

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Proctorville, OH, Employer**

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**Docket No. 14-830
Issued: August 22, 2014**

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, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2014 appellant, through his representative, filed a timely appeal from the January 15, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 properly denied authorization for appellant's back surgery.

FACTUAL HISTORY

On April 24, 2007 appellant, a 54-year-old rural carrier associate, sustained a traumatic injury in the performance of duty when he reached in the back seat of his vehicle to retrieve a bundle of mail. He felt something in his back, which began to hurt. Appellant described the nature of his injury as "back and down left leg." He indicated that he was quickly bedridden.

¹ 5 U.S.C. § 8101 *et seq.*

A magnetic resonance imaging (MRI) scan obtained on May 8, 2007 showed a large central L4-5 disc herniation with inferior extrusion of disc content on the left almost to the level of the L5-S1 disc space and with effacement and impression on the exiting nerve root structures.

Appellant underwent a left L4-5 lumbar microdiscectomy the following day. The surgeon removed the disc material so as to free up the thecal sac and nerve root. "I felt superiorly, medially and inferiorly and laterally out the foramen, above and below the nerve root. Everything was nice and loose."

OWCP accepted appellant's claim for lumbar radiculopathy.

Two months after surgery, appellant was significantly improved.

OWCP asked its medical adviser to explain whether the surgery was necessary based upon the accepted condition, and whether the claim should be expanded to accept other conditions. The medical adviser noted that appellant had back pain for one month prior to the April 24, 2007 injury, and the record showed significant preexisting degenerative disease. "In addition, the mechanism of injury would not support a herniated disc. There was no lifting injury in question. Therefore, in my opinion the surgery ... was not necessary based upon the accepted condition, and the claim should not be expanded to accept any additional conditions."

In a decision dated October 1, 2012, OWCP denied authorization for appellant's May 2007 surgery. It explained that the surgery related to a lumbar disc displacement, a condition not accepted in the case.

Following a January 16, 2013 telephonic hearing, an OWCP hearing representative observed that appellant had sustained a twisting-type injury at work while reaching into the back of his vehicle on April 24, 2007. Appellant reported a worsening of his symptoms and disability to the extent that he could not drive or walk. Within two weeks, he underwent lumbar disc surgery. Given this time line, and the circumstances surrounding the claim, the hearing representative found in an April 18, 2013 decision that OWCP's medical adviser did not provide sufficient rationale to support his opinion.

Although there was evidence that appellant had back pain and degenerative disc disease prior to the work injury, the hearing representative explained that it was not necessary to prove a significant contribution of employment factors for the purpose of establishing the element of causal relationship. If the employment factor contributed in any way to appellant's condition, such condition would be considered employment related for purposes of compensation under FECA. Further, the hearing representative noted that OWCP's medical adviser failed to discuss the actual mechanism of injury in appellant's case, and failed to discuss with any degree of medical reasoning whether the work incident caused or contributed to the subsequent lumbar herniated disc or disc surgery following the work injury. The hearing representative also noted that the medical adviser failed to discuss whether the surgery was likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation.

In a supplemental report, OWCP's medical adviser stated that the incident in question was reaching back to the back of the truck to get a package "and, in all likelihood, the pain was

already present, and it would not have been expected that this type of activity would have caused any significant aggravation.” The medical adviser continued: “Therefore, taking the entire matter under consideration, it is clear that the primary problem was preexisting disease. There is no question that there was a very large extruded herniated disc where the disc material herniated from the disc space and left the space and went into the canal. This, in all likelihood, could not have occurred with mechanism described.” The medical adviser added: “It is possible, however there is no documentation to support it, that this twisting injury could have caused some aggravation of the preexisting herniated disc. However, the overwhelming abundance of records would indicate the primary difficulty was preexisting, and the incident that was reported in all likelihood, did not aggravate the existing condition. There was certainly no evidence to suggest that it caused it.”

In a decision dated January 15, 2014, OWCP denied authorization for appellant’s back surgery.

LEGAL PRECEDENT

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 that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.² OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in FECA.³ The only limitation on OWCP’s authority is that of reasonableness.⁴

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his claim.⁵ In order to be entitled to reimbursement for medical expenses, the employee must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical opinion evidence.⁶

OWCP, however, is not a disinterested arbiter. Rather, it performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on OWCP to see that its administrative processes are

² 5 U.S.C. § 8103(a).

³ See *Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

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

⁵ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁶ *John R. Benton*, 15 ECAB 48 (1963); see *S.B.*, Docket No. 11-1332 (issued September 12, 2012) (the issue was whether the claimant had established that her October 2002 surgery was causally related to the accepted May 2000 lumbar subluxation injury).

impartially and fairly conducted.⁷ It thus shares responsibility in the development of the evidence.⁸ Once it procures medical opinion, OWCP must do a complete job.⁹ It has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.¹⁰

ANALYSIS

OWCP asked its medical adviser to explain whether appellant's May 9, 2007 surgery was necessary based upon the accepted condition, and whether the claim should be expanded to accept other conditions. The hearing representative found, however, that the opinion of the medical adviser was not sufficiently rationalized.

As the hearing representative noted, appellant sustained a twisting-type injury at work while reaching into the back of his vehicle on April 24, 2007. He felt something in his back and had back pain down the left leg. Appellant quickly became bedridden. An MRI scan showed a large disc herniation at L4-5 with disc extrusion on the left impressing on the exiting nerve root structures. Appellant underwent a left L4-5 lumbar microdiscectomy the following day to remove the disc material and free up the thecal sac and nerve root. Two months later, he was significantly improved.

