

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include additional conditions causally related to his accepted July 22, 2016 employment injury; and (2) whether OWCP abused its discretion in denying appellant's request for authorization for cervical spinal surgery.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On July 25, 2016 appellant, a 59-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2016 he injured his low back and left leg when he tripped over a coworker's leg and fell while in the performance of duty. OWCP accepted the claim for contusion of back left wall of the thorax, a contusion of the left lower leg, and a contusion of left knee. It paid appellant wage-loss compensation on the supplemental rolls, effective September 8, 2016, and on the periodic rolls, effective November 13, 2016.

OWCP had previously accepted that appellant sustained a temporary aggravation of asthma with acute exacerbation under OWCP File No. xxxxxx540 and a recurrent inguinal hernia without obstruction or gangrene under OWCP File No. xxxxxx761.⁴

A September 21, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed an osseous lesion within the posterior aspect of the T-12 vertebral body.

In a report dated January 18, 2017, Dr. Thomas J. Perlewitz, a Board-certified orthopedic surgeon, obtained a history of appellant experiencing low back and knee pain after a July 22, 2016 fall at work. He noted that appellant subsequently complained of bilateral neurological changes. Dr. Perlewitz diagnosed degenerative lumbar disc disease, a large posterior disc protrusion at L3-4 with severe central stenosis, severe grade 1 anteriorlisthesis at L3-4, moderate-to-severe central stenosis at L4-5, severe cervical multilevel central stenosis, severe multilevel cervical disc degeneration and collapse at C3-6 and C7-T1, positive neurogenic changes in the upper extremities, and the inability to walk without a cane due to a myelopathic gait. He recommended a cervical discectomy and fusion at C3-6 followed by a lumbar laminectomy and decompression from L2 to the sacrum. Dr. Perlewitz attributed appellant's neck and low back condition to the July 22, 2016 employment injury as his symptoms had begun on that date.

In an addendum report also dated January 18, 2017, Dr. Perlewitz diagnosed cervical myelopathy and radiculopathy, a lumbar disc herniation with myelopathy, lumbar spinal stenosis

³ Docket No. 18-0988 (issued March 13, 2020); *B.I., Order Granting Remand*, Docket No. 19-1746 (issued March 24, 2020).

⁴ Appellant filed claims assigned OWCP File No. xxxxxx425 (date of injury March 5, 2004), OWCP File No. xxxxxx023 (date of injury May 26, 2004), OWCP File No. xxxxxx722 (date of injury April 30, 2007), and OWCP File No. xxxxxx179 (date of injury January 29, 2008), none of which were formally adjudicated.

with radiculopathy and myelopathy, and lumbar spondylolitheses causally related to the accepted employment injury. He recommended an urgent anterior cervical decompression correction and fusion with instrumentation from C3 through C6.

On March 21, 2017 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that the cervical and lumbar degenerative changes were not caused or aggravated by the July 22, 2016 employment injury.

OWCP referred appellant to Dr. David S. Haskell, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his accepted employment-related conditions.

In a report dated June 7, 2017, Dr. Haskell opined that appellant's preexisting degenerative disc disease and stenosis of the cervical and lumbar spine were not causally related to or aggravated by the July 22, 2016 employment injury. He further found that the proposed cervical discectomy and fusion at C5-6 and a decompressive laminectomy and disc excision at L3-4 were not causally related to the July 22, 2016 employment injury.

By decision dated August 4, 2017, OWCP denied authorization for cervical and lumbar spinal surgery.

On August 16, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On August 31, 2017 Dr. Perlewitz performed cervical laminectomies at C5 and C6 and a spinal canal decompression at C4-7.

A telephonic hearing was held on January 5, 2018. By decision dated February 27, 2018, OWCP's hearing representative affirmed the August 4, 2017 decision.

On April 16, 2018 appellant appealed the February 27, 2018 decision to the Board, under Docket No. 18-0988.

