United States Department of Labor
Employees' Compensation Appeals Board

G.A., Appellant	)	
and	)	**Docket No. 12-884**
	)	**Issued: April 2, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, East Orange, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2012 appellant, through her attorney, filed a timely appeal from a December 15, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which denied authorization for spinal surgery. 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.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 9, 2008 appellant, then a 50-year-old nursing assistant, sustained injuries to her neck and lower back when she turned to change a patient and experienced pain in her back. She stopped work on January 10, 2008. Appellant's claim was accepted for lumbosacral sprain and cervical spasm and expanded to include cervical and lumbar disc herniation. She returned to light duty and worked intermittently until she stopped work again on March 21, 2011.[2]

On February 5, 2010 appellant submitted a request to undergo a lumbar laminectomy. In a February 20, 2010 report, the district medical adviser noted that he reviewed the medical records, including the statement of accepted facts. He noted that a May 13, 2008 magnetic resonance imaging (MRI) scan revealed herniations at C5 and C6 with subligamentous herniations and an annular tear at the L4-5 segment. The district medical adviser concluded that appellant suffered from severe lumbosacral radiculopathy and reported that the requested surgical procedures were reasonable and appropriate under the circumstances. On February 24, 2010 OWCP approved the request for laminectomy surgery, low back disc surgery and spinal disc surgery. It was scheduled for March 10, 2010. In a March 8, 2010 report, Dr. Sanford Fineman, a Board-certified neurosurgeon, noted that he rescheduled appellant's surgery for the end of April because she requested to postpone surgery until she finished nursing school.

In a January 10, 2011 report, Dr. Allen S. Glushakow, a Board-certified internist, noted a date of injury of January 8, 2008 and related appellant's complaints of numbness in her left arm, neck and back pain and left-sided sciatica. Upon examination, he observed cervical tenderness, lumbosacral tenderness with some guarding and decreased sensation over the left leg compared to the right. No spasms in the neck were noted. Straight leg test was positive to 45 degrees on the left and 50 degrees on the right. Dr. Glushakow also reported decreased sensation over the left leg compared to the right and left ankle dorsiflexors weaker on the left than the right. He reviewed an MRI scan report and noted herniated disc at L4-5 with pressure on the foramen. Dr. Glushakow wanted to schedule endoscopic back surgery at L4-5 on the left.

On January 21, 2011 appellant submitted a request for authorization for decompression of spinal cord, injection for spinal disc, injection of foramen epidural shots, and removal of part of the lumbar vertebra.

On January 27, 2011 OWCP referred appellant's claim to a district medical adviser to determine whether the requested procedures were causally related to and medically necessary to treat her accepted conditions. In a February 5, 2011 report, Dr. Andrew A. Merola, a Board-certified orthopedic surgeon and district medical adviser, approved the procedures for decompression of spinal cord (procedural code 63056) and foramen epidural injections but did not authorize removal of part of her lumbar vertebra (procedural code 22102). He indicated that procedure No. 22102 for removal of part of the lumbar vertebra was part of procedure No. 63056

[2] On March 28, 2011 appellant filed a recurrence claim alleging that on March 21, 2011 she sustained a recurrence of her neck and back conditions when she was unable to lift, bend or push. Because OWCP had not issued a decision regarding her recurrence claim before the filing of this appeal, the Board does not have jurisdiction over the recurrence issue in this case.

for decompression of the spinal cord. The medical adviser stated that the procedure for removal of part of the lumbar vertebra was not standard treatment for lumbar radiculopathy. He explained that this procedure was already taken into consideration under procedure No. 63056 for spinal decompression. The medical adviser opined that removal of the part of the lumbar vertebra was an attempt to unbundle codes and procedures.

On March 4, 2011 OWCP authorized appellant's request for decompression of the spinal cord and foraminal epidural injections. It also informed appellant that the district medical adviser did not authorize surgery for removal of part of the lumbar vertebra and advised her that she had 30 days to respond to the district medical adviser's report.

