United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
	)	**Docket No. 11-1581**
and	)	**Issued: March 8, 2012**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, St. Louis, MO, Employer	)	

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 June 22, 2011 appellant filed a timely appeal from a June 1, 2011 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly denied appellant's request for authorization of cervical surgery.

[1] 5 U.S.C. §§ 8101-8193.

[2] At the time appellant filed her appeal on June 22, 2011, she was represented by an attorney, Harry J. Nichols, and requested oral argument. In letters dated January 18 and 19, 2012, Mr. Nichols withdrew his representation because he had retired and appellant requested that the case be reviewed on the record.

On appeal appellant asserts that the weight of the medical evidence regarding the need for surgery rests with her attending physician. She further requested that her monetary compensation be reinstated.

FACTUAL HISTORY

This case has previously been before the Board. In a July 13, 2011 decision, the Board found that OWCP met its burden of proof to terminate appellant' wage-loss compensation effective October 25, 2009 on the grounds that she was no longer disabled from her date-of-injury position.[3] The law and the facts of the previous Board decision are incorporated herein by reference.

In the interim, by report dated February 1, 2010, Dr. David B. Robson, an attending Board-certified orthopedic surgeon, noted that appellant had been his patient since 1989. He described her surgical history, and advised that she was totally disabled and could possibly require further surgery. In reports dated March 3 and September 7, 2010, Dr. Robson provided physical examination findings and advised that appellant's condition had not changed significantly. He advised that she was totally disabled and recommended computerized tomography (CT) scans. A September 21, 2010 CT scan of the thoracic spine demonstrated multilevel degenerative endplate changes and multilevel posterior protrusions of disc, possibly resulting in some compromise of the central canal. A September 21, 2010 CT scan of the lumbar spine demonstrated postoperative changes and mild juxtafusional stenosis at L1-2 with no change seen since a previous study of September 25, 2009. On September 22, 2010 Dr. Robson noted his review of the CT studies. He indicated that appellant would ultimately require surgery, stating "I think this is related to her initial injury as it is the sequelae of juxtafusional changes which have happened to her previously on two occasions. [Appellant] is prone to this." By report dated November 16, 2010, Dr. Robson noted appellant's complaints of severe low back and bilateral leg pain with numbness and tingling. He provided physical examination findings and advised that he was recommending surgery for the removal of hardware and extending the fusion to L1. On December 13, 2010 Dr. Robson requested authorization for L2-4 hardware removal, L1-4 laminectomy, L1-4 posterior lumbar fusion with expedium instrumentation and allograft.

OWCP requested that an OWCP medical adviser review the surgery request, and in a December 14, 2010 report, the medical adviser noted his review of CT scan reports and Dr. Robson's November 16, 2010 report. The medical adviser indicated that Dr. Robson requested the surgery to relieve spinal stenosis, whereas the September 21, 2010 CT scan of the lumbar spine indicated that appellant's spinal stenosis at L1-2 was only mild and unchanged

[3] Docket No. 10-2145 (issued July 13, 2011). OWCP accepted that on October 3, 1979 appellant, then a 28-year-old clerk typist, sustained lumbar and thoracic strains, subluxations of L1, L2 and L3 and an L4-5 disc herniation when her chair fell backwards. She underwent a laminectomy at L4-5 on June 16, 1980, and a fusion procedure from L4 to S1 on October 29, 1980. Appellant returned to private employment until September 20, 1989 and was thereafter placed on the periodic compensation rolls. On May 9, 1990 she had a posterior spinal fusion at L4-5 and lumbar laminectomy and decompression from L3 to L5, and on October 23, 2007 underwent removal of instrumentation and exploration of a fusion mass at L4-5; bilateral L2-3 and L3-4 laminectomy, facetectomy and foraminotomy; and pedical screw fixation and fusion at L2-5.

since September 25, 2009. The medical adviser indicated that, based on the medical record, it was unlikely that a fifth surgical procedure would be beneficial to appellant and concluded that OWCP could not authorize the surgery.