OWCP determined that a conflict in medical opinion arose between Dr. Perlewitz and Dr. Haskell regarding appellant's current condition, disability, and need for further medical treatment. On July 23, 2018 it referred him to Dr. Mysore Shivaram, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated August 27, 2018, Dr. Shivaram reviewed the history of injury and discussed appellant's complaints of cervical and lumbar pain and intermittent left knee pain. He diagnosed preexisting severe cervical degenerative disc disease with stenosis and preexisting multilevel degenerative lumbar disc disease with stenosis unrelated to the accepted employment injury. Dr. Shivaram opined that appellant had recovered from his July 22, 2016 employment injury and required no further treatment. He added, "[w]hatever medical treatment or surgical treatment is performed on the cervical spine or lumbar spine is related to preexisting medical conditions."

On September 19, 2018 OWCP notified appellant of its proposed termination of his wage-loss compensation and authorization for medical benefits. It afforded him 30 days to respond to the proposed termination.

In a report dated October 10, 2018, Dr. Perlewitz advised that appellant had preexisting degenerative changes, but that the July 22, 2016 fall had resulted in new findings consistent with myelopathy. He noted that, prior to his injury, appellant could perform his usual employment and advised that his symptoms and neurological examination supported that he had cord compression. Dr. Perlewitz related, "It is my opinion, to a reasonable degree of medical certainty, that the lumbar disc herniation, cervical cord compression with myelopathy, and gait instability resulted from the work-related fall."

By decision dated January 22, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 2, 2019.

On January 30, 2019 appellant, through counsel, requested a telephonic hearing on the January 22, 2019 decision before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on May 15, 2019. By decision dated July 30, 2019, OWCP's hearing representative affirmed the January 22, 2019 decision.

Appellant appealed the July 30, 2019 decision to the Board, under Docket No. 19-1746.⁵

On November 19, 2019 the Director of OWCP filed a motion to remand the appeal in Docket No. 19-1746 requesting the Board to set aside OWCP's July 30, 2019 decision.

By decision dated March 13, 2020 under Docket No. 18-0988, the Board set aside OWCP's February 27, 2018 decision.⁶ It found that a conflict in medical opinion arose between Dr. Haskell and Dr. Perlewitz regarding whether the requested surgeries were for a condition causally related to an employment injury and were medically warranted. The Board remanded the case for OWCP to refer appellant to an impartial medical examiner (IME).

By order dated March 24, 2020, under Docket No. 19-1746, the Board set aside the July 30, 2019 termination decision and granted the Director's motion to remand the case as the IME had been improperly selected.⁷ The Board remanded the case for OWCP to refer appellant to a properly selected IME for examination to resolve the remaining conflicts in the medical opinion evidence.

On December 23, 2020 OWCP referred appellant to Dr. Stephen E. Robbins, a Board-certified orthopedic surgeon, for an impartial medical examination on the issue of whether

⁵ On July 31, 2019 appellant, through counsel, requested that OWCP expand the acceptance of his claim to include additional employment-related conditions. He further asserted that he had sustained a recurrence of disability due to a consequential injury.

⁶ *Supra* note 3.

⁷ *Id.*

appellant had recovered from his July 22, 2016 employment injury, whether he had additional conditions causally related to his accepted employment injury, and whether it should authorize cervical surgery.

In a report dated March 12, 2021, Dr. Robbins discussed the history of the July 22, 2016 employment injury and appellant's subsequent complaints of pain in the low back, left leg, and knee. He provided his review of the medical records and provided findings on examination, including a positive Hoffman's test on the right and a positive Babinski test bilaterally. Dr. Robbins noted that Dr. Perlewitz had performed an anterior cervical discectomy and fusion at C3-6 and recommended a laminectomy and fusion at L2-S1. He opined that appellant had sustained a lumbar strain due to his injury, indicating that there was "no mention of any neck pain, radicular or myelopathic-type symptoms following the fall. Over time he developed symptoms compatible with cervical myeloradiculopathy and MRI scanning revealed severe central spinal stenosis with myelomalacia."

