United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
	)	**Docket No. 14-708**
and	)	**Issued: January 2, 2015**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, San Francisco, CA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 10, 2014 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) merit decision dated August 14, 2013. Pursuant to the Federal Employees' Compensation Act[1] (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 abused its discretion by appellant's request for authorization for surgery.

FACTUAL HISTORY

Appellant, a 44-year-old claims examiner, filed a Form CA-2 claim for benefits on November 26, 2010 alleging that he developed a lower back condition causally related to

[1] 5 U.S.C. § 8101 *et seq.*

employment factors. OWCP accepted the claim for aggravation of lumbosacral degenerative disc disease.

In a report dated August 12, 2011, Dr. Clement K. Jones, a specialist in orthopedic/spinal surgery, stated that appellant underwent a comprehensive orthopedic spine surgery consultation on July 27, 2011 with follow-up visits on August 3 and 10, 2011; the most recent visit was a preoperative consultation in anticipation of his elective surgery scheduled for August 16, 2011.

Dr. Jones stated that appellant had a history of intermittent lower back pain for 12 years. His chief complaint was lower back pain with radiation to bilateral thighs, worse on the left buttock and thigh pain, fatigue in his legs, and occasional anterior right thigh electrical buzzing sensations. Dr. Jones advised that appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 20, 2011 which showed multiple levels of desiccation and disc space narrowing involving L3-4, L4-5, and L5-S1. He also stated that appellant had undergone lumbar spine x-rays on August 3, 2011 which supported the diagnosis. Bilateral lower extremity EMG and nerve conduction studies performed on August 1, 2011 showed chronic radiculopathy affecting bilateral L3-4 myotome and left L4-5 myotome. Dr. Jones stated that he did not prescribe any other treatment because after multiple diagnostic tests, appellant agreed to undergo elective surgery. Dr. Jones stated that appellant had worked for the past two and half years as a claims examiner, a job which required prolonged sitting at a computer while managing paper claims. He related that sitting was the primary work factor of his job, which aggravated his back condition. Dr. Jones stated that appellant believed that sitting at his computer more than 95 percent of the time aggravated his lower back.

Dr. Jones related that appellant had no prior radicular leg complaints or symptoms despite a nearly 12-year history of intermittent lower back pain. He concluded that, based on appellant's history of progressive worsening symptoms over the prior six months, especially in the two weeks preceding his July 27, 2011 evaluation, it was reasonable to determine that the act of prolonged sitting at work has served as an aggravation of his underlying multilevel degenerative condition.

On August 16, 2011 Dr. Jones performed the surgery.

In an August 16, 2011 report, Dr. Jones stated that appellant had a 12-year history of intermittent lower back pain and a six-month history of progressive worsening symptoms; and his symptoms were especially worse in the two weeks prior to his being examined on July 27, 2011. He related that on July 18, 2011 appellant had an acute onset of severe lower back pain while riding the ferry to work from Marin County to San Francisco. Appellant returned home and was seen in the clinic with pain in bilateral buttocks and legs.

On November 16, 2011 Dr. Jones requested authorization for the August 16, 2011 spinal surgery.

In a March 20, 2012 report, Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed appellant's medical history and the surgical report and denied authorization for the August 16, 2011 surgery. He opined that Dr. Jones had advised that prolonged sitting by appellant at his workplace had aggravated his lumbar disc disease. Dr. Zimmerman stated that appellant related that he had never experienced radicular

symptoms prior to August 2011; he asserted, however, that an October 3, 2007 office note from a medical clinic documented pain radiating down his spine into both legs. He stated:

> "OWCP accepted the generic idea of 'aggravation of lumbosacral degenerative disc disease.' This is L5 and no other level. OWCP did not accept aggravation of discal changes at L3-4 and L4-5. It cannot, thus, authorize the two-level operative procedure performed on August 16, 2011."

