United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 11-2053**
	)	**Issued: August 13, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, St. Louis, MO, Employer	)	

Appearances:
Dale M. Weppner, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 14, 2011 appellant, through her attorney, filed a timely appeal from a March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying authorization for surgery. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 OWCP abused its discretion by denying authorization for cervical surgery, a cervical collar and a bone stimulator.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's attorney contends that OWCP's decision is erroneous and failed to take into account the medical evidence of disc pathology at the surgical levels, which was attributed to the accepted employment injury.

FACTUAL HISTORY

On June 3, 2002 appellant, then a 29-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 12, 2002 she sustained a neck strain after a patient kicked her in the chin at work. OWCP accepted the claim for cervical neck strain. Appellant received compensation for wage loss from October 21, 2002 to January 9, 2003 and returned to a light-duty position.

A May 12, 2002 magnetic resonance imaging (MRI) scan of the cervical spine showed slightly reduced disc space at C4-5.

A July 15, 2002 MRI scan of the cervical spine revealed degenerative disc disease and cervical spondylosis. On axial images at C3-4 and C5-6 there was mild disc bulge without herniation or canal stenosis. At C4-5 there was a moderate disc bulge with posterior osteophytes but not cord compression or canal stenosis.

In a November 25, 2002 report, Dr. John P. Metzler, a Board-certified physical medicine and rehabilitation physician, diagnosed C4-5 central disc protrusion/herniation and advised appellant to continue with her light-duty work. He reported discussing the possibility of a referral for surgical evaluation.

On May 23, 2003 Dr. Metzler reported that appellant was pregnant and if she had persistent symptoms beyond that time, he would consider evaluation for further injections *versus* surgical referral.

In a June 9, 2003 report, Dr. Metzler reiterated his diagnosis of C4-5 disc protrusion and indicated that appellant had been experiencing increased symptoms in her neck. He opined that her symptoms were directly related to her employment injury and in no way related to her pregnancy. Dr. Metzler stated that, as appellant was pregnant, she was not a candidate for a surgical procedure, but would be reevaluated post pregnancy if physical therapy was not successful.

On April 9, 2004 Dr. Metzler diagnosed history of a C4-5 disc protrusion and stated that he had not seen appellant since May 2003. Appellant reported neck pain that radiated down into her right shoulder and into her right arm. Dr. Metzler recommended an updated MRI scan and referred her for evaluation for surgical intervention.

Appellant submitted an April 28, 2005 x-ray of the cervical spine which revealed loss of cervical lordosis in the presence of degenerative disc disease at C4-5 with hypertrophic spurring and narrowing of the right neural foramen at C4-5.

In a June 7, 2006 report, Dr. Robert P. Poetz, an osteopath Board-certified in family medicine, diagnosed preexisting cervical degenerative disc disease and cervical strain with

possible C4-5 and C5-6 disc protrusion and exacerbation of cervical degenerative disc disease on May 12, 2002. He opined that appellant's prognosis was guarded due to the length of time elapsed since the injury and the continuance of pain in all areas of symptomology. Dr. Poetz recommended surgical intervention if indicated.

In an April 19, 2010 report, Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon, reviewed appellant's medical records and conducted a physical examination. Appellant's range of motion of her cervical spine was markedly limited and she had a positive Spurling sign. X-rays revealed spondylitic changes most severe at C4-5 and C5-6. Dr. Mirkin diagnosed cervical spondylosis and indicated that she first developed symptomatology when she was kicked in the face at work. He recommended a new MRI scan and indicated that she may be a candidate for further intervention as she had had symptoms for many years.

An April 26, 2010 MRI scan of the cervical spine revealed C3-4 and C4-5 disc bulging without spinal canal stenosis, C5-6 central disc protrusion with mild spinal canal stenosis and moderate left neural foraminal narrowing and C6-7 minimal disc bulge.

On April 28, 2010 Dr. Mirkin indicated that appellant's MRI scan showed severe spondylosis with stenosis and foraminal narrowing at C5-6. She had less severe disease at other levels, most notably C4-5. Dr. Mirkin opined that appellant had to consider living with the condition or having a two-level decompression, instrumentation and fusion at C4-5-6.

In a June 8, 2010 report, Dr. Mirkin reviewed appellant's diagnostic studies and opined that her condition of cervical radiculopathy was causally related to the May 12, 2002 employment injury.

In a July 28, 2010 letter appellant, through her attorney, requested authorization of cervical spinal surgery and utilization of a spinal stimulator. She stated that she had not received medical treatment for the period May 3, 2006 through April 18, 2010 and had lived with her condition hoping not to need surgery, but decided to proceed with treatment after consulting with Dr. Mirkin.

By letter dated August 19, 2010, OWCP referred the case to an OWCP medical adviser to review appellant's request for cervical spinal surgery and spinal stimulator.

By report dated August 20, 2010, an OWCP medical adviser reviewed the medical evidence and opined that cervical surgery, a cervical collar and a bone stimulator were not necessitated by the employment injury. He noted that appellant was free of neck pain based on physical therapy reports of July 22 and 29, 2002, that following a July 15, 2002 MRI scan appellant underwent pain management procedures in 2002 and 2003 which ceased in 2004 and that it was not until April 19, 2010 that she had a "markedly positive Spurling sign" resulting from a very brief examination by Dr. Mirkin. The medical adviser went on to say that the MRI scan showed cervical degenerative changes incidental to but did not correlate with appellant's symptoms at that time. According to the available documents, the medical adviser further noted that appellant did not receive any further treatment until 2010.

