United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 19-0402**
	)	**Issued: November 13, 2019**
TENNESSEE VALLEY AUTHORITY, DIVISION OF TRANSPORTATION SYSTEMS ENGINEERING & CONSTRUCTION, Paris, TN, Employer	)	

Appearances:
Mark Nolan, Esq., for the appellant[1]
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 December 13, 2018 appellant, through counsel, filed a timely appeal from an August 17, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).

[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.

Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.[3]

ISSUE

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

FACTUAL HISTORY

On August 24, 2016 appellant, then a 65-year-old survey technician, filed a traumatic injury claim (Form CA-1) alleging that on March 1, 2016, he was cutting a tree while in the performance of duty, when it fell and hit his head and right shoulder, causing him to fall to the ground with a hard jolt. He did not indicate that he had stopped work.

In an August 12, 2016 report, Dr. Keith Starkweather, a Board-certified orthopedic surgeon, diagnosed a complete right shoulder rotator cuff tear or rupture of the right shoulder and labral tear of the long head of the right biceps tendon. He recommended surgery.

On September 8, 2016 OWCP accepted the claim for strain of muscle, fascia, and tendon of long head of biceps of right arm, and complete rotator cuff tear or rupture of the right shoulder. On September 16, 2016 Dr. Starkweather performed a right shoulder arthroscopy with arthroscopic rotator cuff repair.

In a December 7, 2016 report, Dr. Starkweather indicated that appellant related that he also hurt his lower back and began having low back pain after his employment injury. He noted that appellant had a prior lumbar fusion surgery in 2008 at L4-5, and indicated that he had reviewed a 2008 lumbar magnetic resonance imaging (MRI) scan and a June 14, 2016 lumbar MRI scan. Dr. Starkweather restricted appellant from work and opined that it was likely that the employment injury had aggravated his preexisting lumbar spinal stenosis and degenerative disc disease.

On January 6, 2017 OWCP expanded acceptance of the claim to include aggravation of spinal stenosis, lumbar region, and aggravation of disc degeneration, lumbar region. It paid appellant wage-loss compensation benefits on the supplemental rolls as of January 18, 2017 and on the periodic rolls effective March 5, 2017.

In a February 21, 2017 report, Dr. Richard Lebow, a Board-certified neurosurgeon, noted appellant's history of injury and treatment. He indicated that appellant had severe low back pain

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the August 17, 2018 decision, OWCP received additional evidence. 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.*

following his March 1, 2016 employment injury, which radiated down the back of both legs and into his knees. Dr. Lebow recommended a lumbar fusion from L3 to L5.

On April 7, 2017 OWCP received a request for authorization for lumbar spine fusion from L3 to L5, and insertion of a spinal fixation device.

On April 10, 2017 OWCP referred the request for authorization to an OWCP district medical adviser (DMA).

OWCP received a May 5, 2017 report from Dr. Nizar Souayah, a Board-certified neurologist serving as a DMA. Dr. Souayah determined that there was no clear evidence that appellant exhausted all conservative therapies, including adequate trials of physical therapy and epidural injections. He indicated that appellant's neurological examination was not focal, and he found no clear evidence of instability, fracture, or spinal cord compression that required surgery without documentation of failed conservative therapies. Dr. Souayah also noted that there was no documentation of a recent electromyography (EMG) scan supporting a diagnosis of lumbar radiculopathy.

On June 1, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Deborah St. Clair, a Board-certified orthopedic surgeon. In a report dated June 20, 2017, Dr. St. Clair reviewed the statement of accepted facts (SOAF), appellant's history of injury, his medical records, and noted appellant's reports of back pain. She examined him and noted that there was "evidence of disease and symptom magnification." Dr. St. Clair explained that appellant had failed surgery, had chronic pain, and did not follow the usual wellness curve of improvement. She opined that he would not benefit from lumbar fusion surgery. Dr. St. Clair explained that the "decompression of spinal stenosis will get people walking further before claudication, but is not very effective in pain claims." She opined that she did not expect improvement with time or with repeated surgery for appellant's back or his shoulder.

By decision dated August 7, 2017, OWCP denied authorization for the requested lumbar spine fusion surgery. It found that the weight of the medical opinion evidence rested with Dr. St. Clair who concluded that the requested treatment was not medically necessary for appellant's accepted employment injury.

On October 24, 2017 appellant, through counsel, requested reconsideration.

In an August 17, 2017 report, Dr. Lebow noted that he had followed appellant since February 21, 2017. He indicated that appellant was doing well until he was struck by a large tree limb falling on his back. Dr. Lebow explained that appellant had worsening back and leg symptoms. He indicated that he had reviewed appellant's lumbar MRI scan from June 14, 2016, which revealed L4-5 decompression and fusion. Dr. Lebow found appellant currently had L3-4 spondylolisthesis and advised that the L3 bone moved forward on L4. He also noted that there was "very severe spinal stenosis behind this." Dr. Lebow related that given appellant's severe symptoms as well as his failure to respond to extensive conservative therapy over the past year, he had recommended surgery in the form of an L3 through L5 decompression and fusion. He opined that it was "irresponsible and dangerous" to deny this surgery for appellant as he was getting weaker in his legs, had very severe spinal stenosis, and was suffering from excruciating back and

leg pain. Dr. Lebow concluded that denying appellant the requested surgery placed him at risk for not only lower extremity paralysis, but also bowel and bladder dysfunction on top of the pain and suffering that he was enduring.