In a March 22, 2011 report, Dr. Glushakow noted a date of injury of January 8, 2008 and related appellant's complaints of severe neck and back pain and numbness in the left arm. Upon examination, he observed cervical tenderness, marked limitation in range of motion in her neck, and marked lumbosacral tenderness and spasm. The compression test was negative. Dr. Glushakow diagnosed lumbar radiculopathy with herniated disc. He indicated that he wanted to schedule endoscopic surgery at L4-5 in the left.

In a March 29, 2011 attending physician's report, Dr. Glushakow noted appellant's diagnoses of lumbar radiculopathy and herniated lumbar disc. He requested endoscopic surgery and indicated that he was waiting for approval. Dr. Glushakow authorized appellant to remain off work until April 26, 2011.

In an April 14, 2011 report, Dr. Merola provided an accurate history of injury and reviewed appellant's records, including the statement of accepted facts. He noted that Dr. Glushakow's March 2011 report indicated that he wanted to perform a foraminotomy and transforaminal steroid injection along with the other surgical procedures previously requested. Dr. Merola reported that a foraminotomy was part of transforaminal decompression of the neurological elements and was irrelevant. He explained that he found no intrinsic bony lesions and neurological compression.

On April 21, 2011 OWCP found that a conflict in medical opinion existed between appellant's treating physician and the district medical adviser regarding whether removal of part of the lumbar vertebra (procedure 22102) was medically necessary to treat appellant's accepted conditions. It noted OWCP authorized procedures for decompression of the spinal cord (procedure 63056) and foramen epidural injections (procedure 64483).

In a May 27, 2011 report, Dr. Howard M. Pecker, a Board-certified orthopedic surgeon and impartial medical examiner, provided an accurate history of injury regarding the January 9, 2008 employment incident and related appellant's complaints of neck and back pain every day. Examination of the cervical spine revealed right and left rotation to 60 degrees, extension to 40 degrees and flexion to 45 degrees. No discrete spinous process, transverse process tenderness and paravertebral spasms were noted. Examination of the upper extremities revealed decreased sensation throughout the left upper extremity to pinprick including the chest, back, left side of the neck and left side of her entire face. No hyperreflexia, wasting or asymmetry was found. Upon examination of the lumbar spine, Dr. Pecker observed light palpation on the entire left side of the back and flank area, but no discrete spinous process tenderness, paravertebral spasm or

discrete flank tenderness. Forward bending was to 60 degrees and right and left bending was to 30 degrees. Dr. Pecker noted that there were no positive neurological findings. He diagnosed degenerative disc disease of the cervical and lumbar spine. Dr. Pecker reported that decrease in sensation to pinprick of the entire left side of the body was a medical impossibility for degenerative disc problems and was a sign of symptom magnification. He explained that appellant's subjective complaints, physical examination and MRI scan findings did not match. Dr. Pecker concluded that removal of part of the lumbar vertebra was not medically necessary for the accepted conditions of lumbosacral sprain, cervical spasm, displacement of cervical intervertebral disc and displacement of lumbar intervertebral disc. He stated that decompression of the spinal cord and injection of the foramen epidural were also not indicated for appellant as appellant had no neurologic deficits, had no evidence of spinal instability and showed signs of symptom magnification.

In a decision dated June 14, 2011, OWCP denied authorization for appellant to undergo spinal surgery (codes 22102, 63056 and 64483) based on Dr. Pecker's impartial medical examiner report which established that the surgical procedures were not medically necessary. It determined that Dr. Pecker's report constituted the weight of the medical evidence and properly resolved the conflict in medical opinion.

On June 20, 2011 appellant, through counsel, submitted a request for an oral hearing, which was held on October 11, 2011. She was represented by counsel, Thomas Uliase. Appellant provided an accurate history of the January 9, 2008 employment injury and related her medical treatment. She stated that she was seen in the emergency room and authorized to return to light duty after a few days off. Appellant noted that Dr. Glushakow recommended back surgery and authorized her to remain off work until she had back surgery. Appellant's counsel alleged that Dr. Pecker's impartial medical examination created a conflict in medical opinion as he believed that no surgery was needed but the district medical adviser authorized the other two surgical procedures for spinal decompression and epidural injections. He further alleged that there were many deficiencies with Dr. Pecker's impartial medical examiner report because the statement of accepted facts (SOAF) failed to mention that appellant's back surgery was approved on February 24, 2010 and March 4, 2011. Accordingly, appellant's counsel alleged that Dr. Pecker's report was based upon an improper or inappropriate factual and medical history and OWCP should refer appellant's case to a new impartial medical examiner.

