United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 15-0080**
	)	**Issued: August 24, 2016**
DEPARTMENT OF THE AIR FORCE, KEESLER AIR FORCE BASE, Biloxi, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2014 appellant filed a timely appeal of a September 8, 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 over the merits of this case.[2]

ISSUE

The issue is whether OWCP abused its discretion in denying authorization for C5-6 and C6-7 cervical disc arthroplasty surgery.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the September 8, 2014 decision, OWCP received additional evidence. Appellant also submitted new evidence with his appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On July 23, 2009 appellant, then a 39-year-old electronic integrated systems mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a right forearm contusion/laceration, shoulder strain, and back strain as the result of his losing his footing and slipping down a ladder on a flight deck. OWCP accepted the claim for right shoulder and upper arm sprain, right superior glenoid labrum lesion, right wrist sprain, and right forearm contusion, which was subsequently expanded to include right rotator cuff tear, brachial radiculitis or neuritis, and cervical intervertebral disc displacement without myelopathy.

In a September 4, 2013 report, Dr. Donald D. Dietze, a treating Board-certified neurological surgeon, reported that appellant was seen for neck pain complaints. Diagnoses included cervical radiculitis, cervicalgia, cervical herniated nucleus pulposus at C5-6, C6-7, cervical disc disorder, and right shoulder rotator cuff injury. A review of a magnetic resonance imaging (MRI) scan revealed significant persistent C5-6 central disc herniation, and progression of the left C6-7 disc herniation. Dr. Dietze discussed the surgery options with appellant and recommended anterior disc replacement surgery.

On December 2, 2013 OWCP received Dr. Dietze's request for authorization to perform cervical spine surgery on appellant.

In a December 12, 2013 report, an OWCP medical adviser reviewed the medical evidence from Dr. Dietze. He advised OWCP to request Dr. Dietze to provide his rationale as to why disc arthroplasty surgery at C5-6 and C6-7 should be performed on appellant.

In a letter dated April 10, 2014, Angela Geraci from the scheduling department of Dr. Dietze's practice, stated she was provided clarification as requested from Dr. Dietze as to why the recommended surgery should be authorized. She attached copies of his prior reports including the most recent April 10, 2014 report, physical therapy reports and diagnostic tests/studies supporting the request for authorization of C5-6 and C6-7 anterior cervical discectomy and stabilization with total disc arthroplasty.

Dr. Dietze, in reports dated August 2, September 18, November 21, December 2, 2013, and April 10, 2014, provided physical examination findings. Diagnoses from the reports included right shoulder rotator cuff injury, C5-6 cervical disc disorder, C6-7 cervical herniated nucleus pulposus, cervicalgia, and cervical radiculitis. In all the reports, Dr. Dietze noted discussing surgical options with appellant who agreed to surgery on December 2, 2013. In the April 10, 2014 letter, he related that review of a recent MRI scan showed progression of the C6-7 left disc herniation and significant persistent C5-6 central disc herniation. Dr. Dietze opined that the only option for significant benefit or resolution was artificial disc replacement surgery.

In an April 28, 2014 report, the medical adviser reviewed the relevant medical evidence and concluded that surgery should not be authorized. He found that while C5-6 and C6-7 pathology was present cervical disc replacement arthroplasty surgery has not been approved for use in more than one level where there is evidence or radiculopathy or myelomalacia at the level in question "and no evidence for symptomatic cervical disc disease at more than one level."

In a May 3, 2014 report, Dr. Dietze related that a July 26, 2013 MRI scan revealed persistent C5-6 broad based posterior disc herniation and a new C6-7 disc herniation, which

"represented a progression of the prior bulge with annular tear." These findings were discussed with appellant on August 1, 2013 and that he believed cervical surgery was the only option offering "potential improvement in his condition." Appellant rejected the surgrical option on August 1, 2013, but during the November 20, 2013 examination decided that the recommended surgery should be done. Dr. Dietze evaluated appellant on March 18, 2014 when appellant reported a worsening of his condition and again recommended surgery to improve function and lessen appellant's pain.

By decision dated May 13, 2014, OWCP denied appellant's request for authorization of C5-6 and C6-7 cervical disc arthroplasty surgery as it found that the requested surgery could not be authorized as it was an off label use of the device.

On May 29, 2014 appellant requested reconsideration and submitted medical evidence in support of his request.

In a May 28, 2014 report, Dr. Dietze stated that he had reviewed the denial of his request to authorize two-level cervical disc artifical disc replacement as it was only approved for one level. He stated that two level artificial cervical disc replacement has recently been approved by the Federal Drug Agency (FDA). Thus, utilization of this surgery "is NO longer an off-label usage." (Emphasis in the original.)

