

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

D.K., Appellant)	
)	
and)	Docket No. 13-230
)	Issued: June 17, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Keyport, 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:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2012 appellant, through counsel, filed a timely appeal from a July 17, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied authorization for right shoulder surgery. 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.

ISSUE

The issue is whether OWCP abused its discretion in denying authorization for right shoulder surgery.

On appeal appellant's counsel contends that there is a conflict in medical opinion and that the opinion of OWCP's referral physician is insufficient to constitute the weight of medical evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a December 10, 2009 decision, the Board affirmed a May 12, 2008 OWCP decision which found that appellant received an overpayment of compensation in the amount of \$30,264.28. The Board affirmed that appellant was not entitled to waiver of recovery of the overpayment as she was at fault. The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference.² The facts relevant to the current appeal are set forth.

In letters dated February 3 and 16, 2010, OWCP informed appellant that her claim had been accepted for aggravation of cervical radiculitis, however, the evidence of record was insufficient to warrant authorization for a second right shoulder arthroscopy.

In a February 22, 2010 letter, appellant informed OWCP that it had previously authorized right shoulder arthroscopic surgery in 2002. She submitted a copy of OWCP's prior authorization. Appellant related that on January 25, 2008 OWCP accepted her recurrence of disability claim beginning July 24, 2007 which was due to right shoulder problems. On the back of the recurrence claim form, the employing establishment noted her complaints of right shoulder soreness and aggravation of her condition from using machines.

In a report dated March 24, 2010, Dr. Aldo Iulo, a second opinion Board-certified orthopedic surgeon, diagnosed resolved cervical sprain with radiculopathy and right shoulder tendinitis/impingement syndrome. He provided range of motion and physical examination findings, which included no muscle atrophy, swelling, effusion or erythema. Dr. Iulo opined that the right shoulder condition had resolved and that additional surgery was not warranted.

In a letter dated November 8, 2010, appellant's counsel requested authorization for right shoulder surgery. He submitted a January 26, 2010 request for authorization for the surgery by Dr. Daniel J. Mulholland, appellant's attending Board-certified orthopedic surgeon.

On December 17, 2010 OWCP received a January 26, 2010 report by Dr. Mulholland recommending right shoulder arthroscopy. Dr. Mulholland listed a diagnosis of right shoulder degenerative joint disease and acromioclavicular joint impingement. He noted an injury date of October 20, 2007 and provided physical findings which included a slightly positive right shoulder impingement sign and range of motion findings.

On December 21, 2010 Dr. Mulholland noted an injury date of October 23, 2000 and that he had treated appellant since May 13, 2002. In 2002, appellant underwent right shoulder surgery which was authorized by OWCP. She was again in need of surgery on her shoulder due to her accepted October 23, 2000 employment injury. The diagnosis was right shoulder impingement of the AC joint with degenerative joint disease which required right shoulder arthroscopy and distal clavicle resection.

² Docket No. 09-780 (issued December 10, 2009). Appellant has an accepted occupational disease claim for cervical radiculopathy. She underwent approved right shoulder arthroscopy, which was performed on November 19, 2002 and an anterior cervical discectomy, which was performed on August 31, 2004. Appellant suffered a second employment injury on October 20, 2007, accepted for aggravation of cervical radiculopathy under claim number xxxxxx238. On February 14, 2008 OWCP combined claim numbers xxxxxx368 and xxxxxx238, with xxxxxx238 as the master file number.

On March 9, 2011 Dr. Kenneth P. Heist, a second opinion Board-certified osteopathic orthopedic surgeon, reviewed the medical records, a statement of accepted facts and conducted a physical examination. He diagnosed right shoulder sprain, status postoperative for right shoulder rotator cuff tear surgery and status postoperative for anterior cervical decompression surgery. Dr. Heist noted the histories of appellant's October 23, 2000 and October 20, 2007 employment injuries. A physical examination of the right shoulder revealed no marked acromioclavicular joint tenderness, no evidence of a rotator cuff tear, no impingement signs and satisfactory range of motion. Dr. Heist reported that a review of magnetic resonance imaging (MRI) scans of the right shoulder were unremarkable. He opined that right shoulder surgery was not warranted based on his clinical examination and review of objective tests.

By decision dated April 26, 2011, OWCP denied appellant's request for authorization for right shoulder surgery.

