

FACTUAL HISTORY

This case has previously been before the Board. The relevant facts are as follows. On October 10, 2006 appellant, then a 56-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed neck and right shoulder conditions due to carrying his mailbag in the performance of duty. OWCP accepted his claim on December 11, 2006 for sprain of the right shoulder and rotator cuff as well as cervical spondylosis with myelopathy.

By decision dated June 17, 2011, OWCP denied appellant's request for cervical spine surgery and recurrence of disability. It found that he had not submitted sufficient medical opinion evidence to establish that his current condition and requested surgery were causally related to his accepted employment injuries.

Appellant's attending physician, Dr. Nazih Moufarrij, a Board-certified neurosurgeon, performed an anterior cervical discectomy and fusion at C4-5, C5-6, and C6-7 on April 22, 2011.

Appellant requested a review of the written record by an OWCP hearing representative on June 30, 2011. Dr. Moufarrij submitted a note dated September 20, 2011 opining, "In my expert opinion, I believe that carrying mail for 28 years has contributed to aggravating a preexisting degenerative disc disease of the cervical spine. This led to severe symptoms, as well as MRI [magnetic resonance imaging] scan findings, that necessitated a three-level anterior cervical discectomy and fusion."

In a decision dated December 15, 2011, OWCP's hearing representative found that appellant had not met his burden of proof to establish that his 2011 cervical condition or that surgery was causally related to his employment. He found that there was no rationalized medical opinion evidence supporting appellant's claim.

Counsel requested reconsideration on June 21, 2012 and submitted a report from Dr. Alexander Neel, a Board-certified orthopedic surgeon, dated May 9, 2012. Dr. Neel noted that appellant's work requirement of carrying a mailbag and opined that wearing a loaded unilateral mail carrying bag caused the mail carrier to lift to one side with a compensatory deviation of the neck away from the side on which the bag is worn. He concluded, "I believe that this constant strain of the muscles and carrying the neck in a laterally tilted fashion could certainly lead to accelerated cervical arthritis and arthrosis which in turn can certainly lead to foraminal encroachment and central stenosis." Dr. Neel also noted that appellant had no recreational activities which would contribute to these conditions or major neck injuries.

By decision dated November 1, 2012, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. The matter then proceeded to the Board. In a June 18, 2013 decision,³ the Board set aside OWCP's November 1, 2012 decision finding that the case was not in posture for a decision as appellant's attending physicians supported that the surgery was causally related to his accepted employment injury. The Board directed OWCP to refer appellant for a second opinion examination.

³ Docket No. 13-317 (issued June 18, 2013).

On August 7, 2013 OWCP referred appellant for a second opinion evaluation with Dr. Paul Stein, a Board-certified neurosurgeon. In a report dated September 12, 2013, Dr. Stein listed appellant's medical history, his current symptomology, and provided findings on examination. He reviewed the statement of accepted facts and responded to OWCP's questions. Dr. Stein determined that there were no objective medical findings to show that appellant's cervical condition and the need for surgery was caused by his federal employment. He noted, "These are degenerative changes which are often progressive over time absent trauma or external conditions. The work activity may have increased his level of discomfort, but the primary factor was a progressive degenerative condition." Dr. Stein concluded that appellant's cervical condition was a natural progression of an underlying preexisting condition and was not specifically caused by his job duties. He further opined that the cervical spine surgery was appropriate and reasonable in regard to appellant's cervical degenerative disc disease which was not caused or aggravated by his employment.

By decision dated November 19, 2013, OWCP denied authorization for appellant's cervical disc surgery performed on April 22, 2011. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on November 26, 2013.

In a May 5, 2014 decision, a hearing representative set aside the November 19, 2013 decision and remanded the case for resolution for a conflict of medical opinion evidence between Drs. Stein, Neel, and Moufarrij regarding whether appellant's cervical surgery was necessary to treat an employment-related condition.

Dr. Moufarrij completed a note on September 11, 2014 and opined: "I think that given that you have done this job for 30 years consisting of repetitive bending, lifting, stooping, and twisting with weights varying between 35 pounds for the mail and up to 70 pounds when dealing with parcels, it is likely that this has contributed to your neck problem."

On January 29, 2015 OWCP referred appellant, a statement of accepted facts (SOAF) and a list of questions to Dr. Hisham Majzoub, a Board-certified neurosurgeon, for an impartial medical examination to resolve the conflict of medical opinion evidence between Drs. Stein and Moufarrij on the causal relationship of appellant's cervical condition and the need for surgery. It asked that Dr. Majzoub review the SOAF, which included appellant's assertion that his neck and right shoulder were strained by the weight of his mailbag, as well as his accepted conditions of right rotator cuff strain and cervical spondylosis with myelopathy. OWCP also asked that Dr. Majzoub respond to specific questions. These questions included: (1) whether there were objective medical findings to show that appellant's cervical condition and need for surgery were caused by his work activities; (2) whether appellant's cervical condition was a natural progression of his underlying preexisting condition or was caused by his job duties; (3) whether the surgery was appropriate as a result of the accepted conditions and needed to give relief, or reduce the degree and period of disability; (4) whether the effects of the work injury had ceased; (5) whether the effects of the work injury prevented appellant from performing any work activities; (6) whether he recommended current treatment and if so, what; and (7) whether appellant had any work restrictions due to his March 1, 2004 employment injury, and if so, what those restrictions were.