On July 11, 2014 appellant was referred for a second opinion evaluation with Dr. James T. Tran, a Board-certified neurological surgeon, to determine whether the requested surgery should be approved.

In an August 18, 2014 report, Dr. Tran responded to the questions posed by OWCP. He stated that there was evidence of left C6-7 disc degeneration and bulges and C5-6 stenosis based on a July 26, 2013 MRI scan. He recommended cervical facet joint injections with radiofrequency treatment for pain relief over six to eight months. Lastly, Dr. Tran disagreed with Dr. Dietze that the FDA had approved artifical discs for use of more than one level disc disease for C3 to C7. He indicated that artificial disc surgery was only approved by the FDA for one-level cervical disc disease from C3 to C7.

On August 28, 2014 the medical adviser reviewed Dr. Tran's report and concurred that the requested surgery not be authorized.

By decision dated September 8, 2014, OWCP denied modification.

LEGAL PRECEDENT

Section 8103 of FECA[3] 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] In interpreting section 8103, the Board has recognized that OWCP has broad

[3] *Supra* note 1.

[4] *Id*. at § 8103; *see R.L.*, Docket No. 08-855 (issued October 6, 2008); *Sean O'Connell*, 56 ECAB 195 (2004), *Thomas W. Stevens*, 50 ECAB 288 (1999).

discretion in approving services provided under FECA.[5] The only limitation on OWCP's authority is 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]

Section 8123(a) of FECA[8] 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.[9]

ANALYSIS

The Board finds that the case is not in posture for a decision as there is a conflict in the medical evidence with regard to whether the recommended surgery should be authorized.

OWCP accepted appellant's claim for right shoulder and upper arm sprain, right superior glenoid labrum lesion, right wrist sprain, right forearm contusion, right rotator cuff tear, brachial radiculitis or neuritis, and cervical intervertebral disc displacement without myelopathy. Appellant requested authorization for C5-6 and C6-7 cervical disc arthroplasty surgery based on the medical reports of Dr. Dietze. By decisions dated May 13 and September 8, 2014, OWCP denied his request for C5-6 and C6-7 cervical disc arthroplasty surgery, finding that the requested surgery could not be authorized as it was an off label use of the device.

The record reflects that Dr. Dietze discussed with appellant the recommendation for C5-6 and C6-7 cervical disc arthroplasty surgery in his various reports. In the December 2, 2013 report, Dr. Dietze stated that appellant agreed with the proposed surgery and a request for authorization was submitted. In an April 10, 2014 report, he reviewed a recent magnetic resonance imaging scan and opined that artificial disc replacement surgery was the only option for significant benefit or resolution. Similarly, in his May 3, 2014 report, Dr. Dietze reiterated that his opinion that the requested surgery was appropriate and should be authorized as it would improve appellant's function and lessen his pain. He, in a May 28, 2014 report, related that the use of two level artificial disc replacement had recently been approved by the FDA so that it was no longer considered to be an off-label use.

Dr. Tran, an OWCP referral physician, examined appellant and found that the requested surgery was not approved by the FDA and, thus, should not be authorized. In his August 18, 2014 report, he stated that the use of artificial discs for more than one level of disc disease was not an approved use of the device by the FDA. In a report dated April 28, 2014, the medical adviser concluded that surgery should not be authorized as the FDA had not approved the use of

[5] *A.O.*, Docket No. 08-580 (issued January 28, 2009); *Joseph P. Hofmann*, 57 ECAB 456 (2006).

[6] *D.C.*, 58 ECAB 620 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

[7] *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

[8] 5 U.S.C. § 8123(a).

[9] *Id.*; *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Geraldine Foster*, 54 ECAB 435 (2003).

cervical disc replacement arthroplasty surgery for use in more than one level. He, reviewed Dr. Tran's August 18, 2014 report and concurred with his opinion that surgery should not be authorized as the FDA did not approve the use of artificial discs for more than one level of cervical disc disease.

The Board finds that there remains an unresolved conflict in the medical evidence between Dr. Dietze, for appellant, and Dr. Tran and the medical adviser, for OWCP, regarding whether appellant's request for surgery should be authorized and whether the FDA has approved the use of artificial discs for more than one level of cervical disc disease. Due to the unresolved conflict of the medical opinion, OWCP should refer appellant to an appropriate Board-certified specialist for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a), to resolve this issue. After this and such other development as OWCP deems necessary, it should issue a *de novo* decision on the issue.

CONCLUSION

The Board finds that the case is not in posture for decision, due to a conflict in the medical evidence, with regard to whether appellant's proposed surgery should be authorized.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.[10]

Issued: August 24, 2016
Washington, DC

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

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

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