Dr. Robbins concurred with Dr. Haskell and Dr. Shivaram that he had sustained contusions of the lumbar spine and left knee that should have resolved within one month. He opined that appellant's herniated disc at L3-5 on the right was unrelated to the fall as he did not experience right leg pain. Dr. Robbins related:

"In my opinion, the work injury did not cause aggravation and acceleration of his preexisting condition of severe degenerative disc disease changes in the cervical and lumbar spine producing spinal stenosis and cervical myeloradiculopathy. This is based on his past history of symptomatic lumbar spinal stenosis. The cervical condition was not aggravated because he had no myelopathy complaints after the fall. His condition is not related to occupational exposure as he has no history of multiple work injuries."

Dr. Robbins opined that appellant's cervical spine surgery was necessitated by a preexisting condition unrelated to his accepted employment injury. He related, "This was based on the lack of any neck, radicular or myelopathic symptom immediately following the injury. Dr. Robbins noted the gradual onset of leg weakness that reflected the natural progression of cervical myelopathy." He further asserted that appellant's low back pain was due to the "natural progression of multilevel degenerative disc disease changes and spinal stenosis" unrelated to employment. Dr. Robbins found that appellant was disabled from employment due to his preexisting conditions.

By decision dated March 22, 2021, OWCP denied appellant's request to expand the acceptance of his claim to include additional back conditions and his request to authorize a cervical decompression and fusion at C3 through 6.

On March 30, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on July 7, 2021.

In a report dated June 14, 2021, Dr. Goran Rudic, a Board-certified internist, advised that appellant had a history of work injuries, beginning in January 2008, when he injured his low back

at work. He indicated that appellant had subsequently injured his low back in February 2008 and experienced bilateral radiculopathy to the lower extremities, more on the left. On March 9, 2015 Dr. Rudic noted that he experienced severe pain in his low back radiating to both legs and contusions of the right arm and knee when he fell on ice in front of his workplace on March 9, 2015 and increased low back pain and sciatica in May 2016 lifting weights at work and on July 25, 2016 after a fall. He asserted that imaging study showed right paracentral disc extrusion and nerve compression consistent with appellant's symptoms. Dr. Rudic noted that appellant had neck surgery in August 2017 and did not want further back surgery. He found that appellant was totally disabled and continued to have low back and sciatica pain.

By decision dated August 25, 2021, OWCP's hearing representative affirmed the March 22, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁸

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.⁹ The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.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, OWCP 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 medical reports of virtually equal weight and rationale and the case is referred to an IME 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

⁸ *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

¹² 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

¹³ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional conditions causally related to his accepted July 22, 2016 employment injury.

On prior appeal the Board found that a conflict in medical opinion existed between Dr. Perlewitz, appellant's attending physician, and Dr. Haskell, an OWCP referral physician, regarding whether the requested surgical procedures were necessary for a condition causally related to the accepted employment injury and were medically warranted. On remand OWCP referred appellant to Dr. Robbins, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical evidence.

In situations where the case is referred to an IME for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

In a report dated March 12, 2021, Dr. Robbins reviewed the history of injury and provided findings on examination. He noted that appellant had no symptoms of neck pain, radiculopathy, or myelopathic symptoms immediately following the injury. Dr. Robbins opined that the accepted employment injury did not cause his neck symptoms or herniated disc at L3-5 on the right side given the absence of symptoms following his injury. He further found that the July 22, 2016 employment injury had not aggravated or accelerated appellant's cervical and lumbar spine degenerative disc disease and stenosis given his lack of myelopathic complaints subsequent to his fall. Dr. Robbins attributed his neck symptoms to the natural progression of cervical myelopathy and his back pain to the progression of degenerative disc disease unrelated to employment.

