United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 17-1389**
	)	**Issued: April 6, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Antioch, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2017 appellant filed a timely appeal from January 25, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for authorization of a lumbar spinal fusion; and (2) whether she has met her burden of proof to establish a recurrence of disability beginning June 6, 2016 causally related to her accepted employment injury.

[1] Appellant timely requested an oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). By order dated February 1, 2018, the Board exercised its discretion and denied her request for oral argument as the issues on appeal could be properly adjudicated by a review of the evidence of record. *Order Denying Request for Oral Argument*, Docket No. 17-1389 (issued October 12, 2017).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 23, 2012 appellant, then a 44-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she experienced progressively worsening back pain due to repetitive lifting in the course of her federal employment. She stopped work on October 18, 2012. OWCP accepted the claim for lumbar radiculopathy and a large central disc protrusion at L5-S1.

On September 9, 2013 appellant underwent a right and left lumbar microdiscectomy and laminotomy at L5-S1. OWCP paid her wage-loss compensation for total disability until August 8, 2014, when she returned to her usual employment.

Dr. Robert A. Rovner, a Board-certified orthopedic surgeon, evaluated appellant on January 5, 2016 for low back pain radiating into the lower extremities. He obtained a history of the October 4, 2012 work injury, noting that she worked full duty but experienced pain, burning, and numbness through the lower extremities into the feet. Dr. Rovner diagnosed disc protrusions at L4-5 and L5-S1, stenosis, and sciatica bilaterally after lumbar surgery. He recommended a magnetic resonance imaging (MRI) scan study. Dr. Rovner indicated that x-rays obtained on that date revealed findings suggesting instability at L4-5.

A January 18, 2016 MRI scan study of the lumbar spine interpreted by Dr. Yurria Lobato, a radiologist, revealed status post right laminotomy at L3-4 with bilateral posterolateral bulges without significant stenosis, a large central disc protrusion at L4-5 resulting in severe stenosis of the spine and compression of the proximal nerve roots at L5, and annular bulging at L5-S1 without significant stenosis.

Dr. Matthew D. Johnson, an attending osteopath, advised that appellant initially experienced back pain in October 2012 due to repetitive strain and trauma performing her work duties. He noted that she was working full time and that an MRI scan study showed a large herniated disc at L5-S1. In a work status form, Dr. Johnson found that appellant could perform her usual employment.

On February 8, 2016 Dr. Rovner reviewed the findings from the January 18, 2016 MRI scan study and discussed appellant's complaints of pain in her back radiating into both legs. He found a normal neurological examination and a negative straight leg raise and reviewed x-rays obtained January 5, 2016 showing instability from flexion to extension at L4-5 and L5-S1 disc degeneration. Dr. Rovner diagnosed spondylosis from L4 to S1, instability at L4-5, and a prior discectomy at L4-5 with a "recurrent large midline L4-5 disc herniation and severe stenosis." He concluded:

> "[Appellant] has symptoms that I believe are secondary to a large recurrent disc herniation at L5-S1 in the midline with almost complete obliteration of the spinal canal. Given the fact that she has had previous surgery at this level and the instability on x-ray, I would recommend revision decompression with fusion and I think this should be done anteriorly… Because the L5-S1 disc below this is so collapsed, that level should be included as well…."

Dr. Rovner requested that OWCP authorize an anterior interbody fusion at L4-5 and L5-S1.

In a February 24, 2016 progress report, Dr. Johnson diagnosed thoracic radiculopathy and noted that appellant had requested modified duty due to increased pain. He provided work restrictions, including lifting 10 to 15 pounds with medication and 5 pounds without medication.

An OWCP medical adviser, on April 4, 2016, reviewed the medical evidence and noted that the neurological examination performed by Dr. Rovner on February 8, 2016 yielded normal neurological findings. He indicated that OWCP had accepted the claim for thoracic or lumbosacral neuritis or radiculitis and displacement of a lumbar intervertebral disc without myelopathy. OWCP's medical adviser opined that surgery at L4-5 and L5-S1 was not medically necessary as appellant did not meet the criteria for a lumbar spinal fusion set forth by the Official Disability Guidelines, noting that she had no focal neurological signs, a demonstrated failure of conservative treatment, objective evidence of instability, or "clear evidence of spinal cord compression, spinal infection and spine fracture."

