United States Department of Labor
Employees' Compensation Appeals Board

B.A., Appellant	)	
and	)	**Docket No. 12-549**
	)	**Issued: September 21, 2012**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Pollack, LA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 20, 2012 appellant, through his attorney, filed a timely appeal from an October 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying authorization for surgery and a recurrence claim. 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.

ISSUES

The issues are: (1) whether appellant established that he sustained a recurrence of disability on July 5, 2007 due to the accepted August 12, 2003 traumatic injury; and (2) whether OWCP abused its discretion by denying authorization for spinal fusion surgery at T11-12 and T2-L1.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 19, 2003 appellant, then a 43-year-old case manager, filed a traumatic injury claim alleging that on August 12, 2003 he sustained a back strain while breaking up an inmate altercation and was thrown to the floor. OWCP accepted his claim for lumbar strain. Appellant was released to full duty on August 19, 2003 and returned to work on August 25, 2003.

On June 8, 2010 appellant submitted a Form CA-2a, alleging a recurrence of disability as of July 5, 2007. He stopped work on November 25, 2007 and returned to work on January 8, 2008. Appellant alleged that, following his original injury, he had difficulty driving to work, sitting, standing, bending and carrying files. He was diagnosed with a hernia on December 12, 2006 which caused him discomfort at work. Appellant further stated that his recurrence occurred on July 5, 2007 when he slipped and fell on a wet floor and sustained a nonoccupational injury in the exact same location as his original August 12, 2003 injury. Once he returned to work after the July 5, 2007 nonoccupational injury, he sustained a recurrence because his back pain escalated. On May 28, 2008 appellant underwent surgery as a result of his thoracic and lumbar injuries.

On September 7, 2010 appellant's treating physician, Dr. William D. Bradley, a Board-certified orthopedic surgeon, requested authorization for spinal fusion surgery at T11-12 and T2-L1.

By letter dated September 3, 2010, OWCP informed appellant that the evidence of record was insufficient to support his recurrence claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days. By letter dated September 10, 2010, OWCP informed him that his request for surgery could not be authorized.

In a September 7, 2010 narrative statement, appellant reported that, after his August 12, 2003 injury, his work caused his back injury to become more painful due to constant walking on concrete floors, bending to search inmates, cell searches, excessive standing and other tasks from his duties. On July 5, 2007 he slipped on a wet floor while in a place of business and his pain increased two fold. Appellant stated on July 7, 2010 that he could not return to work because he was in so much pain. On May 28, 2008 he underwent L5-S1 disc surgery with Dr. Bradley.

Appellant submitted medical reports dated February 21, 2008 to August 6, 2010. On February 21, 2008 Dr. Bradley diagnosed appellant with degenerative disc disease with pseudoradicular pain left greater than right. Appellant stated that his pain was causing him difficulty at work and Dr. Bradley performed an artificial disc replacement at the L5-S1 level on May 28, 2008. Dr. Bradley stated that appellant underwent the procedure well and was no longer experiencing back pain. In an October 2, 2008 medical report, he reported that appellant complained of back pain but also noted that his low back and lower extremity symptoms treated with his disc arthroplasty were continuing to do well. A magnetic resonance imaging (MRI) scan of the back showed multilevel degenerative changes in the lower thoracic region with disc space loss, increasing kyphosis, wedging of the vertebral bodies and spurring mild to moderate in nature. Dr. Bradley diagnosed axial back pain in the lower thoracic region secondary to spondylosis. Approximately, two years later in a May 6, 2010 follow-up report, he stated that appellant complained of increased back pain. Upon review of a May 18, 2010 MRI scan,

Dr. Bradley diagnosed degenerative disc disease at T11-12 and T12-L1 with no significant canal or foraminal stenosis. Appellant informed Dr. Bradley that he sustained severe lower thoracic pain and low back pain after he was injured during an inmate altercation at work in August 2007. Dr. Bradley opined that, due to appellant's ongoing persistent back problem and the location and severity of degeneration, that his condition was most likely a result of this injury. In a June 16, 2010 medical report, Dr. Robert R. Bulger, a Board-certified anesthesiologist, reported that appellant's three-level lumbar discogram showed that the T11-12 disc was abnormal and degenerative, the T12-L1 disc was moderately degenerative and the L1-2 disc was essentially normal. He recommended surgical fusion at T11-12 and T12-L1 and submitted a request for authorization of surgery.

On September 16, 2010 OWCP referred the case record and a statement of accepted facts to Dr. Michael M. Katz, a medical adviser and Board-certified orthopedic surgeon. It asked whether the requested surgical procedures were warranted due to the accepted work injury.

