United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 16-1138**
	)	**Issued: February 22, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Oklahoma City, OK, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 9, 2016 appellant, through counsel, filed a timely appeal from an April 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[3]

[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.*

[3] The record provided the Board includes evidence received after OWCP issued its April 12, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly declined to authorize anterior cervical discectomy and fusion (ACDF) surgery at C4 through C7.

FACTUAL HISTORY

On August 4, 2014 appellant, then a 45-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back and bilateral upper extremities while attending to a patient earlier that day. Specifically, she noted that she was helping another nurse return a patient to bed, when the patient became agitated and grabbed her arm. Appellant also reported that the patient was kicking, punching, and biting. She claimed injuries to her right forearm, left hand/fingers, and right lower back.

On August 28, 2014 OWCP accepted appellant's claim for lumbar sprain, left hand sprain, right elbow contusion, and right lateral epicondylitis.

Appellant's September 12, 2014 cervical and lumbar spine magnetic resonance imaging (MRI) scans revealed multilevel disc disease.

In an October 6, 2014 report, OWCP's district medical adviser (DMA) indicated that appellant's multilevel degenerative changes, disc protrusions, cord effacement, and neural impingement, as evidenced by recent MRI scans, were preexisting conditions and should not be included as accepted conditions. He recommended that appellant's claim be expanded to include cervical sprain.

On October 7, 2014 OWCP expanded the claim to include neck sprain as an accepted condition. It paid appellant wage-loss compensation for temporary total disability beginning October 14, 2014, and subsequently placed her on the periodic compensation rolls effective December 14, 2014.

In an October 31, 2014 report, Dr. Qualls E. Stevens, a neurosurgeon, diagnosed cervical disc displacement, cervical radiculopathy, and lumbar disc displacement. He recommended ACDF surgery at C4 through C7.

In a November 24, 2014 report, Dr. J. Arden Blough, a family practitioner, concurred with Dr. Stevens' recommended surgery. He also found that appellant's cervical and lumbar disc disease, as indicated on her recent MRI scans, was causally related to the August 4, 2014 employment injury.

In an April 17, 2015 report, Dr. Allan S. Fielding, a Board-certified neurosurgeon and OWCP referral physician, indicated that the findings on appellant's September 12, 2014 cervical MRI scan at C4-5, C5-6, and C6-7 were preexistent and degenerative in nature. He indicated that appellant sustained a cervical strain as a result of the August 4, 2014 employment injury, but nothing more serious. With respect to her lumbar spine, Dr. Fielding noted that the September 12, 2014 MRI scan revealed age-appropriate degenerative changes at L3-4, L4-5, and L5-S1, and no evidence of disc herniation or nerve root compression. The lumbar MRI showed no evidence of traumatic injury caused by the August 4, 2014 employment injury. Dr. Fielding found that appellant's employment-related cervical and lumbar strains had long since resolved.

As to the need for surgical intervention, he indicated that the recommended ACDF at C4 through C7 was unwarranted, apart from the fact that the underlying condition was not work related. Dr. Fielding explained that the proposed procedure was occasionally performed, but in his opinion it was not supported by the facts of the case. In a separate work capacity evaluation (OWCP-5c), he indicated that appellant was capable of performing her usual job without restriction.

In an April 22, 2015 report, Dr. Christopher Barry, a Board-certified neurosurgeon, recommended that appellant undergo ACDF at C5-6 and C6-7 to address her cervical and upper extremity symptoms.

OWCP forwarded a copy of Dr. Fielding's report to appellant's physician, Dr. Blough. In a May 18, 2015 report, Dr. Blough expressed disagreement with certain aspects of Dr. Fielding's April 17, 2015 opinion. With respect to appellant's cervical spine, he diagnosed work-related sprain/strain with trigger points, cervical radiculopathy, and disc protrusions at C4-5, C5-6, and C6-7. Dr. Blough did not dispute that appellant's cervical and lumbar sprains had resolved, but he did not believe that was the full extent of her work-related injuries. He further noted that appellant failed conservative treatment and was referred to two different Board-certified spine specialists, both of whom recommended surgical intervention of the cervical spine. Dr. Blough advised that appellant remained temporarily totally disabled.

Based on the differing opinions of Dr. Blough and Dr. Fielding, OWCP declared a conflict in medical opinion and, together with a statement of accepted facts (SOAF), referred appellant for an impartial medical evaluation to determine her disability status and the need for recommended surgical intervention.

In a June 29, 2015 report, Dr. Carlos Acosta, a Board-certified neurosurgeon and impartial medical examiner (IME), found that appellant's cervical strain had resolved.[4] He also reviewed appellant's September 12, 2014 cervical MRI scan and found evidence of degenerative changes, but no evidence of spinal cord compression. Additionally, there was no evidence of paraspinal muscle spasms or loss of lordosis of the cervical spine. Dr. Acosta characterized the cervical MRI findings as normal for appellant's age. He further opined that appellant's accepted cervical strain did not require surgical intervention, and that the proposed surgical procedure was unrelated to her accepted condition. Dr. Acosta noted that other than a cervical strain, no further diagnoses were supported by the physical examination and diagnostic tests. He concluded that appellant could return to work as a practical nurse without restrictions.[5]

By decision dated August 13, 2015, OWCP denied authorization for the requested ACDF surgery at C4 through C7. Based on Dr. Acosta's June 29, 2015 impartial medical evaluation, it found that the proposed surgery was not necessitated by the accepted cervical strain.