In a letter dated May 2, 2011, appellant's attorney requested an oral hearing by an OWCP hearing representative, which was held on August 10, 2011.

By decision dated October 26, 2011, an OWCP hearing representative vacated the August 10, 2011 OWCP decision denying authorization for right shoulder surgery. She found the case was not in posture for a decision as the statement of accepted facts was inaccurate. The hearing representative remanded the case for OWCP to provide an updated statement of accepted facts that clearly listed that it had authorized the November 19, 2002 right shoulder arthroscopy and August 31, 2004 cervical discectomy.

In a December 19, 2011 supplemental report, Dr. Heist reviewed the updated statement of accepted facts. He opined that further surgical intervention was not warranted. Appellant did not exhibit any signs of cervical strain, right scapular costal syndrome or chronic repetitive stress syndrome at the time of his examination. The right shoulder MRI scans were unremarkable and there were no objective impingement signs.

By decision dated February 23, 2012, OWCP denied appellant's request for authorization for right shoulder arthroscopic surgery.

In a February 28, 2012 letter, appellant's counsel requested an oral hearing before an OWCP hearing representative held on May 16, 2012.

In a May 24, 2012 report, Dr. Mulholland reiterated his findings, recommending authorization for right shoulder surgery due to an impingement of the right shoulder causally related to the October 23, 2000 employment injury.

By decision dated July 17, 2012, an OWCP hearing representative affirmed the denial of authorization for right shoulder surgery.

LEGAL PRECEDENT

Section 8103 of FECA³ 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 In interpreting section 8103, the Board has recognized that OWCP has broad discretion in approving services provided under FECA.⁵ The only limitation on OWCP's authority is 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

Section 8123(a) of FECA⁸ 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

ANALYSIS

Appellant requested authorization for right shoulder arthroscopy based on the medical reports of Dr. Mulholland. By decision dated February 23, 2012, OWCP denied her request for right shoulder arthroscopy finding that the medical evidence failed to establish that her right shoulder impingement syndrome or right shoulder degenerative joint disease were causally related to her accepted 2000 and 2007 employment injuries. An OWCP hearing representative affirmed the February 23, 2012 decision on July 17, 2012.

The Board finds that the case is not in posture for a decision due to a conflict in the medical opinion as to whether the recommended surgery should be authorized.

The record reflects that OWCP had previously approved appellant's request for a right shoulder arthroscopic surgery by Dr. Mulholland, which occurred on November 19, 2002. Dr. Mulholland diagnosed right shoulder impingement syndrome requiring surgery. In support of his request for authorization, he noted that OWCP had previously authorized right shoulder surgery in 2002 and that appellant again requires the same surgery.

³ *Supra* note 1.

⁴ *Id.* at § 8103; *see R.L.*, Docket No. 08-855 (issued October 6, 2008); *Sean O'Connell*, 56 ECAB 195 (2004); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *A.O.*, Docket No. 08-580 (issued January 28, 2009); *Joseph P. Hofmann*, 57 ECAB 456 (2006).

⁶ *D.C.*, 58 ECAB 620 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

⁷ *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁸ 5 U.S.C. § 8123(a).

⁹ *Id.*; *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Geraldine Foster*, 54 ECAB 435 (2003).

Drs. Iulo and Heist, OWCP referral physicians, examined appellant and found that the requested surgery was not medically warranted. In a March 24, 2010 report, Dr. Iulo stated that the proposed surgery was not warranted based on the objective tests and his physical examination. In reports dated March 9 and December 19, 2011, Dr. Heist concluded that surgery was not appropriate as there was insufficient evidence to determine any evidence of right scapular costal syndrome, chronic repetitive stress syndrome, any right shoulder impingement signs or a cervical strain and, thus, right shoulder arthroscopic surgery was unnecessary.

The Board finds that there is a conflict in the medical evidence between Dr. Mulholland, for appellant, and Drs. Iulo and Heist, for OWCP, regarding whether appellant's request for surgery should be authorized. Due to the unresolved conflict of the medical opinion, OWCP should refer appellant to an appropriate Board-certified specialist for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a), to resolve this issue. After this and such other development as OWCP deems necessary, OWCP should issue a *de novo* decision on the issue.

CONCLUSION

The Board finds that the case is not in posture for decision, due to a conflict in the medical evidence, with regard to whether appellant's proposed surgery is medically necessary.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 17, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: June 17, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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