In a July 5, 2011 report, Dr. Glushakow related appellant's complaints of progressive sciatica and inability to clean her house and perform activities of daily living. Upon examination he observed less cervical tenderness and spasm and range of motion restricted by 15 percent. Examination of the back revealed marked lumbosacral tenderness and spasm. Flexion was present only in the 50 degrees. Lateral rotation, flexion and extension were decreased by 33 percent. Straight leg raise was positive at 50 degrees on the left and 55 degrees on the right. Dr. Glushakow diagnosed herniated lumbar disc at L4-5 with radiculopathy and cervical radiculitis. He opined that appellant needed endoscopic surgery and strongly protested OWCP's decision denying authorization of surgery. Dr. Glushakow stated that performing a foraminotomy was an integral part of the procedure in order to take the pressure of the L5 nerve and reported that procedure 22102 was necessary because it required extra instrumentation.

In an August 26, 2011 report, Dr. Glushakow noted appellant's January 9, 2008 employment injury and provided a history of her medical treatment. He stated that he requested endoscopic surgery, specifically codes 63056, 62290, 372295, 64483 and 22102, but the code for 22102 was not authorized. Dr. Glushakow explained that appellant still had neurologic symptoms and the endoscopic surgery was essential for relief of her pain.

In reports dated October 4 and November 1, 2011, Dr. Glushakow stated that appellant was unable to work due to left-sided sciatica. He observed less cervical tenderness and spasm and noted that appellant's range of motion in her neck was restricted by 12 percent. Spurling's test was positive and straight leg raise testing was positive at 45 degrees on the left and 50 degrees on the right. Examination of the back revealed flexion present to 60 degrees. Dr. Glushakow also observed decreased sensation over the lateral aspect of the left ankle. He diagnosed herniated lumbar disc, L4-L5 with radiculopathy and cervical radiculitis.

By decision dated December 15, 2011, an OWCP hearing representative affirmed the June 14, 2011 decision denying appellant's request for spinal surgery. It determined that Dr. Pecker's impartial medical examiner's report properly represented the weight of the medical evidence.

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 in the amount of monthly compensation.[3] 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.[4] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[5] 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.[6]

If there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[7] In cases

[3] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

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

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

[6] *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

[7] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

OWCP accepted that appellant sustained a lumbosacral sprain, cervical spasm, and cervical and lumbar disc herniations. In a January 10, 2011 report, Dr. Glushakow, appellant's treating physician, conducted an examination and recommended appellant undergo endoscopic back surgery at L4-5 on the left to treat her disc herniations. On January 21, 2011 appellant submitted a request for authorization for decompression of spinal cord, injections for spinal disc and epidural shots and removal of part of the lumbar vertebra. In a February 5, 2011 report, Dr. Merola, the district medical adviser, approved the procedures for decompression of spinal cord and spinal injections but did not authorize the procedure for removal of part of the lumbar vertebra. He disagreed with Dr. Glushakow's findings and explained that removal of part of the lumbar vertebra, procedure No. 22102, was part of the procedure for decompression of the spinal cord, procedure No. 63056. On March 4, 2011 OWCP approved appellant's request for decompression of the spinal cord and spinal injections. On April 21, 2011 it found that there was a conflict in medical opinion between Drs. Glushakow and Merola regarding whether removal of part of the lumbar vertebra, procedure No. 22102, was medically necessary to treat appellant's accepted conditions. OWCP referred appellant to Dr. Pecker, the impartial medical examiner, to resolve this conflict.