On April 11, 2016 Dr. Rovner noted that appellant's surgical request was denied. He discussed her symptoms of back pain radiating into the legs. On examination, Dr. Rovner found no loss of lower extremity sensation, motor strength, or reflexes. He diagnosed instability at L4-5 with a recurrent large disc herniation and severe stenosis at L4-5, and spondylosis at L4 to S1. Dr. Rovner related, "I cannot imagine the real reason for denial of surgery." He advised that appellant should "continue on temporary disability."

Dr. Johnson, on April 20, 2016, found that appellant could work modified duty with restrictions that included lifting no more than 20 pounds.

In a June 3, 2016 work status report, Dr. Johnson indicated that appellant was temporarily totally disabled pending the next appointment. On June 29, 2016 he again found that appellant was totally disabled until further evaluation.

On June 27, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability from June 6 to 17, 2016.

By letter dated July 6, 2016, OWCP informed appellant that it was adjudicating her claim for wage-loss compensation as a notice of recurrence of disability. It requested that she submit a detailed report from her attending physician with clinical findings supporting that she sustained a worsening of her accepted work injury without intervening cause.

In a narrative report dated June 3, 2016, received by OWCP on July 12, 2016, Dr. Johnson evaluated appellant for increased low back pain and radiculopathy. On examination he found limited lumbar motion due to pain and hypertonicity, tenderness, and spasms of the paravertebral muscles. Dr. Johnson found a positive straight leg raise bilaterally and positive lumbar facet loading with decreased sensation over the lateral foot bilaterally. He indicated that appellant stopped work on June 3, 2016 due to significant pain such that she was unable to work even with restrictions. Dr. Johnson noted that the requested fusion at L4-5 and L5-S1 was denied and that she was placed off work for three months. He found that appellant was totally disabled beginning June 3, 2016 as she "could not continue to tolerate modified duty due to severe pain. She is awaiting surgery with Dr. Rovner."

Dr. Rovner, on June 13, 2016, diagnosed a recurrent large disc herniation at L4-5 with stenosis, spondylosis at L4 to S1, and L4-5 instability. He noted that he was awaiting authorization

for the lumbar fusion and indicated that appellant should "continue on temporary disability per Dr. Johnson…."

In work status reports dated June 29 and July 22, 2016, Dr. Johnson advised that appellant remained totally disabled from employment.

By decision dated August 1, 2016, OWCP found that appellant had not established a recurrence of disability beginning June 6, 2016 causally related to her accepted work injury. It determined that the medical evidence was insufficient to demonstrate a material worsening of her employment injury.

In a July 22, 2016 report, received by OWCP on August 12, 2016, Dr. Johnson discussed appellant's symptoms of increased pain. He reviewed the letter from OWCP regarding her disability from employment. Dr. Johnson discussed appellant's history of a disc herniation with impingement and radiculopathy due to cumulative trauma at work. He indicated that she had low back pain radiating into the right lower extremity with objective examination findings of reduced motor strength and sensation, reduced ankle reflexes, and tenderness of the lumbar spine. Dr. Johnson noted that a lumbar MRI scan study showed a "lumbar disc herniation with foraminal impingement." He diagnosed lumbar radiculopathy. Dr. Johnson found that appellant had a disc herniation and radiculopathy caused by nerve impingement and had "worked through the pain for many years but [her] herniation and pain have worsened. She can no longer complete her job duties." He recommended spinal surgery and found that appellant was totally disabled beginning June 3, 2016 as a result of severe pain. Dr. Johnson advised that she could not lift over 10 pounds, perform repetitive movements, or stand, walk, or sit over four hours per day.

