

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

A.G., Appellant)	
)	
and)	Docket No. 19-0113
)	Issued: July 12, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Laguna Hills, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 19, 2018 appellant filed a timely appeal from a July 24, 2018 merit decision and a September 7, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP abused its discretion by denying authorization for appellant's lumbar laminectomy; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 27, 2015 appellant, then a 55-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that on February 26, 2015 she first realized that she had developed a lumbar condition due to repetitive work tasks she had performed for 28 years in the performance of duty. She did not stop work.

On October 9, 2015 OWCP accepted the claim for aggravation of intervertebral disc disorder with myelopathy, lumbar region. It later expanded acceptance of the claim to include radiculopathy, lumbar region; lumbar annular tear; and lumbar facet arthrosis.

In an August 3, 2016 report, Dr. Robert J. Jackson, a Board-certified neurosurgeon, noted appellant's history of injury dating back to February 2015 and indicated that she had an exacerbation of severe lumbar back pain and lumbar radiculopathy. He noted that a February 2015 magnetic resonance imaging (MRI) scan revealed severe spinal stenosis. Dr. Jackson further noted that appellant underwent physical therapy since that time which helped stabilize her pain, but it provided no significant improvement. He noted that her electromyography scan revealed bilateral anterior tibialis neuropathy and peroneus longus irritation. Dr. Jackson examined appellant and discussed treatment options to include continued conservative treatment. Regarding surgery, he indicated that "[i]f all the treatment alternatives fail, and [her] symptoms continued, surgical intervention would be a reasonable approach." Dr. Jackson explained that appellant had severe spinal stenosis at L4-5 and moderate stenosis at L5-S1 which would "likely need to be addressed surgically at some point in the future." He noted that she wished to pursue conservative treatment as her pain was manageable and she had a high pain tolerance.

A May 3, 2017 MRI scan read by Dr. Qiging Ge, a diagnostic radiology specialist, revealed at L4-5 a four millimeter anterolisthesis with severe facet arthropathy, severe central canal stenosis, and mild to moderate bilateral foraminal narrowing; as well as moderate central canal stenosis and mild-to-moderate bilateral neural foraminal narrowing at L5-S1, when compared to a prior study from March 13, 2015, with no significant interval change.

In a June 21, 2017 report, Dr. Jackson examined appellant, reviewed the May 3, 2017 MRI scan, and recommended an L4, L5, and S1 lumbar laminectomy with decompression and fusion with instrumentation.

In a separate report also dated June 21, 2017, Dr. Neeraj Gupta, an orthopedic surgeon, noted that appellant reported continued back pain radiating into her right leg with numbness. He diagnosed repetitive work injury, industrial-related, lumbosacral sprain and strain with disc bulging, moderate-to-severe stenosis, and radiculopathy in the right lower extremity. Dr. Gupta advised that he agreed with Dr. Jackson's June 21, 2017 recommendation for surgery.

On July 27, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Steven Ma, a Board-certified orthopedic surgeon.

In an August 29, 2017 report, Dr. Ma reviewed the statement of accepted facts, appellant's history of injury, and medical treatment records. He reported findings from his physical examination, and noted that the x-rays of her lumbar spine and pelvis revealed degenerative spondylosis of L4 and L5, and narrowing of the L5-S1 disc space and small spurs from L4 to S1. Dr. Ma diagnosed aggravation of lumbar intervertebral disc disorder. He addressed Dr. Jackson's June 21, 2017 report and explained that appellant "was told that the second MRI [scan] was much worse than the previous MRI [scan] and that is the basis for the surgery." Dr. Ma noted that the radiologist indicated that there was no significant interval change from the original MRI scan and that her physical examination was essentially the same. He also noted that appellant believed that she would have 90 percent success rate with surgery which would alleviate her symptoms for 20 years. Dr. Ma indicated that he did not know of any such procedure of any nature that would give such high results for such a long time. He concurred with Dr. Jackson's original opinion of August 3, 2016, which found that surgery was unnecessary, and he disagreed with Dr. Jackson's June 21, 2017 recommendation for surgery.

In a development letter dated January 2, 2018, OWCP advised appellant that the evidence of record was insufficient to authorize the requested surgery because it did not appear to be medically necessary. It requested that she provide a copy of Dr. Ma's second opinion report to her treating physician for a supplemental opinion. OWCP afforded appellant 30 days to submit the requested evidence.

In response, OWCP received reports dated December 10, 2015, September 7, 2017, and January 11, February 22, April 5, and May 31, 2018 from Dr. Hosea Brown, III, a treating Board-certified internist. In his September 7, 2017 report, Dr. Brown indicated that Dr. Ma's opinion was "biased, unfair, unethical" and that there was inappropriate delay of surgical authorization. However, he also indicated that he was awaiting Dr. Ma's report. In his January 11, 2018 report, Dr. Brown indicated that appellant had been thoroughly evaluated by a Board-certified orthopedic neurosurgeon, who opined that she was a candidate for surgical intervention. He noted that he continued to treat her and requested authorization for the lumbar spine surgery.

