

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

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J.W., Appellant)	
)	
and)	Docket No. 15-0020
)	Issued: August 17, 2016
DEPARTMENT OF TREASURY, INTERNAL)	
REVENUE SERVICE NATIONAL OFFICE,)	
Richmond, VA, Employer)	
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Appearances:
Martin Kaplan, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 2, 2014 appellant, through counsel, filed a timely appeal from a September 21, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for cervical surgery.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 6, 2014, the Board remanded the case, finding that OWCP abused its discretion in denying appellant's request for cervical surgery without properly resolving a conflict in medical opinion as to whether the surgery was medically necessary for the accepted employment injury.³ The findings and facts as set forth in the prior decision are incorporated herein by reference. The relevant facts are set forth below.

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.

In a June 16, 2009 medical report, Dr. Glenn Graves, Board-certified in family medicine, diagnosed radicular arm pain with possible herniated nucleus pulposus or other cervical pathology aggravated by work.

Dr. Rodney Schmidt, a Board-certified diagnostic radiologist, reported on June 18, 2009 that a magnetic resonance imaging (MRI) scan of the cervical spine revealed degenerative disc disease with bilateral foraminal narrowing at C5-6 and degenerative disc disease with right foraminal narrowing at C6-7.

In a June 24, 2009 medical report, Dr. George A. Petroff, a Board-certified neurologist, reported that appellant complained of pain in the right arm and neck and numbness and tingling in the right arm, shoulder, and hand. Appellant's symptoms were continuous and began in April 2009. Based on review of the MRI scan which showed C5-6 and C6-7 disc bulge with foraminal impingement, Dr. Petroff diagnosed cervical radiculopathy.

By decision dated March 17, 2010, OWCP accepted the claim for brachial neuritis or radiculitis.

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 appellant's symptoms and her employment, noting that there was no objective documentation as to why work would cause her brachial neuritis or significant radiculitis. He stated that tremors were the significant component of appellant's complaints which were not related to degenerative disc disease in her cervical spine and as such, no clear linkage between her present symptoms and her work activity. Dr. Mauldin noted that he did not believe that an anterior cervical disc and fusion at C5-6 and C6-7 would resolve her significant upper extremity tremors and her chronic localized neck pain

³ Docket No. 13-2093 (issued May 6, 2014).

to the very lower portion of her cervical spine without a significant component of major radiculopathy. He also 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 further noted that there was no objective evidence as to why she could not do office-type work with restrictions.

By letter dated May 17, 2012, OWCP provided Dr. Anthony Hicks, appellant's treating physician and Board-certified in internal medicine, with a copy of the second opinion report for review.

In a May 22, 2012 report, Dr. Hicks responded to OWCP's May 17, 2012 request and disagreed with Dr. Mauldin's findings. He further pointed out that Dr. Mauldin was not a qualified spinal surgeon and thus, his opinion was of limited probative value as to whether cervical surgery was necessary.

In medical reports dated June 5 to 16, 2012, Dr. Scott Spann, a Board-certified orthopedic surgeon, diagnosed cervicgia, spinal stenosis in the cervical region, degeneration cervical 4 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, the DMA 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 regarding the nature and extent of appellant's employment-related condition and need for surgery. OWCP Form CA-19A Memorandum Referral noted that a referee examination was required from a Board-certified neurosurgeon due to a conflict of opinion. It referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Joshua T. Woody for a referee examination and opinion on the need for her requested surgery. OWCP requested that Dr. Woody provide an opinion regarding 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 responded to the questions provided by OWCP. Specifically, question six asked, "Is the diagnosis medically connected to the work injury by direct cause, aggravation, precipitation, or acceleration." Dr. Woody responded 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 further 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 he concluded that the requested surgery was not a result of the accepted work-related condition.

On November 28, 2012 appellant underwent anterior cervical discectomy and fusion from C5-6 and C6-7.

By letter dated July 8, 2013 appellant, through counsel, requested reconsideration of OWCP's September 28, 2012 decision.

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

On May 6, 2014 appellant appealed to the Board. The appeal was docketed as 13-2093.⁴ As previously noted, in a May 6, 2014 decision, the Board set aside the August 23, 2013 decision finding that OWCP abused its discretion in denying authorization for cervical surgery because it failed to resolve the conflict in medical opinion. The Board noted that Dr. Woody was not Board-certified and the CA-19A form directed OWCP to refer appellant for a referee examination by a Board-certified neurosurgeon. Furthermore, both Dr. Hicks, appellant's treating physician, and Dr. Mauldin, the second opinion referral physician, noted that appellant should be evaluated by a neurosurgeon. As there remained an outstanding conflict in medical opinion, it remanded the case for further medical development.

