United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 10-1067**
	)	**Issued: January 18, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2010 appellant filed a timely appeal from the November 30, 2009 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.[1]

ISSUE

The issue is whether appellant met her burden of proof to show that her requested back surgery was necessary to treat her accepted employment injuries.

FACTUAL HISTORY

In September 2007 the Office accepted that appellant, then a 53-year-old machine clerk, sustained lumbar degenerative disc disease and lumbar radiculopathy due to her repetitive job

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

duties, including lifting heavy mail trays.[2] It paid appellant compensation for periods of disability.[3]

Appellant received conservative treatment from Dr. Robert M. Drisko, II, a Board-certified orthopedic surgeon, including periodic epidural injections in her low back. She underwent regular physical therapy which included disc decompression through traction, but she reported that the decompression therapy did not help her very much. In early 2008 Dr. Drisko stated that magnetic resonance imaging (MRI) scan and computerized tomography (CT) testing showed mild lateral recess stenosis at L3-4, L4-5 and L5-S1, but that electromyogram (EMG) and nerve conduction velocity (NCV) testing of the lower extremities was negative for radiculopathy.[4] Around this time, appellant reported to Dr. Drisko that the epidural injections had not helped her at all. She reported during some visits to Dr. Drisko that she had pain radiating from her back into her left leg and during other visits she reported pain radiating from her back into both legs, more so on the left than the right.

In an April 29, 2008 report, Dr. Drisko recommended that appellant undergo an X-stop lumbar surgical procedure at L3-4, L4-5 and L5-S1.[5] He indicated that appellant fit the criteria for the procedure because she was over 50, her pain pretty much went away when she sat down and she had stenosis at L3-4, L4-5 and L5-S1.[6] Dr. Drisko noted that appellant did not have advanced osteoporosis and stated:

> "[Appellant] does understand that there is a possibility that it would not work and she also understands that her recovery would be a lot more rapid than if she underwent a traditional decompression. Peer review journals recently have shown that at [two] years' follow-up, the procedure can be efficacious in at least 70 percent of people. This is probably as good as people who undergo a decompression. Therefore at this point, we will make a recommendation that she undergo the X-stop procedure."[7]

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[2] Appellant was working in a limited-duty position at the time due to prior work injuries, including mild left shoulder impingement syndrome and permanent aggravation of herniated discs at C6-7. Her claim was also accepted for right carpal tunnel syndrome.

[3] Appellant began working in a limited-duty position for the employing establishment for four hours per week.

[4] The record contains the findings of MRI scan , CT, EMG and NCV testing from April, July and August 2007. The findings of July 30, 2007 CT testing identified neural foraminal stenosis at L1-2 and bilateral mild stenosis at L4-5 with varying degrees of foraminal and lateral recess encroachment at L2-3, L3-4 and L5-S1. The findings of April 18, 2007 MRI scan testing showed mild bilateral foraminal stenosis at L1-2 and L4-5 and moderate to severe left foraminal stenosis at L5-S1. In April 2008 Dr. Arthur B. Jenny, an attending neurosurgeon, indicated that the MRI scan testing was taken at an improper angle to properly evaluate the L4-5 and L5-S1 areas. The findings of August 16, 2007 EMG and NCV testing showed "no obvious evidence of focal/generalized neuropathy" or "lumbosacral radiculopathy."

[5] The X-stop procedure involves inserting devices into the back of the spine to prevent a patient from bending too far backward at the narrowed segment, a position that for patients with spinal stenosis can cause leg pain and/or low back pain.

[6] Dr. Drisko stated that the stenosis was lesser at L5-S1 than at L3-4 and L4-5.

[7] Dr. Drisko submitted a form to the Office requesting authorization for the surgery.

On July 5, 2008 Dr. Daniel D. Zimmerman, a Board-certified internist who served as an Office medical adviser, stated that he had reviewed the evidence of file and found that there were insufficient confirmed findings to support approval of the requested X-stop procedure. He noted that the diagnostic testing did not show central canal stenosis in the low back and that MRI scan testing was performed at an improper angle to assess the L4-5 and L5-S1 areas. Dr. Zimmerman asserted that Dr. Drisko's progress notes were confusing with regard to positive and negative findings and lacked adequate examination findings to support the diagnostic abnormalities implied by diagnostic testing.

In an August 18, 2008 report, Dr. Ernest J. Hanson, a Board-certified neurosurgeon who served as an Office referral physician, indicated that on examination appellant demonstrated prominent signs of depression. In reporting her history, appellant stated that her back pain initially started in the right paraspinal and right hip areas. Dr. Hanson indicated that the physical examination showed no restriction of lumbar flexion, extension or lateral bending and that the worst pain responses were elicited in the right leg. Straight leg raising was to 90 degrees bilaterally, Lasegue's maneuver was negative bilaterally and sensory testing was reported as entirely normal. Dr. Hanson opined that sufficient evidence was not present to justify the X-stop surgery. Appellant's history was not consistent with compression of the cauda equine due to postural alteration in spinal canal diameter. Dr. Hanson further advised that, based on his review of the MRI scan and CT reports, there was no indication of clear-cut lumbar spinal stenosis. He noted that the left-sided diagnostic testing findings seen at L5-S1 were inconsistent with appellant's current presentation of mostly right-sided leg symptoms. Dr. Hanson stated that appellant's body mass index of 38.9 suggested an elevated risk of surgical complications which must be considered.

