United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 20-1313**
	)	**Issued: May 17, 2021**
DEPARTMENT OF THE NAVY, NAVY INSTALLATIONS COMMAND, Portsmouth, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2020 appellant filed a timely appeal from an April 15, 2020 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 over the merits of this case.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the April 15, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

FACTUAL HISTORY

This case has previously been before the Board.[3] 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 June 28, 2017 appellant, then a 64-year-old substance abuse counselor, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2017 he strained his lower back when he reached for objects that were falling off a dolly while in the performance of duty. OWCP accepted his claim for right-side sciatica.

In an August 8, 2017 examination note, Dr. Felix Kirven, a Board-certified orthopedic surgeon, recounted appellant's complaints of lumbar pain and conducted an examination. He diagnosed right-side sciatica, herniated disc at L4-5 with stenosis at L4-5, and grade 1 spondylolisthesis at L4-5.[4] Dr. Kirven recommended a posterior lumbar laminectomy at L4-5, transforaminal interbody fusion at L4-5, posterior bone grafting L4-5, and bilateral lateral instrumented fusion L4-5.

On August 10, 2017 OWCP received Dr. Kirven's request seeking authorization for lumbar spine fusion surgery.

OWCP referred the medical evidence of record to Dr. Nizar Souayah, Board-certified in neurology and neuromuscular medicine, serving as an OWCP district medical adviser (DMA) for his review and comment regarding the medical necessity of lumbar spine fusion surgery. In an October 7, 2017 report, Dr. Souayah reviewed appellant's history and opined that the requested lumbar spine fusion surgery was not medically necessary to treat appellant's accepted lumbar injury.

By decision dated November 2, 2017, OWCP denied authorization for lumbar spine fusion surgery based on the October 7, 2017 report of the DMA, Dr. Souayah.

On July 9, 2018 appellant requested reconsideration and submitted additional medical evidence.

OWCP subsequently referred appellant, along with the statement of accepted facts (SOAF) and a copy of the record, to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an August 18, 2018 report, Dr. Schwartz diagnosed right-side sciatica and permanent aggravation of lumbar spinal stenosis with claudication as causally related to the June 9, 2017 employment injury and lumbar spinal stenosis with claudication L4-5, not related to the June 9, 2017 employment injury. He opined that lumbar decompression surgery was an accepted

[3] Docket No. 19-1009 (issued October 22, 2019).

[4] A July 27, 2017 lumbar spine magnetic resonance imaging (MRI) scan report interpreted by Dr. Hiten B. Patel, a Board-certified psychiatrist, revealed degenerative disc disease, severe central canal stenosis at L3-4 and L4-5, moderate central canal stenosis at L2-3, mild central canal stenosis at L1-2 and L5-S1, multilevel foraminal stenosis most prominent at L4-5, and grade 1 anterolisthesis at L4-5.

medical practice to treat appellant's lumbar injury, but found that fusion surgery was not yet necessary.

On September 28, 2018 OWCP found that a conflict in the medical opinion evidence existed between Dr. Kirven, appellant's treating physician, and Dr. Schwartz, an OWCP second opinion examiner, regarding whether the conditions of lumbar intervertebral disc disorder with radiculopathy, lumbar spondylolisthesis, and lumbar spinal stenosis were causally related to the June 9, 2017 employment injury, and whether the proposed lumbar decompressive laminectomy at L4-5 with fusion was appropriate and necessary for the accepted employment injury. It referred appellant to Dr. Mohammad H. Zamani, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical evidence.

In a November 20, 2018 report, Dr. Zamani described the June 9, 2017 employment injury and reviewed appellant's medical records. He noted that diagnostic testing did not support a diagnosis of herniated disc at L4-5 and reported that appellant had a mainly congenital problem of the spinal cord. Upon examination of appellant's lumbar spine, Dr. Zamani observed pain on palpation of the lower lumbar area. Straight leg raise testing in the sitting position revealed some tightness of the hamstring without pain. Dr. Zamani indicated that appellant no longer suffered from radiculopathy due to his June 9, 2017 employment injury and; therefore, the requested surgery was not required.

By decision dated January 11, 2019, OWCP denied modification of the November 2, 2017 decision. It found that the special weight of the medical evidence rested with the November 20, 2018 report of Dr. Zamani, the impartial medical examiner.

On February 13, 2019 appellant requested reconsideration and submitted a January 22, 2019 letter by Dr. Kirven.

