United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 23-0406**
	)	**Issued: September 11, 2023**
U.S. POSTAL SERVICE, OGDEN PARK POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 27, 2023 appellant filed a timely appeal from a November 22, 2022 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 properly denied appellant's request for authorization of lumbar spinal fusion, decompression, and microdisectomy surgery.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the November 22, 2022 decision and on appeal, 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

On January 23, 2021 appellant, then a 49-year-old postal collection and delivery worker, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2021, he sprained his lower back when a customer's vehicle hit his postal vehicle while in the performance of duty. He stopped work on January 16, 2021.

OWCP initially accepted the claim for strain of muscle, fascia, and tendon at neck level; strain of muscle and tendon of back wall of thorax; and strain of lumbar region. It later expanded the acceptance of the claim to include L5-S1 herniated disc and foraminal stenosis, and right shoulder incomplete rotator cuff tear or rupture. OWCP paid appellant wage-loss compensation on the supplemental rolls effective March 6, 2021, and on the periodic rolls as of June 20, 2021.

A February 4, 2021 magnetic resonance imaging (MRI) scan of the lumbar spine, read by Dr. Elliot Wagner, a Board-certified diagnostic radiologist, revealed broad-based posterior herniation of L5-S1 disc, with bilateral foraminal components, causing mild-to-moderate narrowing of central canal and neural foramina, bilaterally, and that the herniation measured eight millimeters (mm) in size. It also revealed diffuse protrusion of L4-5 disc, causing mild narrowing of the central canal and neural foraminal narrowing, and that the bulge measured approximately two mm; and mild facet arthropathy at L4-5 and L5-S1 levels and minimal retrolisthesis of L5 vertebra over S1.

In a March 15, 2021 report, Dr. Anis O. Mekhail, a Board-certified orthopedic surgeon, noted that appellant had a history of back pain in 2016, not from an injury, and that after a few sessions of physical therapy, the pain resolved and there were no further symptoms until the present injury. He provided an impression of large L5-S1 herniated disc, foraminal stenosis, and significant degeneration. Dr. Mekhail recommended decompression, microdisectomy, and fusion, as appellant had significant back pain, significant foraminal stenosis, and significant degeneration of the disc, which was "almost completely bone-on-bone." He noted that with physical therapy and possibly work conditioning, appellant should be able to return to work between six weeks on light duty and three months at full duty.

In an April 21, 2021 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical evidence of record, including Dr. Mekhail's March 15, 2021 report. He agreed with Dr. Mekhail's opinion that appellant's current condition and recommended surgery was causally related to his accepted employment injury. However, Dr. Ugokwe disagreed that the proposed surgery was medically necessary. He indicated that appellant's MRI scan revealed no radiographic evidence of significant element compression or instability.

By letter dated April 27, 2021, OWCP notified appellant that the proposed spinal fusion, decompression, and microdisectomy could not be approved. It found that the medical evidence of record did not support that it was medically necessary to address the effects of his work-related injury. OWCP explained that there was no radiographic evidence of significant neural element compression or instability on the MRI scan. It advised appellant that, if he desired a formal decision with appeal rights, he should submit a written request.

In a May 19, 2021 workers' compensation request for authorization form, Dr. Mekhail repeated his request for the spinal fusion, decompression, and microdisectomy. In an accompanying narrative report, he disagreed with DMA's opinion that appellant's symptoms were not supported by MRI scan findings. Dr. Mekhail explained that the MRI scan clearly revealed that disc herniation below L5-S1 was causing compression on the thecal sac and foraminal stenosis. He further explained that appellant's spinal condition was causing weakness and prolonged pressure on the nerve and that appellant could suffer permanent nerve damage. Dr. Mikhail noted that the MRI scan was consistent with his clinical findings and that appellant had significant weakness in his left gastrocnemius that matched the findings from his MRI scan.

In a June 20, 2021 report, Dr. Ugokwe reiterated his opinion that the requested spinal fusion, decompression, and microdisectomy was not medically necessary because the MRI scan did not show any evidence of instability or significant enough stenosis to warrant aggressive decompression with the resultant instability. He noted that the MRI scan revealed mild-to-moderate central canal and foraminal stenosis at L5-S1.

By decision dated June 29, 2021, OWCP denied authorization for spinal fusion, decompression, and microdisectomy. It found that the weight of the medical evidence rested with the DMA, Dr. Ugokwe, who concluded that the requested treatment was not medically necessary because the MRI scan did not show any evidence of instability or significant enough stenosis to warrant aggressive decompression with the resultant instability.

In an August 19, 2021 report, Dr. Mekhail continued to opine that the proposed surgery was medically necessary to treat appellant's work-related condition of L5-S1 herniated disc, and his diagnosed conditions of lumbar radiculopathy and degenerative disc disease. He also reiterated that appellant's spinal conditions were affecting his quality of life.

On January 4, 2022 appellant requested reconsideration of the June 29, 2021 decision.

On March 14, 2022 OWCP referred appellant for a second opinion evaluation with Dr. Junaid Makda, a Board-certified orthopedic surgeon.

