United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 15-148**
	)	**Issued: February 24, 2015**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Seattle, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 20, 2014 appellant filed a timely appeal from a June 25, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP properly denied authorization for surgery.

On appeal, appellant contends that she continues to suffer from lower back problems that require the proposed surgery.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board with respect to OWCP's denial of authorization for a prior surgery.[2] In a November 15, 2010 order, the Board granted the motion of the Director of OWCP to set aside OWCP's November 13, 2009 decision which denied authorization for low back disc surgery at L5-S1 and its January 11, 2010 decision which denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed. The Board remanded the case to grant appellant's request for surgery and provide her with appropriate compensation benefits. The relevant facts are set forth below.

In an April 4, 2006 decision, OWCP accepted that on April 6, 2003 appellant, then a 25-year-old transportation security screener, sustained lumbar strain and central disc herniation at L4-5 as a result of lifting bags that contained sound equipment at work. It authorized a laminectomy and foraminotomy at L5-S1 on the left performed on July 20, 2010 by Dr. Michael Martin, a Board-certified orthopedic surgeon. OWCP also authorized a redo laminectomy and discectomy at L5-S1 on the left for recurrent disc herniation performed on January 4, 2011 by Dr. Martin.

On November 5, 2012 Dr. Martin requested that OWCP authorize a redo left L5-S1 laminectomy and discectomy. A November 5, 2012 follow-up note signed by a physician's assistant in Dr. Martin's office noted appellant's complaint of worsening chronic low back pain and left leg pain, numbness, tingling, and weakness. Appellant was diagnosed as having lumbar postlaminectomy syndrome and recurrent disc herniation at L5-S1 on the left.

On November 14, 2012 an OWCP medical adviser reviewed the matter and advised that there was recurrent disc material noted on an April 8, 2011 magnetic resonance imaging (MRI) scan. However, he opined that the condition was not likely to improve with the requested surgery. The medical adviser noted that there were multiple "red flags" and stated, among other things that, although it was possible for multiple recurrences of a disc herniation at the same level, such a recurrence of symptoms suggested looking elsewhere. He related that MRI scans and a discogram showed pathology at multiple levels and it was highly unlikely that appellant's back pain would be relieved by the requested procedure. The medical adviser noted that recent examinations showed normal lower extremity strength and reflexes, and intact bilateral sensation. Although sensation was reported to be decreased in the left leg, there was no report of any dermatomal pattern. The medical adviser noted that there was no electromyogram (EMG) documenting any radiculopathy. He recommended a second opinion examination prior to approving the requested surgery.

By letter dated January 10, 2013, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion. In a February 13, 2013 medical report, Dr. Dinenberg provided a history of the April 6, 2003 employment injuries and appellant's medical treatment, a detailed review of the medical record, and examination findings. He diagnosed lumbar herniated nucleus pulposus related to the April 6, 2003 employment injury, status post laminectomy and

[2] Docket No. 10-775 (issued November 15, 2010).

discectomy on the left L5-S1 and revision laminectomy and discectomy on the left L5-S1, and recurrence of herniated nucleus pulposus at left L5-S1 with recurrence of bilateral lower extremity symptomatology. Dr. Dinenberg ordered an EMG/nerve conduction study (NCS) to determine whether the requested surgery was warranted. In an undated addendum to his September 11, 2013 report, he advised that an EMG/NCS revealed very mild chronic left L5 radiculopathy, postlaminectomy syndrome, degenerative lumbar disc disease, and spondylosis. Dr. Dinenberg opined that further surgery was not necessitated by the April 6, 2003 work injury based on the absence of objective radicular findings on examination and the results of two EMG/NCS. His opinion was also based on the failure to achieve long-term pain relief with the two previous laminectomy/discectomies on the left at L5-S1. Dr. Dinenberg stated that no further curative treatment was recommended for appellant's chronic postlumbar laminectomy syndrome and that she should modify her activities. He concluded that she was not totally disabled due to the accepted employment injury.

On March 18, 2013 Dr. Martin reviewed Dr. Dinenberg's findings. He disagreed with Dr. Dinenberg's diagnoses and recommendations. Dr. Martin stated that appellant had a recurrent disc herniation with pain in her back with radiation into the legs, numbness in a dermatomal distribution, and a positive straight leg raising test. He stated that one did not have to have positive EMG findings to be symptomatic from a disc herniation or to be a candidate for surgical intervention. Dr. Martin further stated that using the lack of nerve root damage as an excuse to deny surgery was unreasonable and not based on any accepted medical practice in the treatment of disc herniations. In notes dated May 1 and June 26, 2013, he reiterated that appellant was a candidate for surgery based on meeting the bench marks for symptoms and signs, and confirmatory radiographic and electrodiagnostic testing related to the recurrent disc herniation at L5-S1. Dr. Martin noted that there was a fairly high likelihood of enough pain postoperatively that she would not be able to return to her job of injury. However, he stated that appellant noted that, after each of her prior surgeries, she had a period of time, 6 to 12 weeks, that she was doing extremely well. Dr. Martin advised that she would likely still be left with back and leg pain.