In reports dated September 17 and October 21, 2010, Dr. Katz stated that appellant's claim was accepted for sprain of the lumbar spine as a result of a work-related injury on August 12, 2003. Appellant underwent spine disc replacement surgery at L5-S1 in 2008. In May 2010, he complained of increasing pain in the thoracolumbar region. Based upon review of the case record, Dr. Katz opined that a second opinion examination was warranted due to the relatively infrequent incidence of degenerative processes at the thoracolumbar junction being severe enough to require fusion.

OWCP referred appellant, a statement of accepted facts and the case file to Dr. Robert Holladay, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a November 30, 2010 report, Dr. Holladay provided a summary of appellant's past medical reports and diagnosed postoperative L5-S1 lumbar disc arthroplasty on May 28, 2009 and disc degeneration of the lower thoracic spine. He did not recommend surgery due to appellant's current degenerative condition, noting that the outcome would not be beneficial following surgical fusion because there was no objective documentation of any instability, fracture, infection or tumor that would warrant the fusion surgery. Dr. Holladay did not relate the degenerative changes of the thoracic spine to the accepted injury of August 12, 2003. He opined that appellant's degenerative changes were more likely related to genetics and the aging process rather than a specific traumatic event. Dr. Holladay concluded that Dr. Bradley's recommendation for surgical fusion was not related to the original injury, would not benefit appellant and that the claim should not be accepted for any additional conditions.

In a December 16, 2010 report, Dr. Michael Hisey, a Board-certified orthopedic surgeon, noted that appellant returned for a follow up of his chronic thoracolumbar disabling pain. He discussed treatment options with appellant, noting that surgical treatment of axial and discogenic pain continued to be a controversial topic.

Due to a conflict in medical opinion, OWCP referred appellant, a statement of accepted facts, the case file, a medical conflict statement and a series of questions to Dr. Roby Mize, a Board-certified orthopedic surgeon, for an impartial referee medical examination.

In a March 29, 2011 medical report, Dr. Mize evaluated appellant, reviewed the diagnostic tests and provided a summary of past medical reports and history of injury. He diagnosed appellant with sprain/strain of the lumbar spine and chronic degenerative disc disease at T11-12 and T12-L1. Dr. Mize opined that appellant's sprain of the lumbar spine was a result of the August 12, 2003 work-related accident, as diagnosed by a Dr. Aaron Lirette. Diagnostic tests obtained on August 13, 2003 revealed mild osteoarthritis, mild scoliosis and no acute thoracic bony pathology. Dr. Mize stated that there was no evidence of any relationship between the surgery performed by Dr. Bradley in 2008 and the August 12, 2003 work injury. He further opined that there was no connection between the original August 12, 2003 injury and the diagnosis of chronic degenerative disc disease at T11-12 and T12-L1 and thus, fusion surgery should not be authorized.

By decision dated April 11, 2011, OWCP denied appellant's recurrence claim finding that the medical evidence did not establish that his current condition was causally related to the August 12, 2003 work injury.

In another decision of the same date, OWCP denied authorization for thoracic lumbar spine fusion. It noted that appellant did not establish that his surgical procedure for lumbar spine fusion resulted from the accepted August 12, 2003 work injury.

On April 22, 2011 appellant, through his attorney, requested a telephone hearing before the Branch of Hearings and Review.

Appellant submitted August 21 and September 29, 2011 narrative statements regarding his injuries since August 12, 2003. He also submitted a detailed position description for a correctional treatment specialist, medical reports already of record and memorandum from the U.S. Bureau of Prisons documenting the August 12, 2003 employment incident and inmate altercation.

At the August 9, 2011 telephone hearing, appellant testified that he was having problems with his back from 2003 to 2007 but continued to work. After his July 5, 2007 injury, he returned to work as a case manager but continued to experience pain with his duties. Appellant's attorney argued that the July 5, 2007 nonoccupational injury caused his preexisting condition to become more acute and therefore was related to the original claim. The record was held open for 30 days.

By decision dated October 26, 2011, the hearing representative affirmed OWCP's April 11, 2011 decisions. OWCP found that appellant did not establish a recurrence of disability. It further found that the medical evidence did not support that the request for lumbar surgery was medically necessitated by the accepted August 12, 2003 work injury.[2]

[2] The Board notes that, following the hearing before the Branch of Hearings and Review, appellant filed an occupational disease claim (Form CA-2) for his back condition.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3]

OWCP's procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.[4]

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As noted by Larson in his treatise on workers' compensation once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.[5]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.[6] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[7] The physician's conclusion must be supported by sound medical reasoning.[8]

Section 8123(a) 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.[9] The implementing regulations states that, if a

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[3] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[5] *See* A. Larson, *The Law of Workers' Compensation* § 13.11(a) (1993); *see also Mona R. Wiedenbeck*, Docket No. 99-153 (issued June 16, 2000).

