



floor area of a conveyance. In a note dated January 12, 2010, Dr. Benjamin Bujanda, a Board-certified family practitioner, diagnosed musculoskeletal injury to the lower back with herniated disc at L5-S1. OWCP accepted his claim for sprain of the lumbar back on January 28, 2010.

Appellant submitted additional medical evidence after the acceptance of his claim, including a note from Dr. Bujanda dated January 4, 2010 which described the employment incident. He stated that on December 14, 2009 he was working while squatting down under a truck adjusting a screw when he experienced a sharp pain in his lumbar spine. A magnetic resonance imaging (MRI) scan dated January 6, 2010 demonstrated a disc herniation with impingement on the central aspect of the thecal sac at L5-S1 as well as a disc bulge at L3-4. On August 30, 2010 OWCP accepted the additional condition of displacement of lumbar intervertebral disc without myelopathy. An MRI scan dated September 13, 2011 demonstrated mild lumbar spinal stenosis caused by a congenital condition as well as a central disc herniation at L5-S1 and disc bulge at L3-4. A discogram dated November 14, 2011 suggested grade 3 radial tears anteriorly at L4-5 and L5-S1.

On November 23, 2011 appellant's attending physician, Dr. Jose G. Dones, a Board-certified neurosurgeon, noted appellant's complaints of lower back pain that radiates to the left leg and sometimes to the right leg. He noted that appellant's discogram suggested grade 3 radial tears at L4-5 and L5-S1. Dr. Dones stated that appellant had failed pain management and injections. He recommended an anterior lumbar interbody fusion.

In a letter dated January 5, 2012, OWCP noted that Dr. Dones had requested authorization for lumbar spine fusion. It stated that the evidence did not explain how the need for the procedure resulted from appellant's employment and requested additional information. On August 30, 2010 OWCP updated its acceptance to include displacement of lumbar intervertebral disc without myelopathy.

OWCP's medical adviser noted appellant's accepted conditions and reviewed the medical evidence on February 8, 2012. He noted that Dr. Dones did not provide the specific levels for the anterior lumbar interbody fusion and opined that the pain generator was not well identified. The medical adviser recommended a second surgical opinion from a Board-certified neurosurgeon or orthopedic surgeon.

In a note dated February 15, 2012, Dr. Dones stated that appellant had not improved with epidural injections or physical therapy. He recommended anterior lumbar interbody fusion at L5-S1. Dr. Dones opined that this surgery would give appellant a better chance at a normal life without pain.

On March 9, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Jorge Tijmes, a Board-certified orthopedic surgeon.

On March 22, 2012 Dr. Bujanda examined appellant's lower back. He found muscle contraction on the left side of the lower back with weakness in the left lower extremity. Dr. Bujanda diagnosed herniated disc at L5-S1 with controlled pain. On April 23, 2012 he released appellant to return to regular full-time work.

In a report dated April 10, 2012, Dr. Tijmes listed appellant's history of injury and the accepted conditions. On physical examination, he found tenderness to palpation with paravertebral muscle spasms and hypoesthesia over the left lateral calf and foot. Dr. Tijmes noted that appellant's left Achilles reflex was absent and that he had 4/5 muscle strength in the left extensor hallucis longus, gastrocnemius and anterior tibials on the left. He reviewed appellant's diagnostic studies and diagnosed lumbar pain and lumbar disc herniation at L5-S1. Dr. Tijmes opined that these conditions were due to appellant's employment. He opined that the proposed surgery was not medically necessary as the lateral lumbar flexion-extension radiograph revealed no evidence of instability or abnormal motion and as appellant failed to show signs of radiculopathy on electromyogram and nerve conduction velocity studies.

OWCP's medical adviser reviewed this report on April 30, 2012 and noted the difference of opinion between Drs. Dones and Tijmes. He found that surgery could not be authorized.

By decision dated May 11, 2012, OWCP denied appellant's request for spine surgery. It stated that he had not had an adequate trial of nonoperative treatment.

Appellant requested reconsideration on January 17, 2013. In support of his request for reconsideration, he submitted a statement alleging that Dr. Tijmes had no history or records of his treatment prior to his evaluation.

By decision dated March 21, 2013, OWCP reviewed the merits of appellant's claim and denied modification of its May 11, 2012 decision finding that his statement was not sufficient to establish that Dr. Tijmes' report was not based on a proper factual background.

### **LEGAL PRECEDENT**

Section 8103 of FECA 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.<sup>2</sup> While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.<sup>3</sup>

Section 10.310(a) of the implementing regulations provide that an employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.<sup>4</sup>

In interpreting section 8103(a) of FECA, 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. OWCP has

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<sup>2</sup> *Id.* at § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003); *J.T.*, Docket No. 13-452 (issued May 29, 2013).

<sup>3</sup> *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

<sup>4</sup> 20 C.F.R. § 10.310(a).

administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.<sup>5</sup> In order to be reimbursed for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.<sup>6</sup> Proof of causal relationship must include supporting rationalized medical evidence.<sup>7</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.<sup>8</sup> 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.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained a sprain of the lumbar back and displacement of lumbar intervertebral disc without myelopathy due to his December 14, 2009 employment injury. It denied this request finding that the weight of the medical evidence rested with Dr. Tijmes, who opined that the proposed surgery was not medically necessary.

The Board finds that the report of Dr. Tijmes represents the weight of the evidence on whether the surgery is medically necessary and should be authorized.

Appellant requested authorization for spinal surgery based on the medical reports from his attending physician, Dr. Dones. On November 23, 2011 and February 15, 2012 Dr. Dones found that appellant had failed conservative treatment and recommended anterior lumbar interbody fusion at L5-S1.

OWCP referred the case to Dr. Tijmes for a second opinion. In his April 10, 2012 report, Dr. Tijmes opined that the proposed surgery was not medically necessary as the lateral lumbar flexion-extension radiograph revealed no evidence of instability or abnormal motion and as appellant failed to show signs of radiculopathy on electromyogram and nerve conduction velocity studies. OWCP referred the medical evidence to OWCP's medical adviser, who noted that there was disagreement between the two physicians.

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<sup>5</sup> *R.L.*, Docket No. 08-855 (issued October 6, 2008).

<sup>6</sup> See *Debra S. King*, 44 ECAB 203 (1992).

<sup>7</sup> *M.B.*, 58 ECAB 588 (2007).

<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>9</sup> *R.C.*, 58 ECAB 238 (2006).

The Board finds that the reports of Dr. Dones and Dr. Tijmes are not of equal weight. While Dr. Dones recommends surgery he does not explain how it would benefit appellant by referring to specific diagnostic tests or clinical findings. He does not identify the modalities of conservative treatment received by appellant and does not discuss which treatments have “failed” and whether any other nonsurgical treatment options would be open to him. Finally, Dr. Dones fails to acknowledge that appellant was released to return to work by Dr. Bujanda. It is counterintuitive that an employee released to return to work is in serious need of a back fusion. Dr. Dones fails to reconcile this apparent contradiction. A back fusion is a serious surgical procedure and appellant needs a stronger and more detailed statement for why it is necessary than that found in Dr. Dones reports.

**CONCLUSION**

The Board finds that appellant did not present accurate medical evidence with regards to whether the proposed back surgery is medically necessary and that OWCP did not abuse its discretion by denying it.

**ORDER**

**IT IS HEREBY ORDERED THAT** March 21, 2013 decision of the Office of Workers’ Compensation Programs is affirmed and the case remanded.

Issued: November 5, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees’ Compensation Appeals Board

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

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