# United States Department of Labor
# Employees' Compensation Appeals Board

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| **J.T., Appellant** | ) | |
| **and** | ) | **Docket No. 18-0503** |
| | ) | **Issued: October 16, 2018** |
| **U.S. POSTAL SERVICE, POST OFFICE, Fort Collins, CO, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On January 8, 2018 appellant filed a timely appeal from a November 6, 2017 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 to consider the merits of the case.[2]

### ***ISSUE***

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the November 6, 2017 decision OWCP received additional evidence in this claim. However, the Board's jurisdiction is limited to a review of the evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-0176 (issued September 23, 2009).

## ***FACTUAL HISTORY***

On December 16, 2015 appellant, then a 39-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 15, 2015 she slipped on ice and fell, injuring her back while in the performance of duty. She stopped work on December 16, 2015 and received continuation of pay. On January 29, 2016 OWCP accepted the claim for strained neck muscle, low back strain, concussion, loss of consciousness. It later expanded acceptance of the claim to include pain disorder with psychological factors. OWCP paid appellant wage-loss compensation benefits effective January 30, 2016.

In a report dated January 21, 2016, Dr. John Ray, a Board-certified orthopedic surgeon, related that he had examined appellant following her December 15, 2015 slip and fall. He diagnosed lumbar intervertebral disc disorders with radiculopathy and recommended back surgery. Dr. Ray completed a note on June 1, 2016 and reported that appellant requested fusion surgery. He diagnosed intervertebral disc disorders with radiculopathy, lumbar region. Dr. Ray requested a psychological evaluation in consideration of an L4-5 fusion.

In a report dated June 16, 2016, Dr. Joel Cohen, a clinical psychologist, examined appellant and diagnosed adjustment disorder with depressed mood. His testing was suggestive of poor prognosis for optimal response from invasive procedures. Dr. Cohen diagnosed somatic symptoms disorder, and adjustment reaction with depressed mood. He noted that he was concerned that appellant was not ready to deal with the process of surgery. Dr. Cohen concluded, however, that if surgical intervention was medically necessary it could proceed, followed by additional psychological interventions.

On June 17, 2016 Dr. Ray provided a history of injury and found that appellant's psychological evaluation resulted in a recommendation of surgery. On physical examination he noted mild loss of lumbar lordosis, normal symmetric gait, limited range of motion of the lumbar spine due to discomfort, altered sensation over the left lateral calf, and normal muscle strength. Dr. Ray reviewed appellant's lumbar magnetic resonance imaging scan and diagnosed a large central disc protrusion at L4-5 substantially narrowing each lateral recess at that level. He opined that this finding was consistent with her back and lower extremity pain. Dr. Ray recommended a L4-5 decompression and posterior lumbar fusion.

By development letter dated June 20, 2016, OWCP informed appellant that the evidence of record was insufficient to establish that the requested treatment was medically necessary or causally related to her accepted conditions. It requested that appellant obtain a rationalized medical report explaining how her diagnosed condition and proposed surgery was related to her accepted employment injuries. OWCP afforded appellant 30 days to provide the requested information.

On June 22, 2016 OWCP expanded the acceptance of appellant's claim to include intervertebral disc disorders with radiculopathy L4-5, L5-S1 and intervertebral disc displacement L4-5 and L5-S1.

On July 19, 2016 OWCP referred appellant for a second opinion evaluation with Dr. John Douthit, a Board-certified orthopedic surgeon.

Dr. William Briggs, a Board-certified orthopedic surgeon, completed a report on July 22, 2016 and opined that appellant had exhausted conservative treatment options. He recommended that she consider a fusion, but noted that she was going to be at high risk afterwards with regard to pain control issues.

In a report dated August 22, 2016, Dr. Douthit, reviewed the statement of accepted facts (SOAF), appellant's history of injury, her medical treatment records, and her reports of back pain. He performed a physical examination finding meaningful clinical findings were obscured because of her extreme pain behavior. Dr. Douthit reported that appellant had no sensory or motor losses and had no objective physical findings. He diagnosed depression and possible aggravation of degenerative disease of the lumbar spine. Dr. Douthit found that appellant's severe depression with severe pain behavior was obscuring all clinical findings. He determined that she was currently a poor candidate for surgery, and noted his strong opposition to surgery as treatment for appellant until her depression was improved.