In order to determine whether appellant's surgery was causally related to an accepted condition, OWCP referred appellant to Dr. Aubrey A. Swartz, a specialist in orthopedic surgery, for a second opinion examination. In his report dated June 25, 2012, Dr. Swartz stated that he reviewed the findings on examination, the statement of accepted facts and the medical history. With regard to whether the August 16, 2011 surgery was necessitated by an accepted condition, he stated that Dr. Jones did not offer any treatment other than counseling and simply waiting it out over time. Dr. Swartz asserted that it would be reasonable for appellant to place himself under the care of a pain management physician for his current problem. He advised that pain management could include a combination of appropriate medications, special spinal injection procedures, and possibly a spinal cord stimulator to address the bilateral radicular pain from arachnoiditis he developed at the time of surgery affecting the L3 and/or L4 nerve roots.

In a July 25, 2012 report, Dr. Jones stated that appellant continued to experience chronic intermittent lower back pain as well as persistent severe left lower extremity pain. He related that overall appellant felt that his lower back pain had improved 50 percent. Appellant currently rated the severity of his back condition as a 1 to 3 on a scale of 1 to 10. Dr. Jones opined that there was a 90 percent apportionment due to his alleged July 18, 2011 work injury which occurred while he was riding the ferry to work from Marin to San Francisco, and from repeated and prolonged sitting at work as a claims examiner. He accorded the remaining apportionment to his preexisting history of intermittent lower back pain for 12 years without prior complaints of radicular leg symptoms.

In a November 19, 2012 report, Dr. Swartz stated that the cause of the development of appellant's lumbar degenerative disc disease would be primarily genetic. He indicated that this opinion was supported by recent research in the field; he stated, however, that there were aggravating factors, however, that could accelerate or aggravate the process. These included specific activities of an individual. Dr. Swartz noted that appellant had engaged in recreational activities such as skiing, biking, hiking, and boogie boarding.

Dr. Swartz advised that the type of prolonged sitting required by appellant's job as claims examiner could indeed aggravate discogenic disease and place increased pressure on the lower lumbar discs, and could serve to further aggravate the process of disc herniation, protrusion and/or bulging; this was supported by the medical literature in the field which demonstrated that prolonged sitting may cause more pressure on the disc unit than many other activities. He noted that Dr. Jones' assertion that appellant had not experienced radicular pain prior to the July 18, 2011 incident was contradicted by prior treatment records; *i.e.*, the October 3, 2007 medical note from Dakota Ridge Family Medicine which noted radiation to both legs and buttocks and diagnosed low back pain with possible radicular symptoms. Dr. Swartz stated that the findings that preceded appellant's claim were present, and he opined that it is more likely than not that those radicular complaints represented early radiculopathy referable to the multilevel degenerative disc disease and the spinal stenosis that he experienced in his lumbar spine. He further advised that appellant's

medical history suggested a predisposition to low back and lumbar spine problems and therefore indicated that his degenerative disc problems were primarily genetic. Dr. Swartz stated:

> "It is more likely than not that the sitting for the three to four years he was there at that job would be a temporary aggravation and would not constitute a substantial contributing portion of those factors that would have contributed to this condition. The major factors would have been the intense recreational activities that he enjoyed, also owning a construction company [and] the genetic influence in his spine. The sitting would be more likely a temporary aggravation but would have played a much smaller role than all of these vigorous activities in which he was involved for several years. All of his physical activities, his work in the construction industry and the genetic influence would constitute greater than 50 percent of his current problem and to a much greater degree than 51 percent. The minority would be a temporary aggravation … (consisting of) the three years that he spent at a job where he was required to sit at a desk."

Dr. Swartz concluded that the need for surgery would be the natural progression of his disease, the genetically-influenced disease, in addition to all of the vigorous activities in which he has participated over the years, in addition to working in the construction industry as well; the sitting would have played only a small part and was only a temporary aggravation of his lower back pain.

By decision dated January 10, 2013, OWCP denied authorization for surgery for left L3-4 and L4-5 hemilaminectomy with contralateral laminoplasties, excision of left paracentral and central L4-5 sequestered extrusion, decompression of thecal sac with bilateral L3-4 and L4-5 foraminotomies.

By letter dated February 7, 2013, appellant requested an oral hearing, which was held on May 30, 2013.

By decision dated August 14, 2013, OWCP affirmed the January 10, 2013 decision denying authorization for appellant's August 16, 2011 surgery. It found that Dr. Swartz represented the weight of the medical evidence.

LEGAL PRECEDENT

Section 8103 of FECA[2] 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.[3] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of

[2] *Id*.

[3] *Id.* at § 8103.

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.[4]

ANALYSIS

In this case, OWCP accepted that appellant had sustained the condition of aggravation of lumbosacral degenerative disc disease. Dr. Jones, appellant's treating physician, recommended that appellant undergo a left L3-4 and L4-5 hemilaminectomy with contralateral laminoplasties, excision of left paracentral, and central L4-5 sequestered extrusion, decompression of thecal sac with bilateral L3-4 and L4-5 foraminotomies procedure. He stated that appellant had worked for the past two and half years as a claims examiner, a job which required prolonged sitting, the primary work factor, which aggravated his back condition. Dr. Jones stated that appellant believed that sitting at his computer more than 95 percent of the time aggravated his lower back. Dr. Jones concluded that, based on his history of progressive worsening symptoms over the prior six months, especially in the two weeks preceding his July 27, 2011 evaluation, it was reasonable to conclude that the act of prolonged sitting at work had aggravated his underlying multilevel degenerative condition. Dr. Jones therefore requested authorization for surgery, which he performed on August 16, 2011.

As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. In his May 20, 2012 report, OWCP's medical adviser, Dr. Zimmerman, recommended that OWCP deny authorization for the requested surgery. He stated that OWCP had only accepted the generic idea of aggravation of lumbosacral degenerative disc disease, which occurred only at the L5 level. As OWCP did not accept aggravation of disc changes at L3-4 and L4-5, he opined that OWCP should not authorize the two-level operative procedure performed on August 16, 2011. The case was referred to Dr. Swartz, the second opinion examiner, who opined in his November 19, 2012 report that the primary need for surgery was not due to the accepted condition of aggravation of lumbosacral degenerative disc disease, but to the natural progression of his disease; this was a genetically-influenced disease, exacerbated by all of the vigorous activities in which he engaged over the years, including numerous recreational activities and owning a construction industry. Dr. Swartz asserted that the prolonged sitting required by his job as a claims examiner would have played only a small part in the development of the disease and was only a temporary aggravation of his lower back pain. He further advised that Dr. Jones' assertion that appellant did not experience radicular pain prior to the July 18, 2011 incident was contradicted by the October 3, 2007 medical note which noted radiation to both legs and buttocks and diagnosed low back pain with possible radicular symptoms. Dr. Swartz stated that these findings of radicular complaints which preceded appellant's claim represented early radiculopathy referable to the multilevel degenerative disease and the spinal stenosis that he experienced in his lumbar spine. This medical history suggested a predisposition to low back and lumbar spine problems which strongly suggested that appellant's degenerative disc problems were primarily genetic. Based on the referral opinion of Dr. Swartz, OWCP denied authorization for the requested surgery in its January 10, 2013 decision. An OWCP hearing representative affirmed this decision on August 14, 2013.

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

As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. Dr. Swartz's opinion constituted sufficient medical rationale to support OWCP's January 10, 2013 decision. He stated unequivocally, based on a thorough review of the medical evidence, that the August 16, 2011 surgical procedure was not appropriate or necessary for appellant's accepted condition and that his lower back symptoms were mostly attributable to the natural progression of degenerative disc problems which were primarily genetic, not work related. Dr. Swartz's report is sufficiently probative, rationalized, and based upon a proper factual background. The Board finds that OWCP did not abuse its discretion by relying on the opinion of Dr. Swartz as the weight of evidence to deny approval for the elective spinal surgery.

CONCLUSION

The Board finds that OWCP did not abuse its discretion to deny appellant authorization for elective surgery.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.[5]

Issued: January 2, 2015
Washington, DC

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

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

[5] Michael E. Groom, Alternate Judge, participated in the original decision but was no longer a member of the Board effective December 27, 2014.