By decision dated September 24, 2010, OWCP denied authorization for a cervical collar, a bone stimulator and two-level decompression, instrumentation and fusion at C4-5-6 levels. It

noted that her case was accepted only for cervical strain and found that the medical evidence of record was not sufficient to establish that her current cervical condition was causally related to the May 12, 2002 employment injury.

On October 13, 2010 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. She submitted an October 20, 2010 report by Dr. Mirkin who opined that there was a causal connection between the May 12, 2002 employment injury and appellant's current condition. Appellant indicated that she developed significant symptomatology on that date and had persisted to the present. She also indicated that the symptoms did improve for a short period of time and there was a period when she was out for pregnancy and her treatment stopped before her neck pain recurred. Dr. Mirkin explained that the radiographs he reviewed indicated the pathology that would cause appellant's symptomatology. He opined that her symptomatology was due to the spondylosis that was directly aggravated by the employment injury and the fact that she had no medical treatment for several years had no relationship to causal relationship.

A hearing was held on January 19, 2011 before an OWCP hearing representative. Appellant provided testimony and the hearing representative allotted 30 days for the submission of additional evidence.

Subsequently, appellant submitted a narrative statement. In a January 27, 2011 report, Dr. Mirkin opined that the indication for surgery was cervical spondylosis which was noted on the x-rays. He reiterated his opinion that there was a significant aggravation of appellant's underlying disc disease on May 12, 2002 after significant trauma to her cervical spine. Dr. Mirkin stated that he would agree that she did have some preexisting degenerative disc disease, but it was not until the employment injury when she was struck in the face that she became symptomatic. He noted that appellant acknowledged that her symptoms improved for a short period of time but they recurred and became worse over time.

By decision dated March 15, 2011, an OWCP hearing representative affirmed the September 24, 2010 decision denying the requested cervical surgery.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, 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.[2] In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[3] OWCP has administrative discretion in choosing the means to

[2] 5 U.S.C. § 8103(a).

[3] *See Dale E. Jones*, 48 ECAB 648, 649 (1997).

achieve this goal and the only limitation on its authority is that of reasonableness.[4] 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.[5]

While OWCP 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.[6] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[7] 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 OWCP to authorize payment.[8]

ANALYSIS

OWCP accepted that appellant sustained cervical neck strain as a result of a May 12, 2002 employment injury. In a decision dated September 24, 2010, it denied authorization for a cervical collar, a bone stimulator and two-level decompression, instrumentation and fusion at C4-5-6 levels. By decision dated March 15, 2011, an OWCP hearing representative affirmed the September 24, 2010 decision. The Board finds that OWCP did not abuse its discretion by denying authorization for cervical surgery, a cervical collar and a bone stimulator.

Upon physical examination on April 19, 2010, Dr. Mirkin found markedly limited range of motion of the cervical spine was and a positive Spurling sign. X-rays revealed spondylitic changes most severe at C4-5 and C5-6. Dr. Mirkin diagnosed cervical spondylosis and stated that appellant first developed symptomatology when she was kicked in the face at work. On April 28, 2010 Dr. Mirkin indicated that appellant's MRI scan showed severe spondylosis with stenosis and foraminal narrowing at C5-6. Appellant had less severe disease at other levels, most notably C4-5. Dr. Mirkin opined that she had to consider living with her condition or having a two-level decompression, instrumentation and fusion at C4-5-6. In a June 8, 2010 report, he reviewed appellant's diagnostic studies and opined that her condition of cervical radiculopathy was causally related to the May 12, 2002 employment injury. On August 20, 2010 an OWCP medical adviser reviewed appellant's medical history and found that cervical surgery, a cervical collar and a bone stimulator were not necessitated by the employment injury. He explained that all pain management treatments ceased in 2004, that appellant was not treated again for her

[4] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP 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).

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

[6] *See Kennett O. Collins, Jr.*, 55 ECAB 648 (2004); *Debra S. King*, 44 ECAB 203, 209 (1992).

[7] *Id.*; *see also M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[8] *See R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

cervical condition until April 19, 2010 when the positive Spurling sign was noted. The medical adviser stated that the degenerative changes found in the MRI scan of July 2002 did not correlate with appellant's symptoms at the time. On October 20, 2010 and January 27, 2011 Dr. Mirkin disagreed with the medical adviser and reiterated his prior opinion that there was a significant aggravation of appellant's underlying disc disease on May 12, 2002 after significant trauma to her cervical spine. The Board notes that the mere fact that appellant's preexisting degenerative disc disease became symptomatic following the May 12, 2002 employment injury, does not in and of itself establish a causal connection. The reports of Dr. Mirkin are not well rationalized as to how the accepted cervical strain aggravated or contributed to her cervical degenerative disease. He does not adequately address the gaps in medical treatment of record or explain how the mechanism of injury caused or aggravated the preexisting degenerative disease thereby necessitating surgery. The Board finds that his reports are speculative on the issue of causal relationship between the employment injury and the need for further medical treatment.

Appellant also submitted reports by Dr. Metzler and Dr. Poetz which date back to 2002 and 2006. As they are not relevant to appellant's medical status in 2010 when Dr. Mirkin recommended surgical intervention, the Board finds that they are not sufficient to support the need for surgery.

The Board finds that, based on the medical adviser's report, OWCP did not abuse its discretion when it denied authorization for cervical surgery, a cervical collar and a bone stimulator.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying authorization for cervical surgery, a cervical collar and a bone stimulator.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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