On July 16, 2013 OWCP found a conflict in medical opinion between Dr. Martin and Dr. Dinenberg as to whether the proposed surgery was necessitated by the April 6, 2003 employment injuries. By letter dated August 13, 2013, it referred appellant, together with a statement of accepted facts and medical record, to Dr. Timothy P. Daly, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a September 11, 2013 report, Dr. Daly provided a history of the April 6, 2003 employment injuries and appellant's medical treatment, social background, and hobbies. He also provided a detailed review of the medical record. Dr. Daly noted appellant's current complaints of back pain, numbness, pain, and tingling of the left lower extremity, and occasional numbness on the right side. On examination, he found a well-healed lumbar incision over the L5-S1 level. Spinal alignment was normal with no lateral, postural, or structural scoliosis. There was a normal degree of lumbar lordosis and thoracic kyphosis. Pelvis and hips were level. A palpatory examination was normal as the spinous processes and paraspinous musculature were nontender, and there were no hypertonicity or muscle spasm, focal sciatic notch, or sacroiliac or trochanteric tenderness. An examination of the back was also normal. There was normal strength of the lower extremities. The knees appeared to be normal with stable ligament meniscal examination.

Range of motion measurements for the bilateral feet, ankles, knees, and hips were normal. A vascular examination of the lower extremities was normal. Lasegue testing and a Patrick's test were negative bilaterally. A knee ligament examination, patellar tracking, and stress test ligament showed stable knees in all planes. Circumferential measurements of the lower extremities were normal. Dr. Daly diagnosed lumbar nucleus pulposus by history, and status post laminectomy and revision related to the accepted employment injury.

Dr. Daly stated that his objective examination findings included a well-healed surgical incision at L5-S1, the site of two previous laminectomies, after which, appellant was postlaminectomy syndrome with continued sensory radicular symptoms in the entire left lower extremity. He related that there was no anatomical explanation for having an entire left lower extremity sensory deficit and certainly such a deficit was not attributable to the 2003 back straining incident. Dr. Daly advised that a third surgery would not address the higher sensory deficits reported by appellant, which were global and did not follow a nondermatomal distribution. He opined that she would not likely benefit from a third surgical intervention based on the presence of a really remarkable negative straight leg raise test which reported neither back nor leg discomfort in either the sitting or supine position with an entirely symmetrical and normal motor and reflex testing. Dr. Daly also opined that the subjective deficits reported by appellant did not appear to represent any acute radiculopathy. He noted that on clinical examination there was an entirely negative sciatic stretch test and provocative test for sciatic radiculopathy. Dr. Daly did not objectively feel that appellant's reported entire left lower extremity sensory deficits were physiologic. Appellant had not experienced improvement and he found no objective evidence that an additional surgery at the L5-S1 level would likely produce any significant or curative benefit. Dr. Daly stated that the predictability of further postsurgical problems outweighed the potential benefits of a third surgery, and opined that additional surgery was no more likely to provide significant relief than an epidural steroid injection or judicious use of nonsteroidal anti-inflammatories. He concluded that he agreed with Dr. Dinenberg, who had similar examination findings.

In a decision dated September 25, 2013, OWCP denied authorization for appellant to undergo lumbar surgery based on Dr. Daly's impartial medical report which established that the surgical procedure was not medically necessary.

On September 26, 2013 appellant requested an oral hearing before an OWCP hearing representative, which was held telephonically on April 16, 2014.

In an April 14, 2014 note, Dr. Martin provided a history of appellant's medical, family, and social background. He listed findings on examination and advised that she had lumbar strain/sprain and degenerative disc disease, lumbosacral spondylosis and radiculopathy, lumbar herniated nucleus pulposus, and lumbar postlaminectomy syndrome. Dr. Martin disagreed with Dr. Daly. He stated that Dr. Daly's findings were different than his findings. Dr. Martin summarized that an MRI scan showed that appellant had a recurrent disc herniation. Appellant had sensory loss in a dermatomal distribution in her leg. She also had a positive straight leg raising test. Dr. Martin stated that, based on all available and accepted practices and medical literature, all of the above were indications to proceed with surgery. He advised that failure to approve the surgery would result in ongoing time loss and inability to return to the workforce.

