United States Department of Labor
Employees' Compensation Appeals Board

K.D., Appellant	)	
and	)	**Docket No. 11-1738**
	)	**Issued: March 27, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Clarksville, TN, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 27, 2011 appellant, through her attorney, filed a timely appeal of a May 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying medical treatment. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP abused its discretion by denying appellant authorization for lumbar spine fusion, removal of vertebral body, insertion of spine fixation device, removal of spinal lamina and application of a spinal prosthetic device.

On appeal, counsel argued that OWCP failed to consider the findings and recommendations of the impartial medical specialist.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 29, 2002 appellant, then a 34-year-old city letter carrier, filed a traumatic injury claim alleging that on October 26, 2002 she developed back strain with right sciatica while carrying a satchel of mail. OWCP accepted her claim for sciatica and lumbar strain on January 10, 2003. Appellant's physician released appellant to return to regular duty on February 3, 2003.

Appellant filed a notice of recurrence of disability on March 31, 2004. She alleged that she experienced the same symptoms and the same affected area as her October 26, 2002 employment injury. OWCP accepted this recurrence on April 7, 2004. It authorized spinal injections from 2005 through April 10, 2008.

On April 24, 2008 appellant's attending physician stated that appellant had developed a dural puncture headache following her April 10, 2008 epidural steroid injection. He noted that these headaches required hospitalization and that she could return to work on May 13, 2008. He released appellant to return to work on October 2, 2008.

Dr. David H. McCord, a Board-certified orthopedic surgeon, first examined appellant on June 8, 2010. On June 15, 2010 he opined that she was totally disabled due to diagnostic tests. In a separate report of the same date, Dr. McCord reviewed appellant's magnetic resonance imaging (MRI) scan and found disc derangement, vertical instability and lateral stenosis. He opined that she had failed conservative care and recommended an additional computerized tomography (CT) scan. In a note dated July 20, 2010, Dr. McCord diagnosed internally deranged and disrupted discs, vertical instability and lateral stenosis from L4-S1. He recommended surgical intervention including decompression, instrumentation, bone graft and possible osteotome from L4-S1. On August 6, 2010 Dr. McCord noted that appellant's accepted conditions including sciatica, sprain of the lumbar back and reaction to spinal lumbar puncture. He diagnosed the additional conditions of vertical instability, lateral stenosis and tearing of her lower two discs due to her injury. Dr. McCord recommended surgery including fusion.

Appellant underwent a CT scan on July 16, 2010 which demonstrated radial fissure at L4-5 and degenerative concentric tears L5-S1.

The claims examiner provided OWCP's medical adviser with the record and the requested surgery. The medical adviser recommended a second opinion evaluation.

OWCP referred appellant for a second opinion evaluation with Dr. David A. West, an osteopath specializing in orthopedic surgery, on August 17, 2010. In a report dated September 13, 2010, Dr. West reported her history of injury and performed a physical examination. He noted that appellant had no signs of radiculopathy, that deep tendon reflexes were intact and that she had negative sciatic stretch signs on the left with subjective sciatic symptoms in the right leg. Dr. West opined that she had mechanical low back symptoms and underlying sciatica, which had not resolved since the initial injury in 2002. He noted that appellant's subjective complaints coincided with his clinical findings. Dr. West stated, "Overall, I do not feel that [appellant's] lumbar fusion is medically necessary as directly related to the on-the-job injury. [Appellant] does have mechanical symptoms and does have sciatic type

symptoms. I am not certain that a spinal fusion would alleviate both of these problems and I do not see a direct relationship as to the need for this surgical procedure for the injury that she described at work."

By decision dated September 21, 2010, OWCP denied appellant's request for back surgery including lumbar fusion. It stated that Dr. West's opinion represented the weight of the medical evidence and established that surgery was not medically necessary.

Appellant requested reconsideration on October 15, 2010 and requested that OWCP approve the surgery recommended by Dr. McCord and to expand her accepted conditions to include disc derangement, vertical instability and tearing of her two lower discs.

In a decision dated December 7, 2010, OWCP vacated the September 21, 2010 decision denying the requested surgery.

On January 27, 2011 OWCP informed appellant that there was a conflict of medical opinion evidence and referred her for an impartial medical examination with Dr. Richard Fishbein, a Board-certified orthopedic surgeon.

In a report dated January 6, 2011, Dr. McCord stated that appellant's complaints were significant and severe. He again recommended surgery.

Dr. Fishbein completed a report on February 22, 2011 after reviewing the statement of accepted facts and the medical records. During physical examination, he found that appellant walked with a limp and exhibited poor posture. Dr. Fishbein found severe tenderness to palpation of the right lumbar musculature and right buttocks and positive straight leg sitting. He noted that appellant could not heel/toe walk and that sensation was decreased along the lateral aspect of the right foot and leg. Dr. Fishbein diagnosed severe degenerative disc disease with mild neuroforaminal narrowing at L5-S1 as a result of the October 26, 2002 employment injury. He stated that appellant's lumbar sprain and sciatic had not resolved and had become progressive based on her MRI scans. Dr. Fishbein stated that he did not agree with the suggested surgical treatment as the surgery would absolutely disable her. He noted that appellant did have certain criteria for surgery including intractable pain that interfered with the activities of daily living, progressive problems with radiculopathy down the lower extremities and urinary incontinence which was not related to a gynecological problem. Dr. Fishbein recommended that she be evaluated by a "very competent neurosurgeon…." OWCP requested clarification from him on March 11, 2011.