In a May 13, 2022 report, Dr. Makda noted appellant's history of injury and treatment and provided his examination findings. He opined that a spinal fusion, decompression, and microdisectomy appeared to be a definitive treatment option, and that other options included epidural injections into the disc spaces. Dr. Makda noted that he read the MRI scan report but did not have the ability to review the images. He noted that the report suggested foraminal narrowing and central canal and neural foraminal stenosis and that he did not have any flexion/extension radiographs to suggest any kind of instability. Dr. Makda explained that he was not a spine surgeon and deferred treatment to a qualified neurosurgeon or an orthopedic spine surgeon. He opined that to his knowledge, "the MRI does show stenosis that if left untreated for an extended period of time can potentially cause permanent neurological damage."

On June 15, 2022 OWCP referred appellant for a second opinion evaluation with Dr. Harel Deutsch, a Board-certified neurosurgeon.

In a July 17, 2022 report, Dr. Deutsch reviewed the SOAF and the medical record, and noted appellant's reports of back pain. He examined appellant and concurred with the DMA that appellant would not benefit from the requested surgery. Dr. Deutsch explained that there was no significant stenosis or instability, and his physical examination and the MRI scan were both consistent with mild degenerative changes. He also noted that the physical examination findings were inconsistent with appellant's reported history, and that even with the diagnosis of lumbar herniated disc, appellant would not be a candidate for lumbar fusion. Dr. Deutsch advised that he was able to return to work in a full-time capacity without further treatment.

On August 11, 2022 OWCP requested that Dr. Mekhail review Dr. Deutsch's second opinion report and, within 30 days from the date of the letter, indicate whether he concurred with the report. It explained that, "if no response is received, this office will conclude that you are in full agreement with the contents of the second opinion report dated 07/13/2022." No response was received.

By decision dated September 21, 2022, OWCP denied modification of the June 29, 2021 decision.

On November 21, 2022 appellant requested reconsideration.

In an August 26, 2022 report, Dr. Mekhail noted that appellant had a positive straight leg raising examination on that day and weakness on isolated plantar flexion testing with appellant trying to stand on his tiptoes on the left side. He indicated that he disagreed with Dr. Deutsch's conclusion that appellant had only mild degenerative changes. Dr. Mekhail noted that appellant had significant degeneration of the L5-SI disc and a broad disc bulge on the left side which explained the left S1 radiculopathy. He disagreed that appellant's reported history was inconsistent with his examination findings and opined that "[t]here is no way the patient would know the S1 radiculopathy and fake his weakness and his distribution of the S1 radiculopathy. So I believe the patient is sincere. I believe the pathology explains his symptoms…." Dr. Mekhail reiterated his request for approval for surgery.

By decision dated November 22, 2022, OWCP denied modification of the September 21, 2022 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA[3] 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.[4] While OWCP is obligated to pay for treatment of employment-related conditions, the employee

[3] 5 U.S.C. § 8103(a).

[4] *Id.*; *see J.K.*, Docket No. 20-1313 (issued May 17, 2021); *Thomas W. Stevens*, 50 ECAB 288 (1999).

has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[5]

Section 10.310(a) of OWCP's implementing regulations provide 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, with the only limitation on OWCP's authority being that of reasonableness.[7] 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.[8]

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.[9]

FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[10] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[11]

ANALYSIS

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

[5] *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *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).

[6] 20 C.F.R. § 10.310(a); *see D.W.*, Docket No. 19-0402 (issued November 13, 2019).

[7] *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).

[8] *Id*.

[9] *P.L.*, Docket No. 18-0260 (issued April 14, 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*, *supra* note 7.

[10] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *L.C.*, Docket No. 20-866 (issued February 26, 2021); *B.I.*, *supra* note 7; *Shirley L. Steib*, 46 ECAB 309 (1994).

[11] *L.C.*, *id*.; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP accepted appellant's traumatic injury claim for strain of muscle, fascia, and tendon at neck level; strain of muscle and tendon of back wall of thorax; strain of lumbar region; L5-S1 herniated disc; and foraminal stenosis.

Appellant's treating physician, Dr. Mekahil, thereafter, sought authorization for decompression, microdisectomy, and fusion to treat appellant's accepted lumbar conditions. He explained in a March 15, 2021 report, that appellant had significant back pain, significant foraminal stenosis, and significant degeneration of the discs, which was "almost completely bone-on-bone." In a May 19, 2021 report, Dr. Mekhail noted that appellant's MRI scan clearly revealed that disc herniation below L5-S1 was causing compression on the thecal sac and foraminal stenosis, that appellant's spinal condition was causing weakness and prolonged pressure on the nerve, and that appellant could suffer permanent nerve damage. In an August 26, 2022 report, he noted that appellant had significant degeneration of the L5-SI disc and a broad disc bulge on the left side which explained his left SI radiculopathy. Dr. Mekhail disagreed that appellant's reported history was inconsistent with his examination findings, and opined that "[t]here is no way the patient would know the S1 radiculopathy and fake his weakness and his distribution of the S1 radiculopathy. So I believe the patient is sincere. I believe the pathology explains his symptoms…."

By contrast, Dr. Ugokwe, OWCP's DMA, opined in reