

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

J.W., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE NATIONAL
OFFICE, Richmond, VA, Employer**

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**Docket No. 13-2093
Issued: May 6, 2014**

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 10, 2013 appellant, through her attorney, filed a timely appeal from an August 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for cervical 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 properly denied appellant's request for cervical surgery due to her accepted employment incident.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 3, 2009 appellant, then a 60-year-old tax examiner, filed an occupational disease claim (Form CA-2) alleging that she developed hand, back, neck, shoulder and arm problems as a result of repetitive data entry from her federal employment duties. By decision dated March 17, 2010, OWCP accepted the claim for brachial neuritis or radiculitis. Appellant stopped work and filed a claim for compensation (Form CA-7) for leave without pay beginning September 26, 2011.

On January 12, 2012 OWCP referred appellant to Dr. Donald Mauldin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his February 20, 2012 report, Dr. Mauldin opined that there was no clear relationship between her symptoms and her employment, noting that there was no objective documentation as to why work would cause her brachial neuritis or significant radiculitis. He noted that appellant needed an additional independent evaluation by a Board-certified neurosurgeon relative to the status of her cervical spine and should also be seen by a neurologist to determine if her tremors were work related. Dr. Mauldin stated that, although he was not a spine surgeon, he did not think that anterior cervical disc fusion would resolve her issues.

By letter dated May 17, 2012, OWCP provided a copy of the independent medical examination to Dr. Anthony Hicks, appellant's treating physician Board-certified in internal medicine, for review and comment.

In a May 22, 2012 report, Dr. Hicks disagreed with Dr. Mauldin's findings, and noted that he was not a qualified spinal surgeon and thus his opinion was of limited probative value.

In medical reports dated June 5 to 16, 2012, Dr. Scott Spann, a Board-certified orthopedic surgeon, diagnosed cervicalgia, spinal stenosis in the cervical region, degeneration cervical four disc and brachial neuritis/radiculitis. He submitted a request for surgical intervention and recommended an anterior cervical discectomy and fusion of the C5-6 and C6-7 levels.

The case file was referred to Dr. Michael M. Katz, a district medical adviser (DMA) and Board-certified orthopedic surgeon, for an opinion on appellant's diagnosed conditions and whether surgical intervention was warranted. In a July 31, 2012 report, Dr. Katz diagnosed brachial neuritis or radiculitis, recommended surgery and opined that the surgical procedure was related to the accepted work-related injury.

On August 17, 2012 OWCP found a conflict of opinion between the reports of Dr. Hicks and Dr. Mauldin's second opinion report. An OWCP Form CA-19A Memorandum Referral noted that a referee examination was required from a neurosurgeon. It referred appellant, the case file, a statement of accepted facts and a series of questions to Joshua T. Woody, M.D., for a referee examination and opinion on appellant's diagnosed condition, whether she was totally disabled due to her work injury, whether the surgery requested was due to the accepted work injury and whether her accepted condition of brachial neuritis and radiculitis was caused by her work duties.

In a September 10, 2012 referee report, Dr. Woody opined that the accepted condition of aggravated brachial neuritis or radiculitis was not caused by appellant's work duties and that her condition was a result of age-related degenerative changes. He noted that surgery was due to cervical degenerative disc disease and central canal stenosis, which was a nonwork-related issue.

By decision dated September 28, 2012, OWCP denied appellant's request for cervical surgery finding that the weight of the medical evidence rested with Dr. Woody. It noted that Dr. Woody concluded that the requested surgery was not a result of the accepted work-related condition.

By letter dated July 8, 2013, appellant, through counsel, requested reconsideration of OWCP's decision. In support of her claim, she submitted additional statements and medical reports.

By decision dated August 23, 2013, OWCP affirmed the September 28, 2012 decision denying authorization for cervical surgery because the weight of the medical evidence rested with Dr. Woody.

LEGAL PRECEDENT

Section 8123(a) 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.² In situations where there are 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 on a proper factual background, must be given special weight.³

A referee physician is selected on a rotational basis from the Medical Management Application. The database of Board-certified physicians used for referee examinations contains over 30 specialties. The services of all available Board-certified specialists will be used as far as possible to eliminate the inference of bias or partiality.⁴ The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.⁵

Section 8103(a) of FECA states in pertinent part: 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 the Secretary of Labor considers

² 5 U.S.C. § 8123(a).

³ *Nathan L. Harrell*, 41 ECAB 402 (1990).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(6)(a-b) (July 2011).

⁵ *B.S.*, Docket No. 08-2103 (issued August 21, 2009).

likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.⁶ The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.⁷ The only limitation on OWCP's authority is that of reasonableness.⁸ 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.⁹ In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹⁰

ANALYSIS

OWCP determined that a conflict existed between Dr. Hicks, appellant's treating physician, and Dr. Mauldin, a second opinion referral physician, regarding the nature and extent of her employment-related condition, disability and need for surgery. The August 17, 2012 OWCP CA-19A form Memorandum Referral noted that a referee examination was required from a specialist in the neurosurgery field due to a conflict of opinion. Pursuant to 5 U.S.C. § 8123(a), it referred appellant to Dr. Woody for an impartial medical evaluation (referee examination) to resolve the conflict.

The Board has recognized OWCP's procedures, which provide that the Medical Management System will select Board-certified physicians,¹¹ in the designated specialty in the appropriate geographic area.¹² A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the scheduler must document the reasons for the selection in the case record.¹³

With respect to the selection of Dr. Woody, he does not appear on the electronic American Board of Medical Specialties database or in the electronic database of Board-certified physicians maintained by the American Osteopathic Association. There is no probative evidence that Dr. Woody was Board-certified at the time of his September 10, 2012 report. While OWCP's procedures state that a physician who is not Board-certified may be used if the physician has special qualifications for performing the examination, the medical management

⁶ 5 U.S.C. § 8103.

⁷ *Vicky C. Randall*, 51 ECAB 357 (2000).

⁸ *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

⁹ *Rosa Lee Jones*, 36 ECAB 679 (1985).

¹⁰ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

¹¹ See *B.B.*, Docket No. 13-320 (issued January 29, 2014).

¹² See *supra* note 4 at Chapter 3.500.4b (July 2011).

¹³ *Id.* at Chapter 3.500.4b(6)(f).

assistant did not document reasons for Dr. Woody's selection in the case record.¹⁴ No evidence was presented that Dr. Woody was selected for his special qualifications and no documentation supporting the selection was provided.¹⁵

The Board further notes that the CA-19A form directed OWCP to refer appellant for a referee examination by a Board-certified neurosurgeon specialist. Both Dr. Hicks, appellant's treating physician, and Dr. Mauldin, the second opinion referral physician, stated that appellant should be evaluated by a neurosurgeon. However, there is no indication that Dr. Woody specializes in neurosurgery.¹⁶

Accordingly, the Board finds that OWCP abused its discretion in denying authorization for appellant's cervical surgery as it failed to resolve the conflict between Dr. Hicks, appellant's treating physician and Dr. Mauldin, OWCP's second opinion physician.¹⁷

Dr. Woody's report cannot resolve the conflict and therefore, the case will be set aside and remanded for further development.

CONCLUSION

The Board finds that OWCP abused its discretion in denying appellant's request for cervical surgery without properly resolving the conflict in medical opinion.

¹⁴ *Id.*

¹⁵ *P.T.*, Docket No. 08-1404 (issued December 9, 2008).

¹⁶ *J.S.*, Docket No. 13-523 (issued May 13, 2013).

¹⁷ *See Paul J. Poulin*, Docket No. 03-2034 (issued December 18, 2003).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 6, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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