[6] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

[7] *S.S.*, 59 ECAB 315 (2008).

[8] *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

[9] 5 U.S.C. § 8123(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. 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.[10]

ANALYSIS -- ISSUE 1

OWCP found that appellant sustained an injury on August 12, 2003 and accepted his traumatic injury claim for sprain of the lumbar spine. Appellant was released to full duty on August 18, 2003 and continued to work as a case manager. He claimed a recurrence of total disability commencing July 5, 2007 after he slipped and fell on a wet floor and sustained a nonoccupational injury in the exact same location as his original August 12, 2003 back injury. Appellant stated that he sustained a recurrence because his back pain escalated, causing him to undergo an artificial disc replacement at the L5-S1 level on May 28, 2008. The Board finds that the medical evidence of record is insufficient to establish that he sustained a recurrence of disability.[11]

Appellant's attending physician, Dr. Bradley, performed an artificial disc replacement at the L5-S1 level on May 28, 2008. This procedure was not authorized by OWCP. In a July 1, 2010 report, Dr. Bradley diagnosed degenerative disc disease at T11-12 and T12-L1 and submitted a request for authorization of fusion surgery. He noted that, due to appellant's ongoing persistent back problem and the location and severity of degeneration, that his condition was most likely a result of his August 2007 work injury. An OWCP medical adviser reviewed the case file and opined that a second opinion was warranted based on the relatively infrequent incidence of degenerative processes at the thoracolumbar junction being severe enough to require fusion. OWCP referred appellant to Dr. Holladay for a second opinion referee medical examination. In his November 30, 2010 medical report, Dr. Holladay diagnosed postoperative L5-S1 lumbar disc arthroplasty on May 28, 2009 and disc degeneration of the lower thoracic spine. He did not recommend surgical fusion due to appellant's condition, noting that the outcome would not be beneficial. Dr. Holladay further stated that he did not relate the degenerative changes of the thoracic spine to the August 12, 2003 incident, noting that appellant's degenerative changes were more likely related to genetics and the aging process rather than a specific traumatic event.

OWCP determined that a conflict existed between Dr. Bradley, appellant's treating physician, and Dr. Holladay, the second opinion referee physician. It referred appellant to Dr. Mize for an impartial medical evaluation to resolve the conflict.[12] Accompanying the referral was a statement of accepted facts, a medical conflict statement and the case record containing his medical records. Dr. Mize diagnosed appellant with sprain/strain of the lumbar spine and chronic degenerative disc disease at T11-12 and T12-L1. He opined that appellant's

[10] 20 C.F.R. § 10.321.

[11] *See supra* note 3 and accompanying text.

[12] *See R.A.*, Docket No. 09-1754 (issued May 24, 2010); *Rose V. Ford*, 55 ECAB 449 (2004).

sprain of the lumbar spine was a result of the August 12, 2003 work-related accident. Dr. Mize noted that there was no evidence of any relationship between the L5-S1 lumbar disc arthroplasty performed by Dr. Bradley in 2008 and the August 12, 2003 work injury. He further opined that there was no connection between the original August 2003 injury and the diagnosis of chronic degenerative disc disease at T11-12 and T12-L1 and thus, fusion surgery should not be authorized.

The Board finds that the weight of the medical evidence rests with Dr. Mize as the impartial medical specialist. Dr. Mize's opinion was based on a proper factual and medical background, finding that there was no causal connection between appellant's August 12, 2003 injury and the chronic degenerative disc disease at T11-12 and T12-L1. He further found that there was no causal connection between appellant's accepted employment injury and the May 28, 2008 artificial disc replacement at L5-S1. Dr. Mize's conclusion is supported by a thorough examination, objective evidence and rationale.[13]

Dr. Bradley's reports did not provide any opinion on the cause of appellant's artificial disc replacement at L5-S1 on May 28, 2008. His opinion that appellant's persistent back problem and severity of degeneration was most likely a result of his August 2007 inmate altercation was not supported by adequate rationale.[14] Moreover, Dr. Bradley's opinion cannot be considered properly rationalized given his reliance on an inaccurate employment history as appellant's work-related altercation occurred in August 2003 and not August 2007 as stated by the physician.[15] As previously noted, Dr. Holladay stated that appellant's disc degeneration of the lower thoracic spine was not related to the August 12, 2003 work injury and further noted that surgery would not be beneficial for this condition. Dr. Mize was inclined to agree with this assessment, finding that there was no causal connection between the August 12, 2003 injury and appellant's current lumbar conditions and need for surgery. A well-reasoned opinion from a referee examiner is entitled to special weight.[16] Thus, Dr. Mize's opinion that appellant did not sustain a recurrence of disability as a result of the accepted August 12, 2003 injury is entitled to special weight and represents the weight of the evidence.[17]