In a June 25, 2014 decision, the hearing representative affirmed the September 25, 2013 decision. She found that Dr. Martin's report was insufficient to outweigh the special weight accorded to Dr. Daly as the impartial medical specialist.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician who OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.[3] In interpreting section 8103(a), 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.[4] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[5] 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.[6]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[7] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[8] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was 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] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

[3] 5 U.S.C. § 8103(a).

[4] *See Dale E. Jones*, 48 ECAB 648, 649 (1997).

[5] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

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

[7] *See Kennett O. Collins, Jr.*, 55 ECAB 648 (2004); *Debra S. King*, 44 ECAB 203, 209 (1992).

[8] *Id.*; *see also M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[9] *See R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[10] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP accepted appellant's claim for lumbar strain and central disc herniation at L4-5. It authorized two laminectomies and discectomies performed on July 20, 2010 and January 4, 2011 by Dr. Martin, appellant's attending physician. On November 5, 2012 Dr. Martin requested authorization for redo left L5-S1 laminectomy and discectomy. OWCP denied the request for authorization of surgery. The Board finds that it did not abuse its discretion by denying authorization for redo left L5-S1 laminectomy and discectomy.

OWCP determined that a conflict in medical opinion arose between Dr. Martin and Dr. Dinneberg, the second opinion physician, as to whether the proposed redo left L5-S1 laminectomy and discectomy was necessitated by the accepted April 6, 2003 employment injuries. To resolve the conflict, it properly referred appellant to Dr. Daly, pursuant to section 8123(a) of FECA, for an impartial medical examination and an opinion on the matter.[12]

The Board finds that the well-rationalized opinion of Dr. Daly constitutes the special weight of the medical evidence regarding whether the requested redo left L5-S1 laminectomy and discectomy would be necessitated by residuals of appellant's April 6, 20013 work injuries.

In his September 11, 2013 report, Dr. Daly accurately described appellant's history and provided a detailed review of her medical records. He also provided normal findings on examination of the lumbar spine and lower extremities. Dr. Daly diagnosed lumbar nucleus pulposus by history, and status postlaminectomy and revision related to the accepted employment injury. He opined that the proposed back surgery was not warranted based on the absence of objective examination findings. Dr. Daly explained that straight leg raise, sciatic stretch, and provocative tests were negative. He further explained that despite appellant having postlaminectomy syndrome with continued sensory radicular symptoms in the entire left lower extremity there was no anatomical explanation for this condition which was not attributable to the accepted April 6, 2003 employment injuries. Dr. Daly advised that her subjective deficits did not represent any acute radiculopathy. He noted that appellant had experienced no improvement. Dr. Daly stated that the predictability of further postsurgical problems outweighed the potential benefits of a third surgery. He opined that the proposed surgery was no more likely to provide significant relief than an epidural steroid injection or judicious use of nonsteroidal anti-inflammatories.

The Board further finds that the additional medical evidence submitted by appellant in response to Dr. Daly's report is insufficient to overcome the weight accorded to him as an impartial medical specialist regarding this issue. Dr. Martin's April 14, 2014 note stated that he disagreed with Dr. Daly's opinion. He related that appellant had recurrent disc herniation based on an MRI scan, sensory loss in a dermatomal distribution in her leg, and a positive straight leg

[11] *Manuel Gill*, 52 ECAB 282 (2001).

[12] 5 U.S.C. § 8123(a).

raising test which were indications to proceed with the surgery. While Dr. Martin continued to recommend that she have lumbar surgery, he was on one side of the conflict in medical evidence. The Board has long held that an additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is insufficient to overcome the weight accorded to an impartial medical specialist's report.[13] The Board finds that Dr. Daly's opinion that the recommended lumbar spine surgery was not medically warranted is entitled to the special weight accorded a referee examiner and represents the weight of the evidence.[14] The evidence establishes that the lumbar spine surgery was not medically necessary. OWCP did not abuse its discretion in denying authorization.[15]

On appeal, appellant contends that she continues to suffer from lower back problems that require the proposed surgery. As stated above, Dr. Daly provided a well-rationalized opinion regarding the need for the proposed back surgery which constitutes the special weight of the medical evidence and establishes that such surgery is not warranted due to the April 6, 2003 employment injuries.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied authorization for surgery.

[13] *Roger G. Payne*, 55 ECAB 535 (2004).

[14] *Supra* note 11.

[15] *L.D.*, 59 ECAB 648 (2008).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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