In a report dated April 13, 2015, Dr. Majzoub described appellant's employment history of carrying a mailbag on his right side from 1983 through 2003 and his development of neck pain in 2004. He reviewed appellant's medical history and provided findings on physical examination noting that appellant's motor and sensory examinations revealed no deficit. Dr. Majzoub diagnosed degenerative cervical spine disease which required surgery. He concluded that appellant's cervical surgery was successful and that appellant had no current deficits. Dr. Majzoub opined that appellant's cervical spine disease was independent of his work as a mail carrier. He opined that carrying mail did not affect the cervical spine and that appellant's cervical spine disease was related to degenerative disc disease not to his federal employment duties including carrying a mailbag.

By decision dated May 4, 2015, OWCP denied appellant's request for approval of cervical disc surgery. It found that Dr. Majzoub's report was entitled to the special weight of the medical evidence and established that appellant's cervical condition was not caused or aggravated by his employment duties.

LEGAL PRECEDENT

Section 8103 of FECA 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 While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁵

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being 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 To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁸ In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an

⁴ 5 U.S.C. § 8103; *J.H.*, Docket No. 12-1950 (issued February 13, 2013).

⁵ *Kenneth O. Collins, Jr.*, 55 ECAB 648 (2004).

⁶ *See D.K.*, 59 ECAB 141 (2007).

⁷ *Minnie B. Lewis*, 53 ECAB 606 (2002).

⁸ *M.B.*, 58 ECAB 588 (2007).

employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.⁹

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.¹⁰ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

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.¹²

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for approval of cervical spine surgery.

OWCP accepted appellant's claim for sprain of the right shoulder and rotator cuff as well as cervical spondylosis with myelopathy due to his employment duty of carrying a mailbag. Dr. Moufarrij performed an anterior cervical discectomy and fusion at C4-5, C5-6, and C6-7 on April 22, 2011. He and Dr. Neel opined that this surgery was necessary due to appellant's employment-related cervical condition. OWCP found that the evidence of record did not establish that the surgery was necessary due to appellant's employment-related conditions. Appellant appealed. The Board remanded the case for OWCP to make a referral to a second opinion physician. Dr. Stein, as the second opinion physician, determined that appellant's cervical surgery was not causally related to his federal employment. OWCP properly found that there was a conflict of medical opinion evidence between appellant's attending physicians, Drs. Neel and Moufarrij, and the second opinion physician, Dr. Stein, regarding whether appellant's degenerative cervical spine condition and resultant surgery was causally related to his employment.

To resolve the conflict of medical evidence, OWCP referred appellant to Dr. Majzoub along with a statement of accepted facts and a list of questions. The Board finds that Dr. Majzoub's opinion conflicts with the SOAF. The SOAF made clear that OWCP had accepted appellant's claim for right rotator cuff strain and cervical spondylosis with myelopathy. Dr. Majzoub did not mention these accepted conditions in his report. As a medical professional,

⁹ *R.C.*, 58 ECAB 238 (2006).

¹⁰ 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

¹¹ *R.C.*, *supra* note 8.

¹² *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Dr. Majzoub is entitled to reject causal relationship between appellant's employment and his accepted condition, but if he does so without convincing medical rationale, his opinion has little probative or evidentiary value.¹³ The Board has found that when the referral physician does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁴

Dr. Majzoub repeatedly opined that appellant's employment duties of carrying mailbags did not and would not impact his cervical spine. He found that appellant had degenerative disc disease and that this condition was the cause of his cervical spine condition which required surgery. Dr. Majzoub opined that appellant's cervical spine disease was independent of his work as a mail carrier. He stated that carrying mail did not affect the cervical spine and that appellant's cervical spine disease was related to degenerative disc disease not to his federal employment. The Board has held that medical conclusions unsupported by rationale are of little probative value.¹⁵ In this case, the certainty with which Dr. Majzoub expressed his opinion cannot overcome the lack of medical rationale explaining the basis of that opinion. The Board finds that Dr. Majzoub did not explain why he believed that appellant's underlying conditions as well as his anterior cervical discectomy and fusion were due to degenerative disc disease rather than the accepted condition of cervical spondylosis with myelopathy.¹⁶ The Board further notes that Dr. Majzoub did not respond to the specific questions posed by OWCP.

The Board finds that OWCP abused its discretion when it denied authorization of appellant's cervical spine surgery based on Dr. Majzoub's report.¹⁷ This report cannot resolve the existing conflict of medical opinion evidence as it is not well rationalized and based on a proper factual background, and cannot be accorded special weight.

On remand OWCP should request a supplemental report from Dr. Majzoub addressing the defects in his April 13, 2015 report by noting the accepted conditions and providing clear medical reasoning for his opinions regarding these conditions and any relationship to appellant's need for cervical spine surgery. After this and such other development as OWCP deems necessary, OWCP should issue a *de novo* decision regarding appellant's claim for authorization of cervical spine surgery.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP abused its discretion by denying appellant's request for authorization of cervical spine surgery.

¹³ See *P.B.*, Docket No. 08-1024 (issued January 7, 2009); *Willa M. Frazier*, 55 ECAB 379 (2004).

¹⁴ *Id.*

¹⁵ *Supra* note 11.

¹⁶ *Id.*

¹⁷ *C.M.*, Docket No. 14-1302 (issued May 5, 2015).

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with decision of the Board.

Issued: September 1, 2016
Washington, DC

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

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

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