In a May 27, 2011 report, Dr. Pecker reviewed appellant's medical history and conducted an examination. He disagreed with appellant's treating physician and stated that her subjective complaints, physical examination and MRI scan findings did not match. Dr. Pecker concluded that removal of part of the lumbar vertebra was not medically necessary for the accepted conditions of lumbosacral sprain, cervical spasm, and displacement of cervical and lumbosacral intervertebral discs and stated that decompression of the spinal cord and spinal injections were also not indicated for appellant. The Board finds that OWCP properly found that Dr. Pecker's referee opinion constituted the weight of the medical evidence to establish that removal of part of the lumbar vertebra was not medically necessary to treat appellant's accepted conditions. He reviewed appellant's records, including the statement of accepted facts and conducted an examination. Dr. Pecker did not find any positive neurological findings and determined that decrease in sensation to pinprick of the entire left side of the body was a medical impossibility for degenerative disc problems and was a sign of symptom magnification. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Thus, OWCP properly accorded his opinion the special weight of an impartial medical examiner.[9] Based on Dr. Pecker's referee medical opinion, OWCP did not abuse its discretionary authority by denying appellant's request for removal of part of the lumbar vertebra.

Following the June 14, 2011 decision, appellant requested an oral hearing and submitted additional medical reports from Dr. Glushakow. He provided examination findings and stated

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

[9] *Supra* note 8; *see also Gary R. Seiber*, 46 ECAB 215 (1994).

that endoscopic surgery was essential to relieve appellant's back pain and neurologic symptoms. Dr. Glushakow explained that a foraminotomy was an integral part of the procedure to take pressure off the L5 nerve. He did not, however, further address why the surgical procedure was medically warranted in light of the findings of Dr. Pecker. The Board finds that Dr. Glushakow's opinion is not sufficient to negate Dr. Pecker's impartial medical examiner report as the special weight of the medical evidence because Dr. Glushakow does not provide adequate medical rationale in support of his opinion that spinal surgery was necessary to treat appellant's accepted medical conditions.[10]

The Board notes, however, that OWCP previously authorized appellant's request for decompression of spinal cord and spinal injections on March 4, 2011. At the time appellant was referred to Dr. Pecker for the impartial medical evaluation no conflict existed in the medical opinion evidence regarding the necessity for these procedures. In decisions dated June 14 and December 15, 2011, OWCP denied authorization for removal of part of the lumbar vertebra, as well as decompression of the spinal cord and spinal injections, based upon Dr. Pecker's report as an independent medical examiner resolving a conflict. Dr. Pecker stated that all these procedures were not medically necessary as appellant had no spinal instability and had no neurologic deficits. His report was a second opinion rejecting the medical necessity for decompression of the spinal cord and spinal injections. Dr. Pecker's report did not resolve a conflict in the medical evidence, but rather created a conflict as to whether these procedures were medically necessary. Thus, the Board finds that OWCP improperly found in its December 15, 2011 decision that the surgical procedures for decompression of the spinal cord and spinal injections should be denied. Accordingly, the December 15, 2011 decision should be affirmed, as modified.

On appeal, appellant alleges that Dr. Pecker's impartial medical examination report should not constitute the weight of the medical evidence because it was based on an inaccurate statement of accepted facts. He stated that the SOAF should have been amended to include the fact that the district medical adviser recommended expanding the claim to include lumbar radiculopathy. The Board finds, however, that while the district medical adviser may have recommended the expansion of appellant's claim, OWCP did not formally accept her claim for lumbar radiculopathy. Accordingly, Dr. Pecker based his opinion on proper factual background. He properly reviewed appellant's history and noted the conditions for which her claim was accepted. Accordingly, Dr. Pecker's opinion was based on an accurate history and appellant has not submitted sufficient evidence to demonstrate that Dr. Pecker's impartial medical examination should not be entitled to special weight. Thus, the Board finds that OWCP did not abuse its discretion in denying authorization for removal of partial lumbar vertebra.

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.

[10] *See R.M.*, Docket No. 12-332 (issued June 20, 2012).

CONCLUSION

The Board finds that OWCP did not abuse its discretion to deny authorization for partial removal of the lumbar vertebra, but should not have denied appellant's request for decompression of spinal cord and spinal injections.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: April 2, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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