United States Department of Labor
Employees' Compensation Appeals Board

N.H., Appellant	)	
and	)	**Docket No. 14-717**
	)	**Issued: July 25, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Brookfield, CT, Employer	)	

Appearances:
Scott R. McCarthy, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2014 appellant, through her attorney, filed a timely appeal from an August 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 appellant's request for authorization of cervical spine surgery.

[1] The appeal was stamped as received by the Board on February 11, 2014. Pursuant to Board procedure, since using the date of receipt as the filing date would result in a loss of appeal rights, the date of the postmark is considered the date of filing. 20 C.F.R. § 501.3(f)(1). The date of the postmark was February 6, 2014, which renders the appeal timely filed.

[2] 5 U.S.C. §§ 8101-8193.

On appeal, appellant's attorney asserts that the attending physician's opinion is entitled to the weight of the medical evidence.

FACTUAL HISTORY

On October 23, 2008 appellant, then a 48-year-old postal clerk, was involved in a motor vehicle accident while delivering express mail. OWCP accepted contusions of the right shoulder and wrist. Based on the opinion of Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon who provided a second-opinion evaluation for OWCP, it accepted a temporary aggravation of cervical radiculopathy. Appellant came under the care of Dr. Daniel C. George, a Board-certified orthopedic surgeon. A November 14, 2008 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated multilevel degenerative changes with mild to moderate spinal stenosis at C5-6 and C6-7. Dr. George recommended cervical spine surgery. On August 27, 2009 he performed authorized discectomy and fusion at C5-6 and C6-7.

Appellant was placed on the periodic compensation rolls. She returned to two hours of limited duty a day on January 16, 2010 and increased her hours to three each day in April 2010. Appellant continued to receive partial wage-loss compensation.

On April 27, 2010 Dr. Anthony R. Viola, Board-certified in orthopedic surgery, evaluated appellant for right shoulder pain that began at the time of the October 23, 2008 motor vehicle accident. Based on the findings of a May 17, 2010 MRI scan study, he diagnosed a post-traumatic right shoulder rotator cuff tear. OWCP accepted the condition and authorized surgery. On August 2, 2010 Dr. Viola repaired the torn rotator cuff. Appellant was returned to the periodic rolls. She returned to four hours of modified-duty daily on January 8, 2011 and received partial wage-loss compensation.

Dr. George requested approval for a C4-5 discectomy and fusion. In April 2011, OWCP referred appellant to Dr. Franck H. Schildgen, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Dr. Schildgen was asked whether the recommended discectomy and fusion at C4-5 was warranted and necessitated by the accepted employment injury.

In a May 9, 2011 report, Dr. Schildgen noted the history of injury and appellant's complaints of neck and right shoulder pain. Physical examination of the cervical spine demonstrated a slight loss of range of motion and mild tenderness over the spinous processes from C3 through C7. There were no focal, motor or sensory deficits present. Dr. Schildgen reviewed the November 14, 2008 MRI scan study and diagnosed preexisting degenerative disc disease at C5-6 and C6-7 with associated foraminal stenosis that was aggravated by the October 23, 2008 employment injury. He noted that appellant had degenerative disc disease at C4-5 to a lesser extent. Dr. Schildgen advised that the C4-5 disc condition was not causally related to the employment injury. He found that the recommended discectomy and fusion at C4-5 was not based on her accepted motor vehicle accident.

By decision dated May 17, 2011, OWCP denied appellant's request for surgery at C4-5.

Dr. George subsequently requested surgical authorization and authorization for a cervical MRI scan study. On October 28, 2011 he explained that the requested surgery was at a level

adjacent to the previous fusion and a common complication following surgery was adjacent level degeneration, which was causally related to the initial surgery.

On November 17, 2011 appellant requested reconsideration. OWCP determined that a conflict in medical evidence arose between Dr. George and Dr. Schildgen regarding whether the recommended cervical surgery was necessitated by the October 23, 2008 injury. In September 2012, it referred appellant to Dr. Lane Spero, a Board-certified orthopedic surgeon, for an impartial evaluation.[3] Dr. Spero was provided a statement of accepted facts and the medical record.