Dr. McCord completed a report on March 23, 2011 and stated that appellant had exhausted all conservative treatments. He stated that his recommendation for surgical fixation was sound, reasonable and conservative.

Dr. Fishbein responded on April 21, 2011 and stated that appellant's degenerative disc disease was not due to an industrial accident, but that she was not experiencing any pain until the 2002 employment injury. He stated, "It is medically probable that her ongoing symptoms and pain are related to the natural progression of her degenerative disc disease. The current objective findings would not be cured with a multilevel fusion." Dr. Fishbein opined that appellant could currently bend her back and had no loss of strength although she experienced diminished

sensation. He concluded, "Surgery of this type is not a cure and is contraindicated. [Appellant] would likely be left with her current symptoms as well as loss of lumbar motion."

By decision dated May 2, 2011, OWCP denied appellant's request for a lumbar spine fusion, removal of vertebral body, insertion of spine fixation device, removal of spinal lamina and insertion of spine prosthetic device. It stated that Dr. Fishbein's report constituted the weight of the medical evidence and that based on this report authorization was denied as the requested treatment was not medically necessary.

LEGAL PRECEDENT

Section 8103 of FECA[2] 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.[3] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. 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]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.[6] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[2] 5 U.S.C. §§ 8101-8193, 8103.

[3] *Id*. at § 8103.

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

[5] *Daniel J. Perea*, 42 ECAB 214 (1990).

[6] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

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

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

ANALYSIS

Appellant's attending physician, Dr. McCord recommended a spinal fusion to address appellant's accepted employment-related condition of sciatica and lumbar sprain. OWCP referred her for a second opinion evaluation with Dr. West. In his September 13, 2010 report, Dr. West opined that appellant had mechanical low back symptoms and underlying sciatica, which had not resolved since the initial injury in 2002. He concluded that the recommended lumbar fusion was not medically necessary and would not alleviate her medical condition. Due to this disagreement between appellant's physician and OWCP's second opinion physician, the Board finds that OWCP properly found that there was a conflict of medical opinion necessitating referral to an impartial medical specialist.

OWCP designated Dr. Fishbein as the impartial medical examiner, who provided an accurate history of injury based on the statement of accepted facts and provided detailed findings on physical examination. Dr. Fishbein diagnosed severe degenerative disc disease with mild neuroforaminal narrowing at L5-S1 and in his initial report indicated that this condition was as a result of the October 26, 2002 employment injury. He stated that he did not agree with the suggested surgical treatment as it was his opinion that the surgery would disable appellant. Dr. Fishbein recommended that she be evaluated by a neurosurgeon.

OWCP requested a supplemental report from Dr. Fishbein and he responded on April 21, 2011 clarifying that appellant's degenerative disc disease was not due to an industrial accident, but that it was medically probable that her ongoing symptoms and pain are related to the natural progression of her degenerative disc disease. Dr. Fishbein concluded, "Surgery of this type is not a cure and is contraindicated. [Appellant] would likely be left with her current symptoms as well as loss of lumbar motion."

The Board finds that these reports are sufficiently detailed and well reasoned to constitute the special weight of the medical evidence. Dr. Fishbein based his reports on a proper history of injury, detailed physical findings and provided medical reasoning for his conclusions. He attributed appellant's current condition, not her accepted employment injury, to the natural progression of her degenerative disc disease. Dr. Fishbein also explained why he found that the proposed surgery would not be in her best interest as she currently had the ability to move her back which would likely be lost with the proposed lumbar fusion.

In a report dated March 23, 2011, Dr. McCord opined that appellant had exhausted all conservative treatments. He concluded that his recommendation for surgical fixation was sound, reasonable and conservative. Dr. McCord did not provide additional physical findings or offer additional rationale in support of his opinion. As he was on one side of the conflict that Dr. Fishbein resolved, the additional report from Dr. McCord is insufficient to overcome the

[8] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

weight accorded Dr. Fishbein's report as the impartial medical specialist or to create a new conflict with it.[9]

As the weight of the evidence as represented by Dr. Fishbein's reports supports that appellant was not currently a candidate for surgical intervention, the Board finds that OWCP properly exercised its broad discretion under FECA to deny authorization for the proposed surgery.

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.

On appeal, counsel argued that Dr. Fishbein supported a causal relationship between appellant's degenerative disc disease and her employment injury. As noted above, Dr. Fishbein clarified this opinion in his April 21, 2011 supplemental report clearly stating that her current condition was a natural progression of her underlying degenerative disc disease. Counsel also argued that Dr. Fishbein recommended additional evaluation by a neurologist. This suggestion was also contained in the initial report and rebutted by the clarification which was emphatic that the proposed surgery was not a cure and was contraindicated.

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying authorization for surgery.

[9] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board