On August 17, 2016 Dr. Johnson indicated that a 2016 MRI scan study showed "a herniation and foraminal stenosis worse than what was present in the past."[3] He asserted that appellant "previously had worked through her pain but in late 2015 and early 2016 the pain became unbearable necessitating referral to [an] orthopedic spine surgeon." Dr. Johnson questioned why her claim was denied and related, "There is clear physical exam[ination] evidence and diagnostic evidence of 'material worsening.'" On September 14, 2016 he noted that appellant now used a cane for walking and had been unable to work for three months. Dr. Johnson reiterated that she was disabled from work and listed restrictions.

Appellant, on October 31, 2016, requested reconsideration.

In November 23 and December 21, 2016 progress reports, Dr. Johnson noted that appellant continued to await surgical authorization.

By decision dated January 25, 2017, OWCP denied modification of its August 1, 2016 decision. It determined that Dr. Johnson provided light-duty restrictions on August 17, September 14, and November 23, 2016, but also found that appellant was totally disabled. OWCP further found that Dr. Johnson indicated that she was off work due to pain, which was not sufficient to support a disability finding.

[3] In a progress report dated October 12, 2016, Dr. Rovner again noted that he was awaiting approval for an anterior fusion at L4-5 and L5-S1.

In another decision dated January 25, 2017, OWCP denied authorization for the lumbar spinal fusion requested by Dr. Rovner. It noted that OWCP's medical adviser found that the surgery was not medically necessary as there was no clear evidence of compression of the spinal cord or lumbar instability.

On appeal appellant contends that her physician advised her that she should not work and that her supervisor did not properly advise her regarding how to file a claim with OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA states in pertinent part: 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 the Secretary of Labor 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]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[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 judgments, 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]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar radiculopathy and a large central disc protrusion at L5-S1. Appellant underwent a lumbar discectomy and laminotomy at L5-S1 on September 9, 2013.

A January 18, 2016 MRI scan study interpreted by Dr. Lobato showed a large central disc protrusion at L4-5 causing severe stenosis of the spine and compression of the proximal nerve roots at L5 and annular bulging at L5-S1 with no significant stenosis. On February 8, 2016 Dr. Rovner reviewed the MRI scan study, discussed appellant's complaints of back pain with bilateral lower extremity radiculopathy, and diagnosed a large recurrent disc herniation at L4-5 as demonstrated by MRI scan study causing "almost complete obliteration of the spinal canal." He further noted that x-rays obtained on January 5, 2016 showed instability at L4-5. On examination, Dr. Rovner found normal neurological findings and a negative straight leg raise. He noted that appellant previously underwent surgery at this level and recommended a revision decompression and fusion at L4-5 and L5-S1, noting that that L5-S1 disc had also collapsed.

[4] 5 U.S.C. § 8103(a).

[5] *See B.J.*, Docket No. 15-1961 (issued September 7, 2016); *Vicky C. Randall*, 51 ECAB 357 (2000).

[6] *See Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[7] *Rosa Lee Jones*, 36 ECAB 679 (1985).

An OWCP medical adviser reviewed the evidence on April 4, 2016 including the report of Dr. Rovner dated February 8, 2016. He noted that Dr. Rovner indicated that appellant's examination yielded normal neurological findings. OWCP's medical adviser opined that the proposed surgery was not medically necessary as she had no neurological symptoms, had not failed conservative treatment, did not have objective evidence of instability, and had no evidence of compression of the spinal cord.