In a November 18, 2012 report, Dr. Spero noted the history of injury and stated that appellant's neck pain did not improve after the October 2009 surgery. Physical examination of the cervical spine demonstrated diminished range of motion with a normal motor examination and negative Spurling's maneuver and Hoffman's test. Dr. Spero reviewed June 2012 cervical x-rays that demonstrated the previous fusion and indicated that there was suspicion for pseudoarthrosis at the C5-6 level, which could cause pain. He obtained x-rays that demonstrated no gross movement at the C5-6 level and degeneration at the C4-5 level. Dr. Spero indicated that the degeneration at C4-5 likely preexisted the employment injury and was not related to the fusion surgery because appellant continued to have neck pain throughout the course of treatment. He recommended that a computerized tomography (CT) scan be performed to rule-out pseudoarthrosis and advised that she could perform full-time work with a lifting restriction of 20 pounds and that her narcotics should be tapered.

On December 6, 2012 and January 9, 2013 OWCP requested Dr. Spero to address whether the proposed surgery at C4-5 was warranted and necessitated by the October 23, 2008 employing establishment injury. Dr. Spero did not respond.

A January 9, 2013 MRI scan study of the cervical spine demonstrated postoperative changes at C5-6 and C6-7, an extruded right central disc protrusion at C4-5 and suspected small syrinx within the left aspect of the cord at the C5 level. Dr. George continued to recommend the surgery.

In a merit decision dated August 14, 2013, OWCP denied modification of the May 17, 2011 decision, finding that the weight of the medical evidence rested with the opinion of Dr. Spero, the referee physician. The requested authorization for surgery was denied.

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.[4] While OWCP is obligated to pay for treatment of employment-related

[3] The original physician selected declined to perform the evaluation.

[4] 5 U.S.C. § 8103; *see L.D.*, 59 ECAB 648 (2008).

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.[5]

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being 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] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[8] In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[9]

Section 8123(a) of FECA 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.[10] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.[11] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

The Board finds that this case is not in posture for decision because the conflict in medical opinion remains unresolved. OWCP accepted that appellant sustained a temporary

[5] *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[6] *See D.K.*, 59 ECAB 141 (2007).

[7] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[8] *M.B.*, 58 ECAB 588 (2007).

[9] *R.C.*, 58 ECAB 238 (2006).

[10] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[11] 20 C.F.R. § 10.321.

[12] *V.G.*, 59 ECAB 635 (2008).

aggravation of cervical radiculopathy, due to an employment related October 23, 2008 motor vehicle accident. On August 27, 2009 Dr. George, an attending orthopedic surgeon, performed a discectomy and fusion at C5-6 and C6-7. In March 2011, he requested authorization for additional cervical spine surgery, at the C4-5 level. Dr. George explained that the requested surgery was in a level adjacent to the previous fusion and a common complication following surgery was adjacent level degeneration, which was causally related to the initial surgery. OWCP referred appellant to Dr. Schildgen for a second-opinion evaluation. Dr. Schildgen opined that the recommended surgery was not warranted, advising that the degenerative changes at C5 were not related to the employment injury. OWCP found that a conflict in medical opinion regarding the need for additional surgery and referred appellant to Dr. Spero for an impartial evaluation.

The Board finds that Dr. Spero's October 18, 2012 report is of insufficient probative value to carry the special weight accorded a referee physician. Dr. Spero qualified his opinion noting the value of preoperative films for review. The record includes an MRI scan study dated November 14, 2008, which was not addressed. While Dr. Spero advised that appellant's degenerative conditions at C4-5 likely preexisted the October 23, 2008 injury and surgery. Further, appellant's symptoms were perhaps due to pseudoarthrosis at the C5-6 level. Dr. Spero recommended that a CT scan study be done. The Board finds that his opinion is equivocal and speculative. Dr. Spero did not answer the specific OWCP question as to whether the recommended surgery was warranted and necessitated by the October 23, 2008 employing establishment injury. Although asked on December 6, 2012 and January 9, 2013 to furnish a supplemental report, he did not respond.

In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report to correct the defects in the original opinion.[13] If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate medical specialist.[14]

As Dr. Spero provided an equivocal report that did not adequately address the necessity of the recommended cervical spine surgery, a conflict in medical opinion still exists. The case will be remanded to OWCP for selection of an impartial referee physician to provide an opinion on this issue. After such further development as deemed necessary, OWCP should issue a merit decision on whether the recommended cervical spine surgery is authorized.

CONCLUSION

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

[13] *Guiseppe Aversa*, 55 ECAB 164 (2003).

[14] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2013 is set aside and remanded for proceedings consistent with this opinion of the Board.

Issued: July 25, 2014
Washington, DC

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

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

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