OWCP received reports dated May 17, July 12, September 20, October 18, and November 29, 2017, and January 10, February 21, March 1, 21, and 22, April 18, May 16, and June 27, 2018, from Dr. Neil R. Soni, Board-certified in physical medicine and rehabilitation, who requested authorization for transforaminal lumbar epidural injections, myelography, fluoroscopy, and acupuncture therapy, and noted that appellant was awaiting authorization for lumbar spine surgery recommended by Dr. Jackson.

By decision dated July 24, 2018, OWCP denied authorization for appellant's requested L4, L5, and S1 lumbar laminectomy. It found that the weight of the medical opinion evidence rested with Dr. Ma who indicated that there was no significant change in the MRI scans warranting the prescribed surgery and that appellant was provided with incorrect information regarding the expected results of the surgery. As a result, OWCP determined that the medical evidence of record did not establish that the requested treatment was medically necessary for appellant's accepted employment injuries.

On August 16, 2018 appellant requested reconsideration.

In an August 8, 2018 report, Dr. Soni requested authorization for pain management, including medication and acupuncture.

In August 9, 2018 reports, Dr. Brown noted that he had received and reviewed Dr. Ma's report. He indicated that he disagreed that surgical intervention was unnecessary. Dr. Brown explained that he had continued to treat appellant and explained that she continued to have objective findings which showed that her conditions were deteriorating. He repeated his opinion that her surgery should be authorized.

By decision dated September 7, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of FECA³ 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.⁴ 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.⁵

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.⁶

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.⁷ 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.⁸ To be entitled to reimbursement of medical expenses, a claimant has the burden of proof to establish that the

³ 5 U.S.C § 8103.

⁴ See *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *D.C., id.*; *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

⁶ 20 C.F.R. § 10.310(a).

⁷ *N.M.*, Docket No. 18-1584 (issued March 15, 2019); see *D.K.*, 59 ECAB 141 (2007).

⁸ See *N.M., id.*; *Minnie B. Lewis*, 53 ECAB 606 (2002).

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.⁹ 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

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

For a surgical procedure to be authorized, the evidence must establish 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.¹²

Appellant's attending physicians, Drs. Jackson, Gupta, and Brown, indicated that the requested surgery was needed based on the deterioration of her condition. However, they did not provide a rationalized explanation, based upon medical findings, that the proposed surgery was in fact medically necessary.¹³

The Board notes that Dr. Ma, the second opinion physician, provided a rationalized opinion to explain why the surgery was unnecessary. Dr. Ma indicated that the radiologist determined that there were no significant interval changes from the original MRI scan and that appellant's physical examination was essentially the same. He also noted that Dr. Jackson's original report found no need for surgery at that time, based upon the February 2015 MRI scan, and had not explained why her May 3, 2017 MRI scan reflected a change in her condition, such that the surgical procedure was medically necessary. Dr. Ma further explained that appellant also had an unrealistic expectation of what the proposed surgery would provide as she believed that the surgery would have 90 percent success rate and would alleviate her symptoms for 20 years, but he noted that there was no procedure which was known to have such results. The Board finds that he accurately

⁹ *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *M.B.*, 58 ECAB 588 (2007).

¹⁰ *See N.G. id.*; *R.C.*, 58 ECAB 238 (2006).

¹¹ *D.C.*, *supra* note 4; *D.K.*, 59 ECAB 141 (2007); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹² *See J.L.*, *supra* note 4; *R.C.*, 58 ECAB 238 (2006).

¹³ *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about her proposed surgery which comported with his findings.¹⁴

The Board thus finds that OWCP did not abuse its discretion in denying authorization for the proposed lumbar surgery. As noted above, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.¹⁵ As Dr. Ma explained that the proposed surgery was not medically necessary, the Board finds that OWCP acted reasonably in denying appellant's request for authorization for lumbar laminectomy.¹⁶

Appellant may submit new evidence and/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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁸ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁹

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁰ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration, without reopening the case for a review on the merits.²¹

¹⁴ See *J.L.*, *supra* note 4; *Manuel Gill*, 52 ECAB 282 (2001).

¹⁵ *Supra* note 11.

¹⁶ *B.L.*, Docket No. 15-1452 (issued September 20, 2016).

¹⁷ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [the Secretary’s] own motion or on application.” 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.607.

¹⁹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of its decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees’ Compensation System. *Id.* at Chapter 2.1602.4b.

²⁰ *Id.* at § 10.606(b)(3).

²¹ *Id.* at § 10.608(a), (b); *C.C.*, Docket No. 18-0136 (issued March 14, 2019); *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of her request for reconsideration under 20 C.F.R. § 10.606(b)(3). The Board notes that the underlying issue in this case is whether OWCP abused its discretion by denying authorization for her lumbar laminectomy. Authorization for surgery is a medical issue which, on reconsideration, must be addressed by relevant medical evidence not previously considered.²²

On reconsideration, OWCP received August 9, 2018 reports from Dr. Brown, and an August 8, 2018 report from Dr. Soni. The reports from Dr. Brown were cumulative and substantially similar to his previously submitted reports. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²³ The report from Dr. Soni, while new, did not address the underlying issue of the need for surgery. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.²⁴ Thus, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP has not abused its discretion by denying authorization for appellant's lumbar laminectomy. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²² See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²³ See *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

²⁴ *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

ORDER

IT IS HEREBY ORDERED THAT the September 7 and July 24, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 12, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board