By decision dated September 7, 2016, OWCP denied authorization for appellant's requested surgical lumbar spinal fusion. It found that the weight of the medical opinion evidence rested with Dr. Douthit who concluded that appellant's obesity was hindering her recovery and distorting medical findings as well as noting that appellant had a severe psychiatric disorder making her a poor candidate for surgery. OWCP determined that the weight of the medical evidence did not establish that the requested treatment was medically necessary for appellant's accepted employment injuries.

On September 30, 2016 appellant requested an oral hearing and review of the written record from OWCP's Branch of Hearings and Review. In a letter dated October 11, 2016, OWCP informed appellant that the September 7, 2016 decision was issued in error and that a new decision would be issued following her impartial medical examination.

Dr. Ray examined appellant on September 22, 2016. On physical examination he found sensation was altered over the left lateral calf and giveaway weakness on strength testing. Dr. Ray noted symptom magnification, but continued to recommend posterior lumbar fusion.

In a report dated September 30, 2016, Dr. Raymond P. van den Hoven, a Board-certified physiatrist, noted appellant's history of injury, performed a physical examination and reviewed the result of his electrodiagnostic studies. He found no evidence of lumbar radiculopathy in either lower extremity based upon the electrodiagnostic studies. Dr. van den Hoven noted that appellant had a legitimate source of low back pain with degeneration at the L4-5 and L5-S1 levels. However, he also reported significant nonorganic findings including severe weakness of the right lower extremity and complaints of numbness in a nondermatomal pattern in her right leg. Dr. van den Hoven concluded, "I think [appellant] has some genuine pathophysiology in her lumbar spine, and if it were not for the significant nonorganic findings, in my opinion L4-5 fusion would be a reasonable option."

In a letter dated October 6, 2016, OWCP referred appellant for an impartial medical examination with Dr. Alfred Lotman, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Douthit, OWCP's second opinion physician, and appellant's

treating physicians Dr. Ray and Dr. Briggs, regarding appellant's need for lumbar spinal fusion surgery.

Dr. Lotman completed his report on November 14, 2016. He reviewed appellant's history of injury, the SOAF, as well as her medical history, and performed a limited examination as appellant was in a wheelchair. Dr. Lotman noted her marked and extreme pain behaviors and reported that he could not detect a motor, sensory, or reflex abnormality. He reported that sensation to light touch was diminished in both legs in a nondermatomal pattern which would change when examined repeatedly. Dr. Lotman could not detect any muscle atrophy. In response to OWCP's questions, he opined that appellant did not meet the criteria for surgery due to significant psychological overlay. Dr. Lotman opined that her diagnosed condition did not warrant surgical intervention.

By decision dated November 17, 2016, OWCP denied authorization for surgical lumbar spinal fusion, finding that Dr. Lotman's report was entitled to the special weight of the medical evidence.

On December 12, 2016 appellant requested an oral hearing before an OWCP hearing representative.

On December 29, 2016 OWCP expanded acceptance of the claim to include major depressive disorder, and undifferentiated somatoform disorder.

By decision dated February 3, 2017, an OWCP hearing representative found that Dr. Lotman's report was insufficiently rationalized to resolve the conflict of medical opinion and remanded the case for OWCP to obtain a supplemental report.

In a report dated March 7, 2017, Dr. Lotman explained that lumbar fusion was not medically necessary and that appellant was not a good surgical candidate for multiple reasons. He noted on his previous examination he could not detect motor, sensory, or reflex abnormality. Dr. Lotman further noted that appellant's sensory loss in both legs was in a nondermatomal pattern and shifted on repeat sensory examination. He was also unable to detect muscle atrophy. Dr. Lotman noted that in order to justify operative interventions, clinical findings, clinical course, and diagnostic tests must all be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement. He also determined that nonphysiologic modifiers of pain presentation or nonoperative conditions mimicking radiculopathy or instability must be ruled out prior to elective surgical intervention. Dr. Lotman opined that appellant did not meet these criteria as she had no repeatable specific neurologic findings, marked somatoform pain behaviors, negative electrodiagnostic studies, and unexplainable inconsistencies. He concluded that appellant was not a suitable candidate for surgery for these reasons.

