

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

B.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 11-1442
Issued: March 5, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2011 appellant, through her attorney, filed a timely appeal from a February 10, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied her request for physical therapy and spinal epidural injections. 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 properly denied authorization for physical therapy and spinal epidural injections.

FACTUAL HISTORY

On August 4, 2005 appellant, then a 45-year-old distribution window clerk, filed a traumatic injury claim alleging that on August 2, 2005 she sustained a back injury when she

¹ 5 U.S.C. § 8101 *et seq.*

lifted a tub of mail. OWCP accepted her claim for acute lumbosacral sprain, acute sciatica and acute post-traumatic radiculitis. Appellant received medical treatment from Dr. Jerry Murphy, a general practitioner, and underwent physical therapy beginning in 2005. She stopped work in 2007 and was placed on the periodic rolls.

On July 6, 2008 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, for a second opinion examination regarding the nature and extent of her work injury. In a July 9, 2008 report, Dr. Valentino noted appellant's complaints of low back pain with increased spasms in her right leg. He reviewed her medical history and provided an accurate history of injury that she sustained a low back injury as a result of lifting a heavy tub of mail at work. Upon examination, Dr. Valentino observed that appellant's normal spine curved without spasm, malalignment, trigger points or subluxation and her range of motion about the cervical, thoracic, and lumbar regions were complete and intact. Evaluation of the spinous process, interspinous ligament, facets, sacroiliac (SI) joints, and piriformis and sciatic notch areas were normal. Appellant's Spurling maneuvers, straight leg raise test and Fabre's test were negative. Her motor and sensory examinations were also normal. Dr. Valentino found that appellant's acute lumbosacral sprain, radiculitis, and sciatica had resolved and that she had completely recovered from her accepted medical conditions. He reported that she was able to return to work without any restrictions and was not in need of ongoing supervised medical care.

In a July 8, 2008 report, Dr. Michael Cohen, a Board-certified neurologist, noted appellant's complaints of persistent bilateral low back pain radiating down to the right lower extremity. He reviewed appellant's diagnostic records and noted that a magnetic resonance imaging (MRI) scan showed protrusions at L2-3, L3-4 and L4-5 and was abnormal L2 through L5. Dr. Cohen conducted an examination and diagnosed right lumbosacral radiculopathy and lumbosacral strain with fibromyositis. He recommended appellant continue physical therapy.

In a June 5, 2009 medical report, Dr. Murphy noted that he began treating appellant on August 10, 2005 after she sustained a back injury as a result of lifting a tub of mail at work. He diagnosed sciatica and lumbosacral neuritis and noted that her physical findings were unchanged. Dr. Murphy recommended that appellant continue with her medications, physical therapy and injections. He submitted a request for authorization for physical therapy and spinal injections.

In a September 8, 2009 report, Dr. Murphy stated that physical therapy was an aid to prevent the patient from requiring surgery and for strengthening and reconditioning of her injured spinal support structures. He also explained that the modalities she received included strengthening and reconditioning of her injured spinal support structures, pelvic traction, heat, ice and spinal injections. Dr. Murphy stated that his opinion was to a reasonable degree of medical certainty and based on correlation of information from appellant's chart and physical examination.

In a September 21, 2009 report, Dr. Murphy reviewed Dr. Valentino's July 9, 2008 second opinion evaluation and disagreed with his findings. He explained that appellant's symptoms had not resolved because she remained symptomatic and continued to undergo medical treatment, physical therapy and spinal injections as late as June 2009. Although Dr. Valentino stated that he reviewed her medical records and diagnostic studies, he did not

specify which records or diagnostic studies showed that she was no longer in need of medical treatment. Dr. Murphy reported that he and other clinicians had found appellant's straight leg raise and femoral stress test were positive. He further stated that Dr. Valentino's conclusions were based on opinion and were subjective in nature. Dr. Murphy recommended that appellant undergo a functional capacity evaluation as that would be a more objective basis to conclude her level of functionality and her capabilities in the workplace.

OWCP referred appellant's record, together with a statement of accepted facts, to a district medical adviser to determine whether further medical treatment, specifically physical therapy and spinal injections, was necessary.

In an August 2, 2010 report, Dr. Arnold T. Berman, the district medical adviser, reviewed appellant's medical records and noted an accurate history of injury that she injured her back when she lifted a tub of mail at work. According to Dr. Valentino's July 9, 2008 report, appellant's acute lumbosacral sprain, sciatica and post-traumatic radiculitis had resolved and no additional treatment was needed. Dr. Berman pointed out that she underwent spinal surgery on September 12, 2007 and explained that epidural injections following lumbar spine surgery were generally ineffective because the fluid cannot mitigate in the area of the nerve roots as a result of the scar formation following surgery. He concluded that additional injections would not be beneficial. Dr. Berman recommended that further treatment for appellant should be aquatic exercise, water-walking and to avoid long periods of sitting and strenuous activity. He relied on Dr. Valentino's lack of objective findings of residuals from the injury to recommend that only the exercise program mentioned be approved for the future and that additional spinal injections not be approved.