In an October 8, 2008 report, Dr. Hanson further explained his reasoning for not recommending the requested X-stop surgery. He discussed the inconsistencies found on his review of the medical records as well as his clinical examination of appellant. Dr. Hanson indicated that on his clinical examination appellant specifically complained of back pain and right leg pain, but these complaints were inconsistent with her complaints to Dr. Drisko and other physicians who documented complaints of back pain and left leg pain. Dr. Hanson stated, "In my opinion the totality of the clinical presentation, history and course of appellant's illness is not congruent or consistent over time and her symptoms and findings on examination are not corroborated by the anatomy and pathology present in her MRI scan and lumbar CT scan."[8] The findings of an October 21, 2008 myelogram showed disc protrusion and disc space narrowing, left greater than right, at L5-S1.

In an October 23, 2008 report, Dr. Drisko stated that appellant reported that her symptoms "pretty much" went away when she was sitting. He continued to recommend X-stop surgery.

[8] Appellant had questioned Dr. Hanson's qualifications and he responded by providing an explanation for why he was disciplined by the Kansas State Board of Healing Arts. Dr. Hanson asserted that the action had nothing to do with his competence to make medical evaluations. The record contains a June 2006 document in which the Kansas State Board of Healing Arts indicated that he was being censured and fined for misrepresentations regarding the surrender of his Missouri medical license and the surrender of surgical privileges at a Kansas hospital. The document provides no indication that Dr. Hanson was not fully qualified to provide medical opinions.

The Office determined that there was a conflict in the medical opinion between Dr. Drisko on the one hand and Dr. Zimmerman and Dr. Hanson regarding the need for the X-stop surgery and referred appellant to Dr. Dale D. Dalenberg, a Board-certified orthopedic surgeon, for examination and an impartial medical examination.

In a January 30, 2009 report, Dr. Dalenberg described appellant's medical history and reported that on examination she had normal range of motion of the lumbar spine, she stood with an erect posture as viewed in the coronal and sagittal planes and neurological examination was unremarkable. He indicated that based on his clinical examination and review of the medical records appellant had a diffuse lumbar spondylosis condition but did not have significant lumbar stenosis, the diagnosis for which the X-stop procedure was indicated. Appellant's disease process was mild in nature and L5-S1 was the level most responsible for her symptoms. Dr. Dalenberg indicated that his working diagnosis would be that appellant's symptoms arise from a degenerative L5-S1 disc with encroachment on the left S1 nerve root, giving rise to some degree of right lower extremity radicular pain. He stated, "Her symptom complex is partially suggestive of discogenic pain (her sitting tolerance, as reported by the claimant, is only 30 minutes) and partially suggestive of claudication pain secondary to stenosis involving at least that one nerve root (given her relief with forward flexion and sitting)."

Dr. Dalenberg concluded that X-stop procedure was not necessary for treatment of appellant's work-related injuries. He opined that there was insufficient radiographic evidence that appellant had any notable stenosis and indicated that the limited stenosis that appellant might have is in an area (L5-S1) that is difficult to treat with the X-stop procedure. Dr. Dalenberg stated that a significant portion of appellant's symptomatology was discogenic and explained that the X-stop procedure was not intended for treatment of this type of condition. He further stated that based on the fact that appellant had no relief from the prior lumbar epidurals it was hard to believe that indirect nerve decompression with the X-stop procedure would afford any relief. Dr. Dalenberg indicated that discography testing might help determine whether L5-S1 was really the pain generator level. If L5-S1 really was the pain generator level, surgical decompression, instrumentation and fusion might be appropriate. He stated, "Any surgery would be controversial in this patient, but the X-stop alone is likely to produce disappointing results."

In a February 9, 2009 decision, the Office denied appellant's request for authorization of X-stop surgery on the grounds that there was insufficient medical evidence to show that the surgery was necessary to treat her accepted employment injuries. It indicated that the weight of the medical opinion rested with the well-rationalized report of Dr. Dalenberg.

In a February 12, 2009 report, Dr. Drisko indicated that CT testing showed mild lateral recess stenosis at L3-4 and L4-5. He stated that appellant understood that the X-stop procedure might not work but posited that there was "really no down side if it does not work." In an April 20, 2009 report, Dr. Drisko stated that the April 18, 2007 MRI scan testing showed bilateral foraminal stenosis at L4-5 and L5-S1 with endplate osteophytic spurring at L5-S1 and noted that appellant had failed conservative treatment. He described the X-stop procedure and indicated that it had the advantage of being less intrusive than other surgical procedures. Dr. Drisko concluded that the X-stop procedure was "warranted, appropriate and medically necessary for this patient." Appellant submitted documents, including articles from periodicals, which described the X-stop procedure.

