United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 17-1034**
	)	**Issued: October 12, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Norfolk, VA, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2017 appellant filed a timely appeal from January 26 and March 9, 2017 merit decisions 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 consider the merits of the case.

ISSUE

The issue is whether OWCP abused its discretion by denying authorization for appellant's requested lumbar surgery.

FACTUAL HISTORY

On August 4, 1987 appellant, then a 33-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she was hit by a large pie wagon and sustained lower back pain radiating down her left leg. She stopped work on August 4, 1987. OWCP accepted

[1] 5 U.S.C. § 8101 *et seq.*

appellant's claim for lumbar strain on December 28, 1987. On June 1, 1990 it expanded acceptance of the claim to include herniated disc from L4-S1. On July 18, 1991 OWCP accepted pseudoarthrosis and authorized implementation of a spinal cord stimulator. Appellant initially received intermittent wage-loss compensation benefits on the supplemental rolls until December 29, 2002. She received benefits on the periodic rolls from December 29, 2002 until January 24, 2004.

Appellant's surgical history includes a decompressive laminectomy on November 13, 1987, a bilateral total laminectomy with bilateral posterolateral fusion on February 28, 1990, and an anterior lumbar discectomy and anterior lumbar interbody fusion on June 28, 2001. She continued to receive medical treatment for her accepted conditions and received numerous epidural injections.[2]

By decision dated November 24, 2004, OWCP issued a decision finding that appellant had returned to work as a modified clerk on December 29, 2003, and that the earnings in this position fairly and reasonably represented her wage-earning capacity. It determined that the pay in the modified clerk position was equal to or greater than the pay in the date-of-injury position. Therefore, appellant had zero percent loss of wage-earning capacity.

An August 10, 2016 magnetic resonance imaging (MRI) scan of the spine was interpreted by Dr. Srinesh Alle, a Board-certified radiologist, as showing postsurgical changes at L4-5 and L5-S1, mild central canal stenosis at L3-4, multilevel degenerative changes, and no significant change since the previous MRI scan.

In a November 21, 2016 report, Dr. Michael Gauthier, a Board-certified family practitioner, noted that appellant complained of low back pain in the left gluteal region and left leg pain radiating down to the foot and equal in all toes. He administered another L5-S1 lumbar transformational epidural steroid injection. Dr. Gauthier diagnosed radiculopathy, lumbar region; spinal stenosis, lumbar region; spondylosis without myelopathy or radiculopathy, lumbar region; nicotine dependence; and noted that she was overweight.

In a November 23, 2016 report, Dr. Felix M. Kirven, a Board-certified orthopedic surgeon, noted that appellant had a lumbar spine MRI scan dated August 10, 2016, which showed herniated discs at L2-3 and L3-4 with foraminal stenosis at those levels as well as central canal stenosis. He noted lumbar herniated disc syndrome and adjacent segment. Dr. Kirven noted a previous lumbar fusion at L4-5 and L5-S1 and that appellant had now developed adjacent segment disease and opined that she was in need of a decompressive laminectomy at L2-3 and L3-4 with instrumented posterior fusion at L3-4.

On December 9, 2016 Dr. Kirven requested authorization to perform a lumbar spine fusion, application of spine prosthesistic device, spine fusion extra segment, and removal of spinal lamina. By letter dated December 13, 2016, OWCP informed his office that the procedures could not be approved as further medical development was necessary.

[2] The record reflects that appellant received epidural injections on March 18, 1993, April 19 and May 2, 1994, February 3, April 26, and June 12, 1995, April 9 and August 13, 1996, January 15, June 29, August 7, and November 5, 1997, May 5, 1998, July 5 and August 9, 2000, September 26, 2011, and March 26, 2012.

In a December 20, 2016 report, Dr. William Tontz, a Board-certified orthopedic surgeon and OWCP medical adviser, indicated that the proposed surgery was causally related to the accepted medical condition. He noted that appellant had persistent symptoms since the industrial injury and that there was a lack of evidence of preexistent symptoms leading up to the employment injury. However, Dr. Tontz indicated that there was a lack of medical necessity for lumbar fusion as there was no evidence of segmental instability and severe stenosis from Dr. Gauthier's examination note of November 21, 2016. He noted that the MRI scan of the lumbar spine from August 10, 2016 demonstrated only mild central canal stenosis at L3-4 and multiple degenerative changes. Dr. Tontz concluded that the proposed lumbar spine fusion, application of spinal prosthetic device, spine fusion extra segment, and removal of spinal lamina was not medically necessary.