The Board finds that Dr. Robbins accurately described the accepted employment injury and provided his review of the medical record. Dr. Robbins performed a thorough clinical examination with detailed examination findings and reached a reasoned conclusion regarding whether acceptance of appellant's claim should be expanded, noting that there was no evidence supporting a causal relationship between a cervical condition or degenerative disc disease of the lumbar spine and lumbar stenosis causally related to the accepted employment injury.¹⁵ The Board, therefore, finds that Dr. Robbins' opinion is entitled to the special weight accorded to an IME regarding the issue of whether acceptance of appellant's claim should be expanded to include additional conditions.¹⁶

In a report dated June 14, 2021, Dr. Rudic noted that appellant had experienced injuries to his back at work in January and February 2007, March and May 2016, and July 25, 2016. He found that he was totally disabled due to low back and sciatic pain. While Dr. Rudic noted that imaging studies after 2016 showed a disc extrusion and nerve compression, he did not directly

¹⁴ *D.S.*, Docket No. 19-1698 (issued June 18, 2020); *C.W.*, Docket No. 17-0918 (issued January 5, 2018); *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁵ *See F.A.*, Docket No. 20-1652 (issued May 21, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021).

¹⁶ *W.N.*, Docket No. 21-0123 (issued December 29, 2021); *C.W.*, Docket No. 21-0017 (issued December 28, 2021).

address the relevant issue of whether appellant's accepted employment injury caused or aggravated additional diagnosed conditions. Consequently, Dr. Rudic's report is insufficient to meet appellant's burden of proof.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA¹⁸ 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 the period of disability, or aid in lessening in the amount of monthly compensation.¹⁹

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.²⁰ 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 to produce a contrary factual conclusion.²¹

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 criteria must be met for OWCP to authorize payment.²²

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.²³

ANALYSIS -- ISSUE 2

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

As discussed, on prior appeal the Board found a conflict in medical opinion between Dr. Haskell and Dr. Perlewitz regarding whether conditions causally related to the accepted

¹⁷ See *E.W.*, Docket No. 20-0338 (issued October 9, 2020); *O.M.*, Docket No. 18-1055 (issued April 15, 2020).

¹⁸ *Supra* note 2.

¹⁹ 5 U.S.C. § 8103; see *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

²⁰ See *D.C.*, Docket No. 20-0854 (issued July 19, 2021); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *D.K.*, 59 ECAB 141 (2007).

²¹ See *E.F.*, Docket No. 20-1680 (issued November 10, 2021); *J.L.*, Docket No. 18-0503 (issued October 16, 2018).

²² See *P.S.*, Docket No. 20-0075 (issued July 12, 2021).

²³ *Supra* note 13.

employment injury necessitated the requested cervical and lumbar surgeries. The Board finds that OWCP properly accorded special weight to Dr. Robbins as the IME.²⁴ Dr. Robbins found that appellant's cervical spine surgery resulted from a preexisting condition unrelated to his accepted employment injury and provided as a rationale that he had no neck, radicular, or myelopathic symptoms immediately after the injury but instead experienced the gradual onset of symptoms over time due to natural progression of the condition. He further opined that appellant's current lumbar condition was unrelated to his employment, but instead related to the natural progression of degenerative disc disease. The Board finds that Dr. Robbins provided a well-rationalized opinion based on a complete background, his review of the SOAF, the medical record, and his examination findings. Dr. Robbins' opinion is, thus, entitled to the special weight of the medical evidence.²⁵

The only limitation on OWCP's authority is approving or disapproving service under FECA is one of reasonableness.²⁶ OWCP obtained an impartial medical examination through Dr. Robbins, who found that appellant did not require surgery due to his accepted employment injury. Thus, the Board finds that OWCP did not abuse its discretion in denying authorization for the requested cervical and lumbar surgeries.²⁷

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 appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional conditions causally related to his accepted July 22, 2016 employment injury. The Board further finds that OWCP did not abuse its discretion in denying appellant's request for authorization of cervical spinal surgery.

²⁴ See *G.M.*, Docket No. 18-1710 (issued June 3, 2019).

²⁵ See *D.S.*, Docket No. 19-1698 (issued June 18, 2020).

²⁶ See *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

²⁷ See *D.S.*, Docket No. 18-0353 (issued February 18, 2020).

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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