In a June 8, 2009 decision, the Office affirmed its February 9, 2009 decision indicating that the weight of the medical opinion continued to rest with the opinion of Dr. Dalenberg.

Appellant submitted additional documents which described the X-stop procedure. In an October 8, 2009 report, Dr. Drisko recommended that appellant undergo a Lynx fusion procedure, but he did not provide any further explanation of this recommendation.

In a November 30, 2009 decision, the Office affirmed its June 8, 2009 decision denying authorization for surgery.

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."[9] 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.[10] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[11]

Section 8123(a) of the Act provides in pertinent part: "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."[12] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[13] In situations where 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.[14]

ANALYSIS

The Office accepted in September 2007 that appellant sustained lumbar degenerative disc disease and lumbar radiculopathy due to her repetitive job duties. In April 2008 appellant requested authorization to have an X-stop procedure performed by Dr. Drisko, an attending Board-certified orthopedic surgeon. The procedure involves inserting devices into the back of

[9] 5 U.S.C. § 8103.

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

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

[12] 5 U.S.C. § 8123(a).

[13] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the spine to prevent bending too far backward at the narrowed segment. The Office denied authorization based on the opinion of Dr. Dalenberg, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

The Board finds that the Office properly determined that there was a conflict in the medical opinion between Dr. Drisko on the one hand and Dr. Zimmerman, a Board-certified internist who served as an Office medical adviser, and Dr. Hanson, a Board-certified neurosurgeon who served as an Office referral physician, on the issue of whether the requested X-stop surgery was necessary to treat appellant's accepted employment injuries.[15] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Dalenberg for an impartial medical examination and an opinion on the matter.[16]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Dalenberg, the impartial medical specialist selected to resolve the conflict in the medical opinion.[17] The January 30, 2009 report of Dr. Dalenberg establishes that the requested X-stop procedure is not necessary to treat appellant's accepted employment injuries.

In his January 30, 2009 report, Dr. Dalenberg indicated that based on his clinical examination and review of the medical records appellant had a diffuse lumbar spondylosis condition but did not have any notable lumbar stenosis, the diagnosis for which the X-stop procedure was indicated. He characterized appellant's disease process as mild in nature noting that her symptoms most likely arise from a degenerative L5-S1 disc with encroachment on the left S1 nerve root, giving rise to some degree of right lower extremity radicular pain. Dr. Dalenberg concluded that this type of condition was not the type of medical presentation which was appropriate for X-stop surgery.

The Board has carefully reviewed the opinion of Dr. Dalenberg and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Dalenberg provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[18] He provided medical rationale for his opinion by explaining that the limited stenosis that appellant might have is at L5-S1, an area that is difficult to treat with the X-stop procedure.[19] Dr. Dalenberg stated that a significant portion of appellant's symptomatology is discogenic and explained that the X-stop procedure is not intended for treatment of this type of condition. He also pointed out that as

[15] In an April 29, 2008 report, Dr. Drisko recommended that appellant undergo an X-stop surgical procedure at L3-4, L4-5 and L5-S1. In contrast, Dr. Zimmerman indicated in a July 5, 2008 report that Dr. Drisko had not adequately supported the need for the procedure. In August 18 and October 8, 2008 reports, Dr. Hanson determined that the X-stop procedure was not appropriate for appellant's condition.

[16] *See supra* notes 12 and 13.

[17] *See supra* note 14.

[18] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[19] Dr. Dalenberg indicated that the various diagnostic tests showed conflicting findings regarding the existence and extent of stenosis in appellant's back. None of the testing showed central canal stenosis and an attending neurosurgeon stated that the April 2007 MRI scan testing was taken at an improper angle to properly evaluate the L4-5 and L5-S1 areas.

appellant reported having no relief from lumbar epidurals it was hard to believe that indirect nerve decompression with the X-stop procedure would afford any relief.[20]

For these reasons, the Office properly denied authorization for the X-stop procedure requested by appellant.[21]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to show that her requested back surgery was necessary to treat her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] After the initial denial of authorization for X-stop surgery, appellant submitted additional reports in which Dr. Drisko continued to recommend the procedure. However, as Dr. Drisko was on one side of the conflict, his additional reports are essentially duplicative of his stated opinion and are insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001). Appellant submitted periodical articles about the X-stop procedure, but such evidence of general application would be of little evidentiary value in establishing the need for the requested surgery in appellant's case. *See William C. Bush*, 40 ECAB 1064, 1075 (1989).

[21] Appellant submitted additional evidence, after the Office's November 30, 2009 decision, including a December 14, 2009 report of Dr. Drisko and periodical materials regarding the X-stop procedure. However, the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).