The Board finds that the case is not in posture for decision regarding authorization for a lumbar fusion at L4-5 and L5-S1 because OWCP's medical adviser provided insufficient rationale for his determination. The medical adviser indicated that appellant did not demonstrate evidence of instability or compression of the spinal cord, but he did not explain this finding in light of the objective diagnostic testing. Both the interpreting radiologist, Dr. Lobato and Dr. Rovner found the January 18, 2016 lumbar MRI scan study to show a large recurrent disc herniation at L4-5 causing severe spinal stenosis and compression of the L5 nerve root. Additionally, Dr. Rovner noted that x-ray studies obtained on January 5, 2016 revealed instability at L5-5 of the lumbar spine. OWCP's medical adviser did not substantiate his findings in contradiction of the diagnostic results for which he reviewed that appellant had no documented evidence of lumbar instability or nerve root compression. Therefore, his opinion is unreasonable and therefore is insufficient to support OWCP's denial of surgical authorization.[8]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[9] On remand, OWCP should obtain a reasoned opinion regarding whether the proposed surgery should be authorized. Following such further development as deemed necessary, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[10]

Appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence a causal relationship between her recurrence of disability and his employment injury.[11] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling

[8] *See D.B.*, Docket No. 14-0830 (issued August 22, 2014).

[9] *See W.W.*, Docket No. 15-1130 (issued August 7, 2015); *Phillip L. Barnes*, 55 ECAB 426 (2004).

[10] 20 C.F.R. § 10.5(x).

[11] *Carmen Gould*, 50 ECAB 504 (1999).

condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[12]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[13] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[14]

ANALYSIS -- ISSUE 2

OWCP paid appellant compensation for total disability subsequent to her September 9, 2013 lumbar surgery until August 8, 2014, when she resumed her regular employment. Appellant stopped work and filed a claim for wage-loss compensation beginning June 6, 2016, which OWCP adjudicated as a notice of recurrence of disability.

The Board finds that the case is not in posture for decision. On June 3, 2016 Dr. Johnson noted that OWCP had denied appellant's request for a lumbar fusion at L4-5 and L5-S1. On examination he found reduced lumbar motion and spasm and tenderness of the paravertebral muscles with a positive straight leg raise bilaterally and a bilateral loss of sensation over the foot. Dr. Johnson opined that appellant was totally disabled beginning June 3, 2016 due to severe pain.

Dr. Rovner, in a June 13, 2016 report, diagnosed a recurrent disc herniation and instability at L4-5 and spondylosis from L4 to S1. He advised that appellant was temporarily disabled as found by Dr. Johnson.

In a report dated July 22, 2016, Dr. Johnson reviewed OWCP's letter requesting additional information from appellant supporting disability. He provided objective findings of reduced sensation and motor strength, a loss of ankle reflexes, and lumbar spine tenderness. Dr. Johnson reviewed MRI scan findings, diagnosed lumbar radiculopathy, and opined that appellant was unable to work, noting that she could not lift more than 10 pounds. On August 17, 2016 Dr. Johnson advised that appellant's lumbar MRI scan study from 2016 showed worsening herniation and foraminal stenosis and opined that the findings on physical examination and diagnostic studies demonstrated a material worsening of her condition.

The Board finds that, although the opinion of Dr. Johnson is not sufficiently rationalized to establish that appellant sustained a recurrence of disability beginning June 6, 2016 due to her accepted work injury, it is of sufficient probative value to warrant additional development.[15] Dr. Johnson evidenced knowledge of her work injury and based his opinion that she was unable to work on examination findings and the current diagnostic studies. OWCP, however, did not

[12] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[13] *See S.M.*, Docket No. 16-0990 (issued February 8, 2017); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[14] 20 C.F.R. § 10.121.

[15] *See R.M.*, Docket No. 17-1652 (issued January 5, 2018).

undertake further development of the medical record, such as referring the record to an OWCP medical adviser or referring appellant for a second opinion examination.[16]

As noted, while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[17] On remand, OWCP should further develop the medical evidence by referring appellant to an appropriate specialist to determine whether she sustained a recurrence of disability beginning June 6, 2016 due to her accepted work injury. Following this and any other development deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly denied appellant's request for authorization for a lumbar spinal fusion. The Board further finds that the case is not in posture for decision regarding whether she met her burden of proof to establish a recurrence of disability beginning June 6, 2016 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 6, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[16] *See S.S.*, Docket No. 17-0705 (issued November 9, 2017).

[17] *Marco A. Padilla*, 51 ECAB 202 (1999).