

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

D.B., Appellant

and

**DEPARTMENT OF THE AIR FORCE, ALTUS
AIR FORCE BASE, OK, Employer**

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**Docket No. 12-965
Issued: October 16, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 20, 2012 appellant filed a timely appeal from a December 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether OWCP abused its discretion by denying authorization for back surgery.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that the record contains a March 15, 2012 OWCP decision with respect to wage-earning capacity. Appellant specifically identified the December 22, 2011 decision as the decision on appeal and provided arguments related to the denial of surgery. As he did not request review of the March 25, 2012 decision, the Board will not review the decision on this appeal.

FACTUAL HISTORY

On September 30, 2002 appellant, then a 29-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back strain on September 23, 2002 when he was reaching for a component. The reverse of the claim form does not indicate that he stopped work. On October 29, 2002 OWCP accepted the claim for dislocations of the lumbar and sacral vertebra.³

In a report dated November 10, 2008, Dr. Mark Duncan, an osteopath, stated that appellant had congenital spondylolisthesis at L5 and S1 which was not work related. He stated that appellant had low back pain that was most likely related to his spondylolisthesis.

Appellant stopped work on March 31, 2010 and filed a claim for compensation (Form CA-7). He began receiving intermittent compensation for wage loss. OWCP further developed the medical evidence as to the extent of an employment-related disability. In a report dated August 17, 2010, Dr. Robert Holladay, a Board-certified orthopedic surgeon selected as a referee physician,⁴ diagnosed lumbar pain, lumbar disc degeneration and spondylolisthesis. He opined that, from a medical perspective, the degeneration and spondylolisthesis were not employment related.

In a report dated June 9, 2011, Dr. Renato Bosita, Jr., a Board-certified orthopedic surgeon, listed a history that appellant had back pain while in the military from 1991 to 1995, worked as an aircraft mechanic but had severe back and leg pain. Appellant tried to work as an aircraft electrician but stopped in March 2010, and then worked driving a crew bus and at a desk job, retiring in 2011. Dr. Bosita provided results on examination and stated that a magnetic resonance imaging (MRI) scan showed retrolisthesis at L4-5, disc desiccation at L4-5 and L5-S1, with L5-S1 spondylolisthesis. He opined that appellant was a good candidate for surgical intervention.

OWCP referred appellant for a second opinion examination by Dr. Melburn Huebner, a Board-certified orthopedic surgeon. In a report dated August 19, 2011, Dr. Huebner reviewed a history and results on examination. He stated that there was no objective evidence of a current and disabling open dislocation of lumbar vertebra or closed dislocation of sacrum. In response to a specific inquiry from OWCP as to any additional conditions which should be accepted as employment related, Dr. Huebner stated that there was a lumbosacral strain that had resolved. With respect to surgery, he opined that the surgery was not warranted or required as a result of the September 23, 2002 employment injury.

In a report dated October 6, 2011, Dr. Bosita noted that appellant had been seen by Dr. Huebner, who had opined that surgery was not indicated. He stated that Dr. Huebner did not

³ An April 14, 2010 statement of accepted facts stated that the accepted conditions were open dislocation of lumbar vertebra and closed dislocation sacrum.

⁴ FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). 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. 20 C.F.R. § 10.321 (1999).

look at all the evidence and Dr. Bosita reiterated that fusion surgery was necessary as conservative care had failed.

OWCP found that a conflict in medical opinion under 5 U.S.C. § 8123. It selected Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, as a referee physician. In a report dated November 22, 2011, Dr. McCaskill reviewed a history of injury, statement of accepted facts and listed findings on examination. He diagnosed spondylogenic lumbosacral spine pain and congenital spondylolisthesis. Dr. McCaskill stated that appellant did appear to have some legitimate limitation of active lumbar motion but there were no other significant abnormal physical findings. While appellant did have some degree of legitimate ongoing mechanical spinal pain there was no evidence of any type of neurological condition. He did not appear to have sustained a significant traumatic injury on September 23, 2002, and the current MRI scan findings, “on the basis of which surgery has been proposed, cannot be reasonably attributed to the work-related event of September 23, 2002.” Dr. McCaskill further stated:

“I am unable to attribute the necessity of any surgical treatment to activity at work on September 23, 2002. In view of the apparent mechanical origin of the patients symptoms, I know of no credible evidence to attribute any mechanical difficulties that the patient is having to the previous imaging findings or to believe that the proposed surgical treatment would be of predictable symptomatic or functional benefit to the patient, as opposed to continue nonoperative care. I am further impressed by the fact that the patient appears to have had relatively limited nonoperative care other than for passive chiropractic care. I certainly do not feel that the proposed surgery is necessary as the result of any injury that can be clearly attributed to activity at work on September 23, 2002.”

By decision dated December 22, 2011, OWCP denied authorization for the proposed surgery. It found the weight of the evidence did not establish the surgery was necessary for treatment of an employment-related condition.

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.⁵ 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.⁶ OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP’s authority is that of reasonableness.⁷

⁵ 5 U.S.C. § 8103(a).

⁶ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁷ *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).

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.⁸ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁹ 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.¹⁰

ANALYSIS

In the present case, OWCP found there was a disagreement between attending physician, Dr. Bosita and the second opinion physician, Dr. Huebner, as to the need for back surgery. Dr. Bosita had proposed the surgery and Dr. Huebner opined that the surgery was not warranted for an employment-related condition. Section 8123(a) provides that a referee physician will be selected to resolve a conflict between an attending physician and an OWCP physician.¹¹ The referee physician, Dr. McCaskill, provided an unequivocal opinion that the surgery was not warranted for treatment of the September 23, 2002 employment injury. He found no objective evidence of a continuing employment-related condition, opining that the MRI scan findings which provided the basis for the proposed surgery were not employment related. In addition, Mr. McCaskill reported that there was no indication that the proposed surgery would be of predictable symptomatic or functional benefit to appellant.

It is well established that, when a case is referred to a referee physician for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹² Dr. McCaskill provided a rationalized medical opinion on the issue presented. As noted above, OWCP has discretion with respect to the furnishing of services under 5 U.S.C. § 8103(a). Since the weight of the medical evidence did not support that the back fusion surgery was necessary for treatment of an employment-related condition, OWCP properly denied authorization.

On appeal, appellant stated that he disagreed with the decision to deny his back surgery because he was injured on the job. It is not disputed that he sustained an employment injury; the issue is whether the proposed back surgery was medically warranted for the employment injury. Appellant stated that he had a reinjury in 2005 that was not discussed by OWCP. It is not clear whether he is referring to another employment injury. There is no indication that appellant provided a history of a 2005 injury to Dr. Bosita, Dr. McCaskill or other physicians of record. Appellant argued that OWCP sent him to physicians that would support their position and did not review x-rays. Dr. McCaskill was selected as an impartial referee physician and appellant provided no argument that Dr. McCaskill was not properly selected according to established

⁸ See *Debra S. King*, 44 ECAB 203, 209 (1992).

⁹ *Id.*; see also *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹⁰ See *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹¹ *Supra* note 3.

¹² *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

procedures.¹³ He provided a background indicating that he was familiar with the history of injury and provided a rationalized opinion on the issue presented. For the reasons noted above, OWCP did not abuse its discretion in denying authorization for 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.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying authorization for back surgery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2011 is affirmed.

Issued: October 16, 2012
Washington, DC

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

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

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

¹³ The selection procedures are set forth at Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4 (July 2011).