By decision dated August 16, 2010, OWCP denied authorization for spinal injections and physical therapy for appellant's back based on the reports of Dr. Valentino and Dr. Berman. It determined that physical therapy and further epidural injections were no longer medically necessary.

On August 18, 2010 appellant, through counsel, requested a telephone hearing. On December 14, 2010 appellant requested that her request for an oral hearing be changed to a review of the written record. She contended that there was a conflict of medical evidence between Dr. Valentino and Dr. Murphy, which required a referral to a referee physician pursuant to 5 U.S.C. § 8123(a).

In an August 17, 2010 report, Dr. Murphy reiterated that appellant had not fully recovered from her work injuries and was in need of further ongoing medical care because she remained symptomatic.

In a decision dated February 10, 2011, an OWCP hearing representative affirmed the August 16, 2010 decision denying the requested spinal injections and physical therapy. The weight of the medical evidence rested with the second opinion specialist, Dr. Valentino, and the district medical adviser, which established that appellant no longer had any ongoing medical condition causally related to the August 2, 2005 work injury.

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 the 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 achieve this goal and the only limitation on OWCP's 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

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

ANALYSIS

OWCP accepted that appellant sustained acute lumbosacral sprain, acute sciatica and acute post-traumatic radiculitis as a result of an August 2, 2005 employment incident. In a decision dated August 16, 2010, OWCP denied authorization for spinal injections and physical therapy finding that the treatments were not medically necessary. By decision dated February 10, 2011, an OWCP hearing representative affirmed the August 16, 2010 decision denying authorization for spinal injections and physical therapy. The Board finds that a conflict of medical opinion exists between Drs. Murphy and Cohen and Drs. Valentino and Berman as to appellant's ongoing residuals and need for the requested physical therapy or epidural injections.

Appellant received medical treatment from Dr. Murphy since 2005. In a June 5, 2009 report, he stated that her physical findings were unchanged and recommended she continue with her medications, physical therapy treatments and spinal injections. In an August 17, 2010 report, Dr. Murphy stated that appellant had not fully recovered from her work injuries and was in need of further ongoing medical care because she remained symptomatic. On July 8, 2008 Dr. Cohen conducted an examination and observed that an MRI scan showed protrusions at L2-3, L3-4 and L4-5 and was abnormal L2 through L5. He recommended appellant continue physical therapy. In a July 9, 2008 second opinion report, Dr. Valentino noted that her range of motion about the

² 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

³ *W.T.*, Docket No. 08-812 (issued April 3, 2009); *A.O.*, Docket No. 08-580 (issued January 28, 2009).

⁴ *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

⁵ *L.W.*, 59 ECAB (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁶ 5 U.S.C. § 8123(a); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Dale E. Jones*, 48 ECAB 648 (1997).

cervical, thoracic, and lumbar regions were complete and intact and her motor and sensory examinations were normal. Appellant's Spurling maneuvers, straight leg raise test and Fabre's tests were negative. Dr. Valentino concluded that she had recovered from her accepted medical conditions and was not in need of ongoing medical treatment. In an August 2, 2010 report, Dr. Berman, the district medical adviser, reviewed appellant's medical history and concurred with Dr. Valentino's medical opinion. He noted the lack of objective findings of any residuals from her employment injury and recommended that the only further treatment she needed was exercise. In a September 21, 2009 report, Dr. Murphy disagreed with the second opinion report and contended that appellant's conditions had not resolved.

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.⁷ The Board finds a conflict in medical opinion arose between appellant's physicians, Drs. Murphy and Cohen, and Drs. Valentino and Berman on behalf of OWCP as to appellant's ongoing residuals and whether physical therapy and spinal injections are necessary medical treatment. The case shall be remanded to OWCP for referral to an impartial medical examiner.⁸ After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued regarding appellant's request for spinal injections and physical therapy.

CONCLUSION

The Board finds that OWCP improperly denied authorization for physical therapy and spinal injections.

⁷ 5 U.S.C. § 8123(a); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Dale E. Jones*, 48 ECAB 648 (1997).

⁸ See *Lori E. Rayner-Brown*, Docket No. 02-375 (issued July 12, 2002).

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with the decision of the Board.

Issued: March 5, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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