United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
	)	**Docket No. 12-1310**
and	)	**Issued: March 5, 2013**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
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 June 1, 2012 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated December 8, 2011. 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 surgery for L4-5 microdiscectomy, medial facetectomy, foraminotomy and excision of ruptured facet synovium.

FACTUAL HISTORY

On November 26, 2010 appellant, then a 51-year-old surgical health technician, experienced pain in her lower back while lifting a patient. She filed a claim for benefits on

[1] 5 U.S.C. § 8101 *et seq.*

December 6, 2010 which OWCP accepted for a sprain of the lumbar region. Appellant received compensation for temporary total disability.

In a report dated February 2, 2011, Dr. Hagop L. Der Krikorian, a specialist in neurological surgery, advised that appellant had been experiencing low back pain and right-sided sciatica. He noted that she had been injured on November 26, 2010, after which she developed acute low back pain, which progressively worsened over the next 48 hours. It radiated into the right buttock, right thigh, right calf and right foot, with some tingling sensation exacerbated by physical activity, coughing and sneezing. Dr. Der Krikorian stated that appellant did not have any back pain prior to this incident.

On examination, appellant had mild sciatica at 60 degrees on the right side, with distinct hypesthesia and hyperalgesia in the L5 distribution on the right and hypesthesia in the L4 distribution on the right. Dr. Der Krikorian stated that there was a combination of a disc herniation and ruptured extruded facet synovium at L4-5 on the right side impinging upon the right L5 nerve root, with mild central canal stenosis and mild L5-S1 disc osteophyte complex narrowing the inferior neural foramen. He opined that appellant had L5 and L4 radiculopathy on the right side secondary to a combination of disc herniation and ruptured facet synovium at the L4-5 interspace on the right side, as indicated by a magnetic resonance imaging (MRI) scan. Dr. Der Krikorian presented her with the option of conservative treatment involving pain management, medical management, physical therapy, epidural steroid blocks, or, as a last resort, surgical intervention.

In a February 15, 2011 report, Dr. Der Krikorian stated that appellant's overall condition had remained unchanged since his previous examination. Appellant was still experiencing low back pain radiating into the right groin, right ankle and right foot which she could no longer tolerate. Dr. Der Krikorian reiterated that appellant had L5 and L4 radiculopathies on the right side secondary to a combination of disc herniation and ruptured facet synovium. He stated that she had failed medical management and discussed different treatment options. Appellant decided to undergo surgery for an L4-5 microdiscectomy, exploration, decompression and excision of the ruptured facet synovium.

On March 11 and 16, 2011 Dr. Der Krikorian requested authorization for an L4-5 microdiscectomy, exploration, decompression and excision of the ruptured facet synovium. On March 18, 2011 appellant underwent surgery. The procedure was performed by Dr. Der Krikorian.

In a March 23, 2011 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed appellant's medical history and the surgical report. He opined that she did not undergo adequate conservative treatment prior to having the March 18, 2011 surgery. The proper course of treatment would have been for appellant to have undergone three epidural steroid injections, two weeks apart, with a course of anti-inflammatory medication, aquatic exercises, physical therapy, ultrasound and ice only with no electrical stimulation for the first week. Following this period of conservative treatment, appellant should have been reevaluated by Dr. Der Krikorian and then submitted a request for surgery to OWCP. Dr. Berman stated that, since these conservative measures were not utilized, it was not correct to conclude that she had failed conservative treatment.

By decision dated May 19, 2011, OWCP denied authorization for surgery for L4-5 microdiscectomy, exploration, decompression and excision of the ruptured facet synovium.

On May 23, 2011 appellant requested an oral hearing, which was held on September 27, 2011.

OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination as to the necessity for surgery. In a report dated June 6, 2011, Dr. Smith opined that Dr. Der Krikorian had recommended a surgical procedure despite the lack of appropriate workup and the lack of attempted conservative treatment for the accepted condition of a back sprain. He stated that it was highly likely that appropriate treatment would have helped appellant's symptoms and perhaps could have precluded the need for surgery.

Dr. Smith stated that a review of the MRI scan showed degenerative changes consisting of facet hypertrophy and a facet cyst on the right side at L4-5. There was no evidence of any post-traumatic bone edema around the right-sided facet joint which would indicate a direct insult to the joint that would have produced this cyst. In addition, Dr. Smith noted that the postoperative pathology report noted that tissue removed from appellant's spine was all degenerative in nature. Based on these findings, it did not appear that the facet degenerative disease and hypertrophy or the facet cyst was causally related to the November 26, 2010 injury. Dr. Smith advised that, in any event, there was no objective documentation that appellant had post-traumatic radiculopathy with spinal instability related to the November 26, 2010 incident. He concluded that appellant's lumbar degenerative disease and the surgery performed by Dr. Der Krikorian was unrelated to the accepted injury.

At the hearing, appellant stated that she had never experienced previous back pain which radiated down her right leg. Dr. Der Krikorian told her that she needed to have surgery and that there was no guarantee that the procedure would "fix" the problem. Appellant noted that her back pain had diminished somewhat since surgery. Her attorney contended that the trauma from the November 26, 2010 work injury exacerbated appellant's underlying back condition and necessitated the March 18, 2011 surgery.

By decision dated December 8, 2011, OWCP affirmed the denial of authorization for appellant's March 18, 2011 surgery. It found that the weight of the medical evidence was represented by Dr. Smith's referral opinion.

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

[2] *Id*.

[3] *Id.* at § 8103.

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. 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.[4]

ANALYSIS

The Board finds that this case is not in posture for decision.

The Board finds a conflict in medical opinion evidence exists between Dr. Der Krikorian and Dr. Smith concerning whether appellant's March 11, 2011 surgery was related to her work-related injury.

OWCP accepted that appellant sustained a lumbar sprain from her November 26, 2010 employment injury. Dr. Der Krikorian, a treating neurosurgeon, recommended that she undergo an L4-5 microdiscectomy, exploration, decompression and excision of the ruptured facet synovium procedure. He stated on a February 15, 2011 report that appellant's overall condition remained unchanged since his previous examination despite the fact that she had tried medical management. Dr. Der Krikorian performed surgery on March 18, 2011.

In a report dated March 23, 2011, Dr. Berman recommended that OWCP deny authorization for the requested surgery. He opined that the procedure was not necessary because appellant did not undergo conservative treatment prior to having the March 18, 2011 surgery. Dr. Berman noted that, following a period of additional conservative treatment, appellant should have been reevaluated by Dr. Der Krikorian prior to requesting authorization for surgery. Appellant was referred to Dr. Smith, a second opinion specialist, who examined her and reviewed the pathology report from surgery. Dr. Smith found that Dr. Der Krikorian did not provide adequate conservative treatment prior to surgery. Moreover, he stated that the tissue removed from the spine was all degenerative in nature and not due to the accepted November 26, 2010 injury. Dr. Smith concluded that the surgery was not necessitated by appellant's accepted lumbar sprain.

As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. There is an unresolved conflict in the medical evidence regarding whether her March 18, 2011 surgery was to ameliorate appellant's accepted lumbar sprain condition. The Board will remand the case for referral to an impartial medical specialist to resolve this conflict.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

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

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2011 Office of Workers' Compensation Programs' decision be set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: March 5, 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