It was after this surgery that OWCP accepted appellant's claim for lumbar radiculopathy.

Under the circumstances, the hearing representative found that the medical adviser's opinion required clarification, including whether the surgery was likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation.

OWCP's medical adviser provided no additional medical rationale. He continued to emphasize that appellant's "primary problem" was preexisting disease. The medical adviser allowed that it was medically possible for the twisting incident to have aggravated a preexisting herniated disc, but it would not be expected that this type of activity would cause any "significant aggravation."

The Board finds that the opinion of the medical adviser is still not well rationalized. The medical adviser failed to explain from a medical or biomechanical perspective why a twisting motion, such as when a man of appellant's habitus reaches to the back of a vehicle to pick up a bundle of mail, cannot herniate an already degenerated disc. He did indicate that an aggravation of a preexisting herniated disc was possible, but he could only speculate in the absence of probative evidence that appellant's L4-5 disc herniation was, in fact, preexisting. That appellant's "primary problem" was preexisting degenerative disease or that the incident could

⁷ *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

⁸ *Mary A. Barnett (Frederick E. Barnett)*, 17 ECAB 187, 189 (1965).

⁹ *William N. Saathoff*, 8 ECAB 769 (1956).

¹⁰ *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981).

not, in the medical adviser's opinion, have caused any "significant aggravation" is beside the point. As the hearing representative well explained, causal relationship does not require an aggravation to be significant.¹¹

Moreover, OWCP has accepted the element of causal relationship, at least insofar as the April 24, 2007 work incident and appellant's lumbar radiculopathy are concerned. For purposes of authorizing surgery, it does not matter whether the work incident precipitated the L4-5 disc herniation or merely aggravated it. The question for determination is whether the left L4-5 lumbar microdiscectomy on May 9, 2007 was, in the words of the statute, likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation with respect to the accepted condition of lumbar radiculopathy. The opinion OWCP obtained from its medical adviser did not satisfactorily resolve this issue.

In *William N. Saathoff*,¹² the claimant failed to provide any medical evidence of causal relationship. The Board explained that the Bureau of Employees' Compensation (now known as OWCP) could have rejected the claim at that point on the basis that the claimant failed to sustain his burden of proof. By undertaking development of the medical evidence from a referral physician, the Bureau obligated itself to give the medical expert a proper frame of reference. As the medical opinion it adduced was not directed to the question of causal relationship, and as the deficiency was attributable to the Bureau, the Board set aside the rejection of the claim and remanded the case to the Bureau for further development of the medical evidence.

The Board applied the same reasoning when OWCP obtained an insufficient report from its medical adviser. In the case of *Mary A. Barnett (Frederick E. Barnett)*,¹³ the only medical opinion in the case was from the Bureau's medical adviser, but he predicated his conclusion on the fact that the employee was not doing physical or mental exertion beyond the usual call of duty when suffering from his fatal heart attack. FECA, however, did not require unusual exertion or stress as a prerequisite for compensability. Finding that the Bureau shared responsibility in the development of the evidence, the Board remanded the case for referral to a specialist in cardiology for an opinion on causal relationship.

In the present case, appellant submitted no rationalized medical opinion on whether his left L4-5 lumbar microdiscectomy on May 9, 2007 was appropriate for the accepted lumbar radiculopathy.¹⁴ As in *Saathoff*, OWCP might have denied authorization at that point on the basis that appellant had failed to sustain his ultimate burden of proof to establish that he was entitled to such benefits. By undertaking development of the medical evidence from its medical

¹¹ *Beth P. Chaput*, 37 ECAB 158 (1985) (it is not necessary to prove a significant contribution of employment factors to a condition for the purpose of establishing causal relationship).

¹² *Supra* note 8.

¹³ 17 ECAB 187 (1965).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disability Management*, Chapter 2.600.7.d(2) (September 2010) (if the attending physician requests authorization for surgery, OWCP should ensure that medical rationale has been provided to establish that the proposed surgery is appropriate for the accepted conditions).

adviser, as in *Barnett*, OWCP obligated itself to obtain a medical opinion that would resolve the issue.

As OWCP undertook development of the medical evidence but failed to obtain an opinion that rationally resolved whether the May 9, 2007 surgery should be authorized, and whether the case should be expanded to include other conditions, the Board finds that OWCP has an obligation to pursue the issue further. Accordingly, the Board finds that OWCP abused its discretion in denying authorization upon the medical opinion adduced. The Board will therefore set aside OWCP's January 15, 2014 decision denying authorization and will remand the case for further development of the medical opinion evidence. OWCP shall request an opinion from the attending physician or refer the case to a second opinion specialist for an evaluation of the written record¹⁵ to determine whether appellant's left L4-5 lumbar microdiscectomy on May 9, 2007 was, in the words of the statute, likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation with respect to the accepted condition of lumbar radiculopathy.

After such further development as may become necessary, OWCP shall issue a *de novo* decision on the issue of authorization for surgery.

CONCLUSION

The Board finds that OWCP did not properly deny authorization for appellant's back surgery. Further development of the medical opinion evidence is warranted.

¹⁵ *Id., Developing and Evaluating Medical Evidence*, Chapter 2.810.10.f (September 2010) (a second opinion examination should not be requested, since a physical evaluation after the surgery was performed would have limited value).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: August 22, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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