By letter dated December 20, 2016, OWCP informed appellant that, if her physician believed that a newly-diagnosed condition was causally related to the accepted injury, he should submit a detailed medical report to include an accurate history of the injury and all prior industrial and nonindustrial injuries to similar parts of her body, a firm diagnosis of the recent condition resulting from the injury, findings and or test results which support the recently diagnosed condition, a description of the treatment provided, the prognosis, and the period and extent of disability. It afforded her 30 days to submit the requested information. No further evidence was received at that time.

By decision dated January 26, 2017, OWCP denied appellant's request for authorization for a lumbar spine fusion, application of spine prosthetic device, spine fusion extra segment, and removal of spine lamina. It determined that she had not established that the surgical procedures were necessary to address the effects of her employment-related injury.

On February 21, 2017 appellant requested reconsideration. She provided a letter to her senator, in which she indicated that she was in extreme pain in both legs and could not sleep. Appellant noted that her physician wanted to perform surgery and that the physicians in Washington, DC did not know her. She resubmitted Dr. Gauthier's November 21, 2016 report and the August 10, 2016 MRI scan report, as well as reports by Dr. Kirven that were already of record.

By decision dated March 9, 2017, OWCP conducted a merit review, but denied modification of the January 26, 2017 decision. It concluded that the medical evidence of record did not establish that the requested surgical procedures were medically necessary.

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.[3] While OWCP is obligated to pay for treatment of employment-related

[3] 5 U.S.C. § 8103; *see L.D.*, 59 ECAB 648 (2008).

conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[4]

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.[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] To be entitled to reimbursement of medical expenses, a claimant has the burden of proof to establish 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.[7] 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 employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[8]

ANALYSIS

The Board finds that OWCP did not abuse its discretion by denying authorization for the lumbar spine fusion, application of spinal prosthetic, spine fusion extra segment, and removal of spinal lamina, as requested by Dr. Kirven.

The only limitation on OWCP's authority in approving, or disapproving, services under FECA is that of reasonableness.[9] It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10]

The Board finds that OWCP acted within its discretion when it evaluated the medical evidence of record. OWCP found that the requested spinal surgery was causally related to the accepted employment injury. However, it denied the request for the spinal surgery as it determined that appellant had not submitted evidence establishing that the surgery was medically necessary.

While Dr. Kirven recommended the surgical procedures and related that appellant had now developed adjacent segment disease causally related to the accepted conditions, he offered

[4] *Kennett O. Collins, Jr.,* 55 ECAB 648 (2004).

[5] *See D.K.*, 59 ECAB 141 (2007).

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

[7] *M.B.*, 58 ECAB 588 (2007).

[8] *R.C.*, 58 ECAB 238 (2006).

[9] *See supra* note 6.

[10] *J.B.*, Docket No. 16-1173 (issued February 16, 2017); *see also Daniel J. Perea*, 42 ECAB 214 (1990).

no medical explanation as to why the recommended procedures were medically necessary. Appellant must submit evidence that shows that the requested medical procedure is both due to a condition causally related to an employment injury and that it is medically warranted.[11] As Dr. Kirven offered no explanation regarding medical necessity of the proposed procedures, he did not substantiate that the procedures should be authorized.[12]

OWCP's medical adviser reviewed the medical evidence of record and opined that the proposed surgery was not medically necessary. He noted that appellant's MRI scan of the lumbar spine from August 10, 2016 demonstrated only mild central canal stenosis at L3-4 and multiple degenerative changes, and that the November 21, 2016 examination note by Dr. Gauthier did not establish segmental instability and severe stenosis.[13] The medical adviser therefore concluded that the medical evidence of record did not substantiate that the proposed procedures were medically necessary.

Although appellant was provided an opportunity to submit additional rationalized medical opinion explaining why the proposed surgery was necessary, she failed to do so. She did not submit any other medical evidence which discussed the medical necessity of the proposed surgical procedures.

Accordingly, as the evidence failed to establish that the proposed surgery was medically necessary, OWCP acted within its discretion in denying her request for a lumbar spine fusion, spine fusion extra segment, application of spine prosthetic device, and removal of spine lamina.[14]

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 did not abuse its discretion by denying authorization for the requested lumbar surgery.

[11] *C.J.,* Docket No. 16-1693 (issued July 13, 2017).

[12] *Id*.

[13] *G.G*., Docket No. 17-0504 (issued August 8, 2017).

[14] *See S.B.*, Docket No. 15-1149 (issued December 23, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 9 and January 26, 2017 are affirmed.

Issued: October 12, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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