On remand, OWCP referred appellant, the SOAF, and the case file to Dr. Lloyd Youngblood, Board-certified in neurological surgery, to resolve the conflict between Dr. Hicks and Dr. Mauldin. In a June 18, 2009 "Questions for Determination," OWCP requested that Dr. Youngblood respond to the following question: Was the anterior cervical discectomy and fusion of the C5-6 and C6-7 warranted?

In a July 22, 2014 report, Dr. Youngblood provided findings on physical examination, summarized past medical records, and detailed appellant's medical history. He noted only one question to be addressed: "Was the anterior cervical discectomy and fusion of the C5-6 and C6-7 warranted?" Dr. Youngblood responded, "The second opinions by Dr. Mauldin and Dr. Woody, both independent [o]rthopedic [s]urgeons, are more accurate and better informed regarding the 'wear and tear diseases of life' that were/are present in this case. Dr. Hicks' statements are inconsistent with the structural changes and pathophysiology in this case that necessitated surgical intervention. Surgery was reasonable, appropriate, and effective; it corrected an age-related wear and tear disease, not a condition related in any way to work-related activities."

By decision dated September 21, 2014, OWCP affirmed the September 28, 2012 decision denying appellant's request for cervical surgery, finding that the weight of the medical evidence rested with Dr. Youngblood.

⁴ *Id.*

LEGAL PRECEDENT

Section 8103 of FECA⁵ 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. 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 or her 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 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

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.⁷ 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.⁸

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.⁹ If an impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.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

⁵ 5 U.S.C. § 8103.

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁷ 5 U.S.C. § 8123(a).

⁸ *Nathan L. Harrell*, 41 ECAB 402 (1990).

⁹ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹⁰ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

of appellant's employment-related condition and need for surgery. Following the Board's May 6, 2014 decision, it referred appellant to Dr. Youngblood, Board-certified in neurological surgery, for an impartial medical evaluation (referee examination) to resolve the conflict. By decision dated September 21, 2014, OWCP denied appellant's request for cervical surgery finding that the weight of the medical opinion evidence rested with the opinion of him serving as the impartial medical specialist.

In his July 22, 2014 report, Dr. Youngblood responded to the only question posed by OWCP regarding whether the anterior cervical discectomy and fusion of the C5-6 and C6-7 was warranted. He responded that the surgery was reasonable, appropriate, and effective. However, Dr. Youngblood added that "The second opinions by Dr. Mauldin and Dr. Woody, both independent [o]rthopedic [s]urgeons, are more accurate and better informed regarding the 'wear and tear diseases of life' that were/are present in this case. Dr. Hicks' statements are inconsistent with the structural changes and pathophysiology in this case that necessitated surgical intervention. Surgery was reasonable, appropriate, and effective; it corrected an age-related wear and tear disease, not a condition related in any way to work-related activities."

The Board finds that the opinion of Dr. Youngblood is equivocal regarding whether the accepted work-related condition of brachial neuritis or radiculitis caused or contributed to appellant's need for cervical surgery. Dr. Youngblood failed to acknowledge that the conditions of brachial neuritis/radiculitis were, in fact, accepted employment-related conditions. His report was couched in such vague terms that it did not provide sound medical rationale for his opinion as to whether the cervical surgery was or was not related, either wholly or in part, to the accepted conditions of brachial neuritis or radiculitis. Moreover, it is unclear what condition Dr. Youngblood is referring to as he only generally opined that surgery corrected an age-related disease and not a condition related to work-related activities. The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value.¹¹ As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. However, the opinion on which OWCP relies must contain sufficient medical rationale to support OWCP's decision.¹² Dr. Youngblood found that the cervical surgery was appropriate medical treatment, but he did not provide a rationalized medical opinion, of his own, as to whether the accepted conditions necessitated the cervical surgery.

On remand, OWCP should further develop the medical evidence and obtain a supplemental report from Dr. Youngblood to address the issue of whether appellant's accepted brachial neuritis or radiculitis contributed to the need for surgery.¹³ If Dr. Youngblood is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new impartial specialist for the purpose of obtaining a rationalized medical opinion on the

¹¹ *A.D.*, 58 ECAB 149 (2006).

¹² *See A.W.*, Docket No. 14-0708 (issued January 2, 2015).

¹³ *T.H.*, Docket No. 14-326 (issued February 5, 2015). Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *William J. Cantrell*, 34 ECAB 1233 (1993); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

issue.¹⁴ Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's request for surgery.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly denied appellant's request for cervical surgery and the case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2014 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.¹⁵

Issued: August 17, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

¹⁴ *Supra* note 8.

¹⁵ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.