By decision dated March 14, 2017, OWCP denied appellant authorization for a lumbar spinal fusion finding that this treatment was not medically necessary to address effects of her

December 15, 2015 work-related conditions. It found that Dr. Lotman's reports were entitled to the special weight of the medical opinion evidence.[3]

On August 7, 2017 appellant requested reconsideration of the March 14, 2017 decision. She submitted reports dated June 13, 15, and 2017 from Dr. William D. Boyd, a licensed clinical psychologist, which noted that appellant complained of symptoms consistent with depression. On June 29, 2017 Dr. Boyd opined that appellant was cleared from a psychological perspective for surgery. On July 27, 2017 Dr. Cohen agreed that there were no overt emotional or behavioral factors which would preclude appellant as a candidate for surgical intervention.

In a report dated August 31, 2017, Dr. Ray reviewed appellant's diagnostic testing and diagnosed advanced degenerative disc and facet changes at L4-5 resulting in lateral recess stenosis and modic changes. He recommended posterior lumbar fusions.

By decision dated November 6, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision. It found that there were multiple issues as to whether appellant was a suitable candidate for surgical intervention, including whether she was psychologically fit and whether the physical evidence warranted surgical intervention. OWCP determined that the medical reports of record were insufficient to establish that the requested spinal fusion was medically necessary.

## ***LEGAL PRECEDENT***

Section 8103 of FECA[4] 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 period of disability, or aid in lessening the amount of monthly compensation.[5] While OWCP is obligated to pay for treatment of employment-related 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.[6]

Section 10.310(a) of OWCP's implementing regulations provides that an 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] Its procedures provide that nonmedical equipment such as waterbeds, saunas, weight-lifting sets, exercise bicycles, *etc.*, may be authorized only if recommended by the attending physician and if

[3] On April 24, 2017 appellant requested an oral hearing from OWCP's Branch of Hearings and Review. By decision dated May 8, 2017, OWCP's Branch of Hearings and Review denied this request as untimely and determined in its discretion that appellant's claim could equally well be addressed through the reconsideration process.

[4] *Id.* at § 8103.

[5] *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Thomas W. Stevens*, 50 ECAB 288 (1999).

[6] *D.C., id.; Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[7] 20 C.F.R. § 10.310(a).

OWCP finds that the item is likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.[8]

In interpreting section 8103, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.[9]

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.[10]

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 (known as a referee physician or impartial medical specialist) who shall make an examination.[11] 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.[12] When there exists opposing 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 upon a proper factual background, must be given special weight.[13] 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.[14]

## ***ANALYSIS***

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of lumbar surgery.

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[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3.d(5) (October 1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Durable Medical Equipment*, Chapter 2.810.17.h (June 2014); *D.J.*, Docket No. 13-1637 (December 2013).

[9] *D.C., supra* note 5; *D.K.*, 59 ECAB 141 (2007); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[10] *Id.; see also Minnie B. Lewis*, 53 ECAB 606 (2002).

[11] 5 U.S.C. § 8123(a); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[12] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006); *C.L., id.*

[13] *See C.L., supra* note 11; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[14] *C.L., supra* note 11; *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

OWCP accepted that, as a result of a fall while at work on December 15, 2015, appellant sustained strained neck muscle, low back strain, concussion, loss of consciousness, pain disorder with psychological factors, intervertebral disc disorders with radiculopathy at L4-5 and L5-S1, intervertebral disc displacement L4-5 and L5-S1, major depressive disorder, and undifferentiated somatoform disorder.

