

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

C.G., Appellant	)	
	)	
and	)	<b>Docket No. 20-0784</b>
	)	<b>Issued: May 11, 2021</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tampa, FL,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 26, 2020 appellant filed a timely appeal from a February 19, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes that, during the pendency of this appeal, OWCP issued a March 16, 2020 decision which denied appellant's request for a hearing regarding OWCP's February 19, 2020 decision. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's March 16, 2020 decision is set aside as null and void.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the February 19, 2020 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.*

## **ISSUE**

The issue is whether OWCP abused its discretion in denying appellant's request for authorization for an anterior cervical discectomy and fusion from C3-6 and a posterior laminectomy and fusion from C3-T2.

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 4, 2017 appellant, then a 54-year-old postal support employee mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she was hit on the head by a shelf cage door while in the performance of duty. OWCP accepted the claim for a cervical sprain and herniated nucleus pulposus at C5-6 with radiculopathy. On February 20, 2020 it expanded acceptance of the claim to include a left shoulder partial tear capsule. Appellant stopped work on February 4, 2017 and returned to light-duty work for four hours per day on June 14, 2017. OWCP paid her wage-loss compensation on the supplemental rolls as of April 6, 2017 and on the periodic rolls as of September 17, 2017.

In a February 4, 2019 report, Dr. Robert Kowalski, a Board-certified neurosurgeon, provided an assessment of cervical radiculopathy and cervical myelopathy with cervical radiculopathy. He opined that appellant's symptoms had worsened. Dr. Kowalski also indicated that current magnetic resonance imaging (MRI) scan and computerized tomography scan showed progressive injuries to the C3-4, C4-5, and C5-6 discs, which all had cord compression, and an anterior slip of C7 on T1. In light of appellant's cord compression instability, he recommended decompression surgery at C3-4, C4-5, and C5-6 anterior cervical discectomy and fusion (ACDF) and C3-T2 decompression and instrumentation fusion along with noninvasive electrical bone growth stimulator postoperatively.

OWCP subsequently received Dr. Kowalski's February 8, 2019 surgical authorization requests which included bilateral cervical spine fusion, bilateral insert spine fixation device, and bone marrow aspiration bone graft.

On February 12, 2019 OWCP referred appellant's medical records along with a February 12, 2019 statement of accepted facts (SOAF) to its district medical adviser (DMA) to obtain an opinion as to whether the proposed surgical procedures were medically necessary and causally related to her accepted conditions.

Dr. Kenekwue Ugokwe, a Board-certified neurosurgeon, serving as OWCP's DMA, reviewed the SOAF and appellant's medical records on February 18, 2019. In a report of the same date, he indicated that she had undergone a prior C6-7 fusion. Dr. Ugokwe noted that appellant's cervical MRI scan showed moderate right lateral recess stenosis at C3-4 and bilateral lateral recess stenosis at C5-6. He opined that the proposed cervical spine fusion, removal and spine disc surgery add-on were causally related to the accepted medical conditions as she did not have this neck pain

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<sup>4</sup> Docket No. 18-1655 (issued June 19, 2019).

prior to the work injury. However, Dr. Ugokwe opined that the medical evidence was unclear as to the cervical disc level for the proposed operation.

By letter dated February 19, 2019, OWCP requested additional information from appellant with regards to the proposed surgery.

In a March 18, 2019 letter, Dr. Kowalski indicated that appellant had continued residuals from her employment injury and that he was proposing an anterior discectomy from C3-6, to be performed on day 1, and a posterior fusion from C3-T2, to be performed on day 2. He indicated that conservative treatment had failed and that the surgery was medically necessary to avoid permanent impairment.

On June 13, 2019 OWCP referred appellant to Dr. Mitchell Supler, a Board-certified neurosurgeon, for a second opinion examination to determine whether she had continued residuals of her accepted employment-related conditions and whether the proposed surgery was causally related to her employment injury and/or accepted conditions.

In a September 18, 2019 report, Dr. Supler noted his review of the SOAF and appellant's medical records. He presented findings on physical and neurological examination and provided an impression of C5-6 disc osteophyte complex with bilateral neuroforaminal narrowing producing cervical radiculopathy; bulge of the disc at the C4-5 level with some canal stenosis; and partial tear of the supraspinatus with associated rotator cuff injury. Dr. Supler recommended against the proposed surgery of an anterior discectomy from C3-6 and then a posterior fusion from C3-T2 as it was too extensive for appellant's condition. He indicated that many of her symptoms involving her left upper extremity could be associated with a rotator cuff injury that may have occurred during the work incident and recommended that she be evaluated for an orthopedic injury involving her shoulder. Dr. Supler opined that any cervical surgery could be limited to the C4-5 and C5-6 level, and possibly C3-4 anteriorly. However, he opined that there was no need for any posterior decompression.

By decision dated December 18, 2019, OWCP denied appellant's request for authorization for an anterior discectomy from C3-6 and a posterior fusion from C3-T2. It found that the evidence of record did not support that the requested bilateral cervical spine fusion, bilateral insert spine fixation device, and bone marrow aspiration bone graft procedures were medically necessary to address the effects of her work-related injury or conditions.

On a request form dated and postmarked January 8, 2020, received by OWCP on January 9, 2020, appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review of the December 18, 2019 decision.

On January 23, 2020 appellant requested that OWCP expand the acceptance of her claim to include a left shoulder rotator cuff tear.<sup>5</sup>

In a February 3, 2020 progress note, Dr. Kowalski continued to diagnose cervical radiculopathy, cervical spine instability, and cervical pain. He recommended, given appellant's cord compression, instability, and long tract signs, decompression surgery at C3-4, C4-5, and C5-6 ACDF. Dr. Kowalski indicated that she would require a noninvasive electrical bone growth

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<sup>5</sup> As noted, OWCP expanded the claim on February 20, 2020 to include a left shoulder partial tear capsule.

stimulator postoperatively and that appellant may require a C3-T2 decompression and instrumented fusion in the future.

By decision dated February 19, 2020, OWCP again denied appellant's request for anterior discectomy from C3-6, and posterior fusion from C3-T2.

### **LEGAL PRECEDENT**

Section 8103 of FECA<sup>6</sup> provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.<sup>7</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, and the only limitation on OWCP's authority is that of reasonableness.<sup>8</sup>

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.<sup>9</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>10</sup> In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.<sup>11</sup>

### **ANALYSIS**

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

Following OWCP's December 18, 2019 decision denying appellant's requests for surgical authorization, appellant submitted a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was postmarked January 8, 2020. Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> 5 U.S.C. § 8103(a); *see M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

<sup>8</sup> *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP 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).

<sup>9</sup> *J.M.*, Docket No. 20-0565 (issued November 5, 2020); *see R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 209 (1992).

<sup>10</sup> *B.I.*, *supra* note 8; *see also K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

<sup>11</sup> *P.L.*, Docket No. 20-0392 (issued October 28, 2020); *see T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

of the date of the decision for which a hearing is sought.<sup>12</sup> Unless otherwise directed in writing by the claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date. The record reflects that appellant had timely requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with regards to OWCP's December 18, 2019 denial of authorization, but had did not receive notice from an OWCP hearing representative as to the time and place of the hearing. As there exists an outstanding request for a hearing before an OWCP representative, OWCP improperly issued its February 19, 2020 decision. The case, therefore, will be remanded for OWCP to conduct an oral hearing before an OWCP hearing representative per appellant's request.

The case, therefore, will be remanded for an oral hearing, pursuant to appellant's timely January 8, 2020 request. After this and such further development as deemed necessary, it shall issue a *de novo* decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 19, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 11, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).