeon serving as an Office referral physician, diagnosed degenerative arthritis of the lumbosacral spine with some degree of stenosis of a mild degree. He indicated that appellant still had residuals of the work-related aggravation of his underlying mild spinal stenosis. However, Dr. Maultsby determined that the proposed surgery of lumbar fusion at L1-2, L3-4 and L4-5 was not recommended for treatment of the conditions he believed were caused or aggravated by the work injuries sustained in 2007. He emphasized the limited findings on diagnostic testing and physical examination and posited that these showed that the surgery was not necessary. Dr. Maultsby pointed out the discrepancy between the severity of appellant's low back condition shown on MRI scan testing, *i.e.*, disc bulges without significant interval change to the severity of the condition described by Dr. Battersby, as 100 percent stenosis occlusion.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that the low back surgery for which he requested authorization was necessary to treat his accepted employment injuries.

[7] It does not appear that additional testing was performed between May 7 and August 27, 2009.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2010 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 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