Counsel timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on March 11, 2016.

[4] Dr. Acosta also provided findings with respect to appellant's other accepted conditions, as well as her nonwork-related lumbar degenerative disc disease.

[5] Dr. Acosta later submitted an August 18, 2015 work capacity evaluation (OWCP-5c).

Dr. Blough provided a February 23, 2016 report wherein he noted his disagreement with Dr. Acosta's opinion, and reiterated his May 18, 2015 diagnoses and recommendations.

On March 6, 2016 appellant resumed her full-time, regular duties without restrictions.

By decision dated March 17, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits based on Dr. Acosta's impartial medical evaluation.[6] Counsel then timely requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In an April 12, 2016 decision, an OWCP hearing representative affirmed the August 13, 2015 decision denying authorization for cervical surgery. She continued to find that Dr. Acosta's impartial medical evaluation represented the special weight of the medical evidence with respect to the necessity for surgery to address appellant's accepted cervical condition.

LEGAL PRECEDENT

An injured employee is entitled to receive all medical services, appliances, or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.[7] OWCP has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on its authority being that of reasonableness.[8] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.[9]

While OWCP is obligated to pay for treatment of work-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of a work-related injury or condition.[10] Proof of causal relationship must include rationalized medical evidence.[11] In addition to demonstrating causal relationship, the injured employee must show that the requested services, appliances, or supplies are medically warranted.[12]

FECA provides that if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[13] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually

[6] OWCP previously issued a notice of proposed termination on February 11, 2016.

[7] 5 U.S.C. § 8103(a); 20 C.F.R. § 10.310(a).

[8] *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

[9] *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[10] *Debra S. King*, 44 ECAB 203, 209 (1992).

[11] *Joseph E. Hofmann*, *supra* note 8.

[12] *Id.* at 460-61.

[13] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

equal weight and rationale."[14] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

OWCP accepted appellant's August 4, 2014 traumatic injury claim for left hand sprain, right elbow contusion, right lateral epicondylitis, and lumbar and cervical sprains. Appellant's September 12, 2014 cervical MRI scan revealed evidence of disc protrusions at C4-5, C5-6, and C6-7, which OWCP has not accepted as being causally related to the August 4, 2014 employment injury. Her physician, Dr. Blough, believed the cervical disc protrusions were employment related, and sought authorization for ACDF at C4 through C7. Dr. Fielding, an OWCP referral physician, indicated that the September 12, 2014 cervical MRI scan findings at C4-5, C5-6, and C6-7 were preexistent and degenerative in nature. He found that appellant sustained a cervical strain as a result of the August 4, 2014 employment injury, but nothing more serious. Dr. Fielding also indicated that the recommended ACDF at C4 through C7 was unwarranted, apart from the fact that the underlying condition was not work related. In light of the differing opinions, OWCP properly declared a conflict in medical opinion.[16]

Dr. Acosta, the IME, reviewed appellant's September 12, 2014 cervical MRI scan and found evidence of degenerative changes. He characterized the cervical MRI scan findings as normal for appellant's age. Dr. Acosta further opined that appellant's accepted cervical strain did not require surgical intervention, and that the proposed surgical procedure was unrelated to her accepted condition. He noted that other than a cervical strain, no further diagnoses were supported by the physical examination and diagnostic tests.

When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[17] The Board finds that OWCP properly deferred to Dr. Acosta's June 29, 2015 opinion. The IME provided a well-reasoned report based on a proper factual and medical history. Dr. Acosta accurately summarized the relevant medical evidence, and relied on the SOAF. He also examined appellant and provided a thorough review of the relevant medical records. Dr. Acosta's report included detailed findings on physical examination and medical rationale supporting his opinion. As the IME, his June 29, 2015 opinion is entitled to special weight.[18]

Appellant's physician, Dr. Blough, reviewed Dr. Acosta's report and noted his disagreement. Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the special weight

[14] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[15] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[16] *See supra* note 13.

[17] *Supra* note 15.

[18] *Id.*

accorded the IME's report and/or insufficient to create a new medical conflict.[19] As a party to the original conflict, Dr. Blough's February 23, 2016 report is insufficient to overcome the special weight properly accorded Dr. Acosta's June 29, 2015 opinion, and is similarly insufficient to create a new conflict in medical opinion. Accordingly, the Board finds that OWCP did not abuse its discretion in denying appellant's request for cervical surgery.

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 properly declined to authorize ACDF surgery at C4 through C7.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[19] *I.J.*, 59 ECAB 408, 414 (2008).