By decision dated March 13, 2019, OWCP denied modification of the January 11, 2019 decision.

Appellant filed an appeal with the Board.

On May 15, 2019 appellant underwent lumbar decompression and fusion surgery. The operative report noted a preoperative diagnosis of degenerative spondylolisthesis at L4-5 and stenosis at L3 to L5.

By decision dated October 22, 2019, the Board vacated the March 13, 2019 decision and remanded the case for referral to an impartial medical examiner. It determined that Dr. Schwartz' August 18, 2018 second opinion report lacked sufficient medical rationale and was not of equal weight to Dr. Kirven's reports. Accordingly, the Board found that a new conflict in medical evidence existed between Dr. Kirven and Dr. Zamani regarding whether the requested lumbar decompressive and fusion surgery was medically necessary and appropriate to treat his accepted June 9, 2017 employment injury.

Appellant submitted a March 19, 2019 report by Dr. J Abbott A. Byrd, III, an orthopedic surgeon, who recounted appellant's complaints of low back and right lower extremity pain after a June 9, 2017 employment injury. Upon examination of appellant's lumbar spine, Dr. Byrd

observed mild tenderness in the lumbar spine. Straight leg raise testing was negative. Dr. Byrd diagnosed lumbar herniation of the nucleus pulposus and lumbar spinal stenosis.

A March 26, 2019 lumbar spine MRI scan report revealed severe central canal narrowing at L3-4 and L4-5, moderate central canal narrowing at L2-3, mild central canal narrowing at L1-2, and moderate foraminal stenosis at L3-4 and L4-5.

In subsequent reports dated April 2, June 10, and August 26, 2019, Dr. Byrd continued to provide postoperative treatment following appellant's May 15, 2019 surgery. He diagnosed lumbar herniation of nucleus pulposus and lumbar spinal stenosis. Dr. Byrd reported that appellant's symptoms were due to degenerative spondylosis L4-5 with stenosis at L3-4, L4-5. He also completed a work status note dated June 10, 2019, which indicated that appellant could return to regular-duty work on June 17, 2019.

In a December 12, 2019 letter, Dr. Byrd recounted that appellant was referred to him for evaluation of low back and right lower extremity pain since his June 9, 2017 employment injury. He reported that, when he initially evaluated appellant on March 9, 2019, he noted that appellant's symptoms were due to a degenerative condition and L4-5 herniation of nucleus pulposus, requiring surgical intervention and repair. Dr. Byrd opined that appellant's symptoms were a direct result of his June 9, 2017 employment injury and noted that he was asymptomatic prior to the injury. He requested that the acceptance of appellant's claim be expanded to include lumbar intervertebral disc displacement, lumbar spinal stenosis, lumbar radiculopathy, and arthrodesis status.

On December 21, 2019 OWCP referred appellant, along with a SOAF, a copy of the case record, and a series of questions, to Dr. John Aldridge, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence between Dr. Kirven, appellant's treating physician, and Dr. Zamani, an OWCP second opinion examiner, regarding whether the recommended lumbar decompressive and fusion surgery was medically necessary to treat appellant's June 9, 2017 employment injury. In an April 14, 2020 report, Dr. Aldridge noted that he had reviewed the record, including the SOAF. He described the June 9, 2017 employment injury and discussed the medical treatment that appellant had received. Upon physical examination, Dr. Aldridge observed normal sensation in the bilateral lower extremities and normal 5/5 muscle strength. He reported that appellant's low back had a well-healed incision.

Dr. Aldridge indicated that the MRI scan reports demonstrated that appellant had preexisting severe stenosis secondary to congenital spinal hypoplasia stenosis, severe stenosis at L3-4 and L4-5, and moderate stenosis at L2-3. He also pointed out that appellant's anterolisthesis had significantly progressed over a two-year period. Dr. Aldridge reported: "it appears the surgical intervention performed by Dr. Byrd was directed at this nontraumatic, atraumatic, unrelated progression of his spinal listhesis at L4-5, which went from 3 millimeter (mm) preoperative around the time of injury … to the 7.19 mm progression seen by Dr. Byrd." He noted that the progression of appellant's listhesis was unrelated to the June 9, 2017 employment injury. Dr. Aldridge further indicated that the treatment directed at appellant's lumbar spine, including the L4-5 fusion surgery, "appears to be structurally not caused by the workplace injury of June 9, 2017 and not accelerated by the injury of June 9, 2017." He opined that appellant sustained a temporary aggravation of his underlying spinal stenosis due to his June 9, 2017 employment injury. Dr. Aldridge further explained that the necessity of surgery was not due to the temporary aggravation, but to the progressive effects of appellant's severe spinal stenosis.

By decision dated April 15, 2020, OWCP denied modification of the January 11, 2019 decision. It found that the special weight of the medical evidence rested with the April 14, 2020 report of Dr. Aldridge, the impartial medical examiner.

LEGAL PRECEDENT

Section 8103(a) of FECA[5] 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 by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[6] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in determining whether a particular type of treatment is likely to cure or give relief.[7] The only limitation on OWCP's authority is that of reasonableness.[8]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[9] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[10] In order for a surgical procedure to be authorized, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted.[11] Both of these criteria must be met in order for OWCP to authorize payment.[12]

Abuse of discretion is 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.[13]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall

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[5] 5 U.S.C. § 8103(a).

[6] *Id.*; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[7] *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

[8] *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

[9] *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

[10] *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[11] *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[12] *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[13] *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

appoint a third physician (known as a referee physician or impartial medical examiner) who shall make an examination.[14] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner 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.[16]

ANALYSIS

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

Following the Board's remand, OWCP properly referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Aldridge for an impartial medical examination and opinion in order to resolve the conflict in the medical opinion evidence between Dr. Kirven, appellant's treating physician, and Dr. Zamani, an OWCP second opinion examiner, regarding whether the recommended lumbar decompressive and fusion surgery was medically necessary to treat appellant's June 9, 2017 employment injury.

In an April 14, 2020 report, Dr. Aldridge reviewed appellant's history and provided examination findings. He indicated that diagnostic studies demonstrated that appellant had preexisting severe stenosis secondary to congenital spinal hypoplasia stenosis, severe stenosis at L3-4 and L4-5, and moderate stenosis at L2-3. Dr. Aldridge opined that appellant sustained a temporary aggravation of his underlying spinal stenosis due to his June 9, 2017 employment injury. He further indicated that the treatment directed at appellant's lumbar spine, including the L4-5 fusion surgery, "appears to be structurally not caused by the workplace injury of June 9, 2017 and not accelerated by the injury of June 9, 2017."

Dr. Aldridge's opinion that appellant's surgery "appears to be" not caused by the June 9, 2017 employment is equivocal and speculative. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[17] As such, the Board finds that Dr. Aldridge did not provide adequate medical rationale to explain the basis of his conclusion, and, therefore, his opinion is insufficient to resolve the conflict in medical evidence.[18] In addition, Dr. Aldridge failed to address appellant's accepted right-side sciatica condition, as noted in the

[14] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[15] 20 C.F.R. § 10.321.

[16] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[17] *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[18] *See T.S.*, Docket No. 18-1702 (issued October 4, 2019); *P.H.*, Docket No. 16-0654 (issued July 21, 2016); *S.R.*, Docket No. 16-0657 (issued July 13, 2016).

SOAF. It is therefore unclear whether his opinion was based upon an accurate history.[19] The Board has held that the report of an impartial medical examiner who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict of medical opinion evidence.[20] As such, the Board finds that Dr. Aldridge's opinion is of insufficient probative value to carry the special weight of the medical evidence, and the case must be remanded for further development.[21]

Once OWCP undertakes development of the medical evidence, it must produce medical evidence that will resolve the relevant issues in the case.[22] When it obtains an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the impartial medical examiner's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[23] Therefore, in order to resolve the continuing conflict in medical opinion evidence, the case will be remanded to Dr. Aldridge for a supplemental opinion providing medical rationale with regard to whether appellant's lumbar decompressive and fusion surgery was medically necessary to treat his June 9, 2017 employment injury. If Dr. Aldridge is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP shall refer appellant, together with a SOAF and a list of specific questions, to another impartial medical examiner in the appropriate field of medicine to resolve the issue. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's requested lumbar decompression and fusion surgery.

CONCLUSION

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

[19] Medical reports must be based on a complete and accurate factual and medical background. *See J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid,* 52 ECAB 382 (2001).

[20] *See W.F.*, Docket No. 18-0653 (issued September 26, 2019); *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

[21] *F.K.*, Docket No. 19-1804 (issued April 27, 2020).

[22] *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[23] *B.J.*, Docket No. 18-1186 (issued July 9, 2019); *A.R.*, Docket No. 12-0443 (issued October 2, 2012); *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 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 17, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board