The Board further finds that an intervening incident negated the causal relationship between the accepted lumbar injuries and appellant's condition as of August 12, 2003. Appellant stated that he sustained a nonoccupational lumbar injury on July 5, 2007 when he slipped and fell. Thus, he is asserting a new injury. The exposure to an intervening factor broke the chain of causation stemming from the accepted sprain of the lumbar spine. The circumstances did not

[13] *R.B.*, Docket No. 11-1616 (issued March 1, 2012).

[14] *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[15] *Anna M. Delaney*, 53 ECAB 384, 286 (2002) (The factors that comprise the evaluation of medical evidence include the opportunity for a physical examination and the thoroughness of the examination. Additional factors include the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion).

[16] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[17] *Id.*

involve a spontaneous change in the accepted condition.[18] For the reasons stated above, OWCP's denial of the claimed recurrence of disability was proper under the law and facts of the case.[19]

LEGAL PRECEDENT -- ISSUE 2

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.[20] 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.[21] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[22] 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.[23]

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.[24] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[25] 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.[26]

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[18] *Bryant F. Blackmon*, 56 ECAB 752 (2005).

[19] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[20] 5 U.S.C. § 8103(a).

[21] *See Dale E. Jones*, 48 ECAB 648, 649 (1997).

[22] *See 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).

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

[24] *See Kennett O. Collins, Jr.*, 55 ECAB 648 (2004); *Debra S. King*, 44 ECAB 203, 209 (1992).

[25] *Id.*; *see also M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[26] *See R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained a sprain of the lumbar spine as a result of the August 12, 2003 employment injury. By decision dated April 11, 2011, it denied authorization for thoracic lumbar spine fusion at T11-12 and T2-L1. By decision dated October 26, 2011, an OWCP hearing representative affirmed the April 11, 2011 decision. The Board finds that OWCP did not abuse its discretion by denying authorization for thoracic lumbar spine fusion.

OWCP properly determined that a conflict existed in the medical opinion evidence between appellant's treating physician, Dr. Bradley, and OWCP second opinion examiner, Dr. Holladay, as to whether thoracic lumbar spine fusion should be authorized. It thus properly designated Dr. Mize as the impartial medical examiner. Dr. Mize provided an accurate history of injury based on the statement of accepted facts and provided detailed findings on physical examination. He diagnosed appellant with sprain/strain of the lumbar spine and chronic degenerative disc disease at T11-12 and T12-L1. Dr. Mize opined that appellant's sprain of the lumbar spine was a result of the August 12, 2003 work-related accident. He noted that he found no evidence that there was any relationship between the surgery performed by Dr. Bradley in 2008 and the August 12, 2003 work injury. Dr. Mize opined that, because there was no connection between the original August 12, 2003 injury and the diagnosis of chronic degenerative disc disease at T11-12 and T12-L1, fusion surgery should not be authorized.

The Board finds that Dr. Mize's report is sufficiently detailed and well reasoned to constitute the special weight of the medical evidence. Dr. Mize based his reports on a proper history of injury, detailed physical findings and provided medical reasoning for his conclusion.[27] He noted that appellant's August 12, 2003 lumbar spine sprain was not related to the 2008 L5-S1 artificial disc replacement. Moreover, Dr. Mize stated that there was no connection between the work injury and the diagnosis of chronic degenerative disc disease at T11-12 and T12-L1 and thus, the fusion surgery should not be authorized. Similarly, Dr. Holladay also opined that appellant's disc degeneration of the thoracic spine was not related to the August 12, 2003 injury, that appellant would not benefit from surgery and that his condition was a result of aging and genetics rather than a traumatic incident. As the weight of the evidence as represented by Dr. Mize's report supports that appellant was not a candidate for surgical intervention, the Board finds that OWCP properly exercised its broad discretion under FECA to deny authorization for the proposed surgery.[28]

CONCLUSION

The Board finds that appellant did not establish an employment-related recurrence of disability commencing July 5, 2007. The Board further finds that OWCP properly exercised its discretion in denying authorization for thoracic lumbar spine fusion at T11-12 and T2-L1.

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

[28] *K.D.*, Docket No. 11-1738 (issued March 27, 2012).

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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