By letter dated December 16, 2010, OWCP provided appellant with a copy of the medical adviser's report and asked that her physician provide a medical opinion that addressed the concerns raised by him. Appellant was given 30 days to respond. In a December 22, 2010 letter, addressed to appellant, Dr. Robson stated that, if appellant could get clearance for the surgery, he would do it, but that he was not going to be involved anymore, based on the amount of time and money required.

In a January 24, 2011 decision, OWCP denied appellant's request for surgery. Appellant timely requested a review of the written record, and by decision dated April 13, 2011, an OWCP hearing representative found that a conflict of medical opinion had been created between Dr. Robson and OWCP's medical adviser regarding the need for surgery. She set aside the January 24, 2011 decision and remanded the case to OWCP for referral for a referee examination.

On April 15, 2011 OWCP referred appellant along with the medical record and a statement of accepted facts to Dr. Peter Anderson, a Board-certified orthopedic surgeon, for an impartial evaluation as to whether the proposed back surgery was medically appropriate to treat the effects of the employment injury. In a May 24, 2011 report, Dr. Anderson noted appellant's complaints of incapacitating back pain. He described her past medical and surgical history and reviewed the CT scan reports. Dr. Anderson advised that on examination appellant had good motion of her back with more pain on extension than flexion, and found her to be neurologically intact. He indicated that she is presently having surgery for axial pain, which is dubious at best. Dr. Anderson opined that she basically had failed back syndrome and concluded that the proposal to fuse the rest of the joints in the spine was an "incredibly bad idea" and recommended that she not go through with it. He stated that weight loss, cortisone, anti-inflammatory medication, epidural injections, and physical therapy would be beneficial and that further surgery was, at best, a "crap shoot" that probably would not work.

In a merit decision dated June 1, 2011, OWCP found the weight of the medical evidence rested with the opinion of Dr. Anderson and denied appellant's request for additional lumbar surgery.

LEGAL PRECEDENT

Section 8103 of FECA provides that 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 OWCP 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] While OWCP is obligated to pay for treatment of employment-related

[4] 5 U.S.C. § 8103; *see L.D.*, 59 ECAB 648 (2008).

conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[5]

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being that of reasonableness.[6] 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.[7] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[8] In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[9]

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.[10] When 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 on a proper factual background, must be given special weight.[11]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the opinion of the referee physician Dr. Anderson who opined that the requested lumbar surgery was not medically warranted. In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[12] The accepted conditions in this case are lumbar and thoracic strains, subluxations of L1, L2 and L3 and an L4-5 disc herniation.

[5] *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[6] *See D.K.*, 59 ECAB 141 (2007).

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

[8] *M.B.*, 58 ECAB 588 (2007).

[9] *R.C.*, 58 ECAB 238 (2006).

[10] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Manuel Gill*, 52 ECAB 282 (2001).

[12] *Supra* note 9.

In his May 24, 2011 report, Dr. Anderson noted his review of the record, including diagnostic studies and provided examination findings. Regarding the need for surgery, he stated that the proposal to fuse the joints not previously fused was a bad idea and recommended that she not go through with it. Dr. Anderson stated that the recommended surgery was, at best, a "crap shoot" that probably would not work, and recommended physical therapy and conservative treatment.

As noted above, a reasoned opinion from a referee examiner is entitled to special weight.[13] The Board finds that Dr. Anderson provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record and his examination findings. Dr. Anderson's opinion that the recommended lumbar spine surgery was not medically warranted is entitled to special weight and represents the weight of the evidence.[14] Accordingly, as the evidence establishes that the lumbar spine surgery was medically necessary, OWCP acted within its discretion in denying authorization.[15]

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 properly denied authorization for the recommended lumbar spine surgery.[16]

[13] *Supra* note 11.

[14] *Id.*

[15] *L.D., supra* note 4.

[16] Regarding appellant's argument on appeal that her monetary compensation should be reinstated, as noted above, by decision dated July 13, 2011, the Board affirmed OWCP's termination of wage-loss compensation. Decisions and orders of the Board are final upon expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). While an appellant may petition for reconsideration with the Board within 30 days of the date of issuance of a Board decision, 20 C.F.R. § 501.7(a), appellant did not file a petition for reconsideration with the Board of its July 13, 2011 decision. It is also noted that the record does not contain a request for reconsideration with OWCP on this issue.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 8, 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