In a September 6, 2017 report, Dr. Lebow noted that appellant had severe spinal stenosis at L3-4 and spondylolisthesis, with an underlying L4-5 fusion decompression. He explained that the conditions were worsened by the employment injury and repeated the request for an L3 to L5 decompression and fusion.

In a September 25, 2017 operative report, Dr. Lebow noted that he performed an L3-4 decompressive lumbar laminectomy for medial facetectomy for stenosis, L3-5 posterior arthrodesis, L3-5 posterior arthrodesis, L3-5 posterior instrumentation, pedicle screws and rods, insertion of biomechanical device, DePuy titanium interbody cage at L3-4, L3-4 posterior interbody arthrodesis, and bone marrow aspirate of iliac crest through separate stab fascial incision.

In an October 18, 2017 report, Dr. Starkweather noted that appellant was recovering well from his lumbar spine surgery. He indicated that appellant had reached maximum medical improvement.

By decision dated January 16, 2018, OWCP denied modification of the August 7, 2017 decision. It found that the new evidence was not sufficient to support that the lumbar surgery was medically indicated.

Appellant, through counsel, requested reconsideration on June 19, 2018 and submitted additional medical evidence.

A February 19, 2018 MRI scan of appellant's lumbar spine read by Dr. Vineet Sharma, a Board-certified diagnostic radiologist, revealed severe degenerative changes of the lumbar spine at L2-3 and L5-S1, including moderate degrees of foraminal and central canal stenosis.

OWCP received February 7 and 23, 2018 treatment notes from Dr. Lebow. Dr. Lebow noted that appellant continued to have pain in his back and diagnosed lumbar radiculopathy. He noted that he had reviewed the recent MRI scan results and there was disease at L2-3. Dr. Lebow related that he would reexamine appellant in a year.

Dr. Lebow provided a June 13, 2018 response to questions from counsel. He indicated that his objective findings included severe spinal stenosis, spondylolisthesis, and prior adjacent level fusion. Dr. Lebow responded "yes" with regard to whether he agreed that appellant underwent an L3-5 surgical decompression and fusion with a diagnosis of lumbar spinal stenosis and lumbar spondylolisthesis, which was more probable than not the result of the March 1, 2016 employment injury, and that appellant had required treatment for his lumbar spinal stenosis and lumbar spondylolisthesis, resulting in L3-4 decompression and fusion.

OWCP received treatment notes dated May 2 and 30, June 20 and 27, and July 11, 25, and 30, 2018, from Dr. Peter Kroll, Board-certified in pain medicine. Dr. Kroll diagnosed chronic pain, failed back syndrome of lumbar spine, degenerative disc disease of the lumbar spine, rotator cuff syndrome of right shoulder, neck pain, and lumbar spondylosis.

By decision dated August 17, 2018, OWCP denied modification of the January 16, 2018 decision.

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]

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.[8]

Section 8123(a) of FECA provides, in pertinent part: "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 who shall make an examination."[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

ANALYSIS

The Board finds that this case is not in posture for decision.

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[4] 5 U.S.C. § 8103.

[5] *See J.L.*, Docket No. 18-0990 (issued March 5, 2019); *Thomas W. Stevens*, 50 ECAB 288 (1999).

[6] *D.C.*, Docket No. 18-0080 (issued May 22, 2018)*; Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[7] 20 C.F.R. § 10.310(a).

[8] *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *D.K.*, 59 ECAB 141 (2007); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[9] 5 U.S.C. § 8123(a).

[10] *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

In a June 20, 2017 report, Dr. St. Clair, an OWCP second opinion examiner, reviewed appellant's medical records and a SOAF. She indicated that his physical examination revealed evidence of disease, symptom magnification, a failed surgery, and chronic pain. Dr. St. Clair opined that appellant would not benefit from lumbar fusion surgery. She explained that the decompression of spinal stenosis was not very effective in pain claims. The DMA concurred with her findings.

In support of his request for authorization of surgery, appellant submitted several reports from his treating physician, Dr. Lebow. In his August 17, 2017 report, Dr. Lebow explained that appellant was doing well until the employment injury during which a tree limb fell on his back. He described appellant's worsening back and leg symptoms, reviewed the lumbar MRI scan from June 14, 2016, noted that currently appellant's L3 bone had moved forward on L4, and indicated that there was "very severe spinal stenosis behind this." Dr. Lebow recommended surgery in the form of an L3 through L5 decompression and fusion "given his severe symptoms as well as his failure to respond to extensive conservative therapy over the past year." He also indicated that appellant was getting weaker in his legs, had severe spinal stenosis, and was suffering from excruciating back and leg pain. Dr. Lebow explained that denying the surgery placed appellant at risk of lower extremity paralysis and bowel and bladder dysfunction.

The Board finds that the report of Dr. St. Clair is in equipoise with the report of Dr. Lebow with regard to whether appellant's lumbar surgery should be authorized.

Both physicians provide a description of the employment injury and both discuss the medical evidence and their physical findings, while Dr. St. Clair opined that the surgery was not medically necessary, Dr. Lebow opined that it was necessary. Both physicians provided rationale in support of their respective opinions. The Board, therefore, finds that a conflict in medical opinion has been created regarding whether appellant's lumbar surgery should be authorized. Section 8123 of FECA provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[11]

The case will be remanded to OWCP to refer appellant, the medical record, and a SOAF, to an appropriate specialist to obtain an impartial medical opinion regarding whether lumbar surgery should be authorized. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[11] 5 U.S.C. § 8123(a); *see W.B.*, Docket No. 17-1994 (issued June 8, 2018); *see also A.D.*, Docket No. 17-1855 (issued February 26, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: November 13, 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