Appellant's attending physicians Dr. Ray and Dr. Biggs recommended lumbar spinal fusion. OWCP referred appellant for a second opinion evaluation with Dr. Douthit who determined that appellant had no objective physical findings, was currently a poor candidate for surgery, and his strong opposition to surgery as treatment for her. It properly found that there was a conflict of medical opinion regarding the need and appropriateness of surgery for appellant. Consequentially, OWCP referred appellant to Dr. Lotman to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

The Board finds that the special weight of the medical evidence rests with the opinion of Dr. Lotman, the impartial medical specialist, who examined appellant, reviewed the medical evidence, and found that lumbar fusion was not medically warranted. As noted, for a surgical procedure to be authorized, a claimant must show that the surgery is for a condition causally related to the accepted work injury and that it is medically warranted.[15]

In his November 14, 2016 report, Dr. Lotman reviewed appellant's history of injury, the SOAF, as well as her medical history, and performed a physical examination. He reported that he could not detect a motor, sensory, or reflex abnormality. Dr. Lotman also found that sensation to light touch was diminished in both legs in a nondermatomal pattern which would change when examined repeatedly. Furthermore, he could not detect any muscle atrophy. In response to OWCP's questions, Dr. Lotman opined that appellant did not meet the criteria for surgery due to significant psychological overlay and appellant's diagnosed lumbar spine condition did not warrant surgical intervention. In his supplemental report dated March 7, 2017, Dr. Lotman explained that in order to justify operative interventions, clinical findings, clinical course, and diagnostic tests must all be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement. He opined that appellant did not meet these criteria as she had no repeatable specific neurologic findings, marked somatoform pain behaviors, negative electrodiagnostic studies, and unexplainable inconsistencies. Dr. Lotman determined that appellant was not a suitable candidate for surgery for these reasons.

The Board finds that Dr. Lotman's reports represent the special weight of the medical evidence and that OWCP properly relied on his reports in denying the requested surgery. The Board finds that he had full knowledge of the relevant facts and evaluated the course of her condition, his opinion is based on proper factual and medical history, and his report contained a detailed summary of this history. Dr. Lotman addressed the medical records and made his own examination findings to reach a reasoned conclusion regarding appellant's condition and to support that lumbar spinal fusion was not medically warranted.

Following Dr. Lotman's March 7, 2017 report, appellant provided additional medical evidence from her treating psychologists, Drs. Cohen and Boyd addressing emotional suitability

[15] *See C.L., supra* note 11; *P.F.*, Docket No. 16-0693 (issued October 24, 2016).

for surgery. On June 29, 2017 Dr. Boyd found that she was cleared from a psychological perspective for surgery. On July 27, 2017 Dr. Cohen agreed with Dr. Boyd that there were no overt emotional or behavioral factors which would preclude appellant as a candidate for surgical intervention. These reports are insufficient to overcome the special weight accorded Dr. Lotman's reports or to create a new conflict as the reports only address one aspect of his rationale for denying authorization for surgery, appellant's emotional reactions. Dr. Lotman also found that surgery was inappropriate based on appellant's lack of objective reproducible physical findings.

In his August 31, 2017 report, Dr. Ray reviewed appellant's diagnostic testing and diagnosed advanced degenerative disc and facet changes at L4-5 resulting in lateral recess stenosis and modic changes. He recommended a posterior lumbar fusion. Dr. Ray did not provide any new results of examination and did not address the concerns raised by Dr. Lotman. Reports from a physician who was on one side of a medical conflict that an impartial medical examiner resolved are generally insufficient to overcome the special weight of the impartial medical examiner, or to create a new conflict.[16] While Dr. Ray asserted that the need for lumbar fusion was related to the December 15, 2015 work injury, he failed to explain the findings on physical examination which supported his opinion. Absent a well-rationalized explanation regarding the clinical basis for his opinion that appellant required a lumbar fusion, his opinion is of limited probative value.[17]

The Board concludes that Dr. Lotman's opinion that the lumbar fusion was not medically warranted as appellant did not have objective findings on physical examination supporting the need for surgery is entitled to special weight and represents the weight of the evidence.[18]

The only limitation on OWCP's authority is approving or disapproving service under FECA is one of reasonableness.[19] In the instant case, appellant requested surgery. OWCP obtained an impartial medical examination through Dr. Lotman who found that surgery was not warranted. It therefore had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.

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 denied authorization for lumbar spinal fusion surgery.

[16] *C.L., supra* note 11; *D.C.*, Docket No. 16-0430 (issued August 29, 2016).

[17] *Id.*

[18] *Id.*

[19] *Supra* note 9.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 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