

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

C.J., Appellant)

and)

U.S. POSTAL SERVICE, FERN CREEK)
ANNEX, Louisville, KY, Employer)

Docket No. 11-962
Issued: January 13, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2011 appellant filed a timely appeal from the November 9, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying appellant's request for radiofrequency facet ablation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 in denying appellant's request for a radiofrequency facet ablation.

FACTUAL HISTORY

On July 1, 2006 appellant, then a 39-year-old casual carrier, filed a traumatic injury claim alleging that on June 29, 2006 she was in an employment-related motor vehicle accident when her vehicle was hit from behind, thereby injuring her lower back. On July 25, 2006 OWCP accepted her claim for a lumbar strain.

¹ 5 U.S.C. § 8101 *et seq.*

Appellant received treatment from Dr. David P. Rouben, a Board-certified orthopedic surgeon. In a May 20, 2010 report, Dr. Rouben noted that the facet injections that appellant had received gave her dramatic, complete, yet short-term relief, thereby affirming the interrelationship to her chronic persistent discomfort and pain as emanating from the facet joint and ligamentous neurologic structures therein. He concluded that based on medical probability it was his opinion that she had chronic facet inflammation at L4-L5 and L5-S1 bilaterally, that it was caused by the motor vehicle accident for which he has been treating her and that there was a chronic and persistent problem that necessitated an attempt at nonsurgical intervention in the form of facet ablation and chronic pain care by a pain care specialist.

OWCP referred this case to its medical adviser. In a response dated June 2, 2010, OWCP's medical adviser stated that a more secure diagnosis for appellant's condition would be facet osteoarthritis. He indicated that facet osteoarthritis is very common and universal after the fifties and sixties. The medical adviser indicated that the means to confirm that the facet is the site of origin of back pain is very questionable. He stated that recently published clinical trials showed that response to facet ablation is no better than a placebo and that the procedure should not be approved.

On June 30, 2010 Dr. Rouben noted that appellant participated in facet injections not only for diagnostic but also therapeutic reasons, and that the injections substantiated that her pain seemed to most notably emanate from the facets at the L4-L5 and L5-S1 levels. He indicated that, since appellant wished to avoid surgical options for as long as possible, he would recommend a radiofrequency facet ablation which has been established as a legitimate long-term treatment option for pain that has been shown to chronically and persistently emanate from arthritic facet joints or at least for chronically sprained and strained facet joints that do not seem to respond to other modes. Dr. Rouben indicated that, while appellant may have had a dormant, nondisabling condition prior to the motor vehicle accident of 2006, the accident directly and adversely affected the pain and inflammation of her facet joints, ligaments and capsules. He stated that radiofrequency facet ablation was "the most prudent, legitimate, and conservative mode of treatment" and that pursuant to literature would give appellant a 50 percent or greater chance of giving her long-term relief of discomfort and pain. In an August 30, 2010 report, Dr. Rouben requested that a pain specialist take over appellant's care as she needed stronger treatment for pain.

By decision dated November 9, 2010, OWCP denied authorization for the procedure facet ablation.

LEGAL PRECEDENT

Section 8103(a) of FECA (5 U.S.C. § 8103(a)), 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, and reduce the degree or the period of disability or aid in lessening the amount of monthly compensation. 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.² OWCP has administrative

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

discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.³

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.⁴ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁵

Section 8123(a) of FECA 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.⁶ 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination.⁷ 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.⁸

ANALYSIS

OWCP accepted that on June 29, 2006 appellant was in an employment-related motor vehicle accident and sustained a lumbar strain. Appellant's treating orthopedic surgeon, Dr. Rouben, indicated that appellant underwent facet injections for both diagnostic and therapeutic reasons. He indicated that these injections substantiated that appellant's pain emanated from the facets at the L4-L5 and L5-S1 levels. Dr. Rouben noted that appellant wished to avoid surgery for as long as possible, and recommended treatment with radiofrequency facet ablation which he considered to be a legitimate long-term treatment option when pain has been shown to be chronic and persistently emanated from either arthritic facet joints or chronically sprained and strained facet joints. He stated that appellant's employment-related accident directly and adversely affected the pain and inflammation in her joints, ligaments and capsules which have been substantiated to be the source of appellant's discomfort. Dr. Rouben concluded that radiofrequency facet ablation was the most prudent, legitimate and conservative mode of treatment and would give appellant a 50 percent or greater chance of giving her long-term relief of discomfort or pain. However, OWCP's medical adviser disagreed and questioned Dr. Rouben's findings, indicating that the means he used to confirm that the facet is the site of origin of back pain was questionable. He also stated that recently published clinical trials showed that response to facet ablation is no better than placebo and that the procedure should not

³ *Daniel J. Perea*, 42 ECAB 214, 221 (1990); *D.A.*, Docket No. 09-936 (issued January 13, 2010).

⁴ *See Dona M. Mahurin*, 54 ECAB 309 (2003); *see also Debra S. King*, 44 ECAB 203, 209 (1992).

⁵ *See Debra S. King*, *supra* note 4; *Bertha L. Arnold*, 38 ECAB 282 (1986).

⁶ 5 U.S.C. § 8123(a); *see S.R.*, Docket No. 09-2332 (issued August 16, 2010).

⁷ 20 C.F.R. § 10.321.

⁸ *V.G.*, 59 ECAB 635 (2008).

be approved. Based on the opinion of OWCP's medical adviser, OWCP denied appellant's request for facet ablation.

The Board finds that the case is not in posture for decision due to the conflict in medical opinions between appellant's treating physician, Dr. Rouben, and OWCP's medical adviser with regard to whether the requested facet ablation was a reasonable treatment for appellant's injuries that resulted from the employment-related motor vehicle accident.⁹ Because of this unresolved conflict in medical opinion, this case will be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision due to an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 13, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

⁹ See C.S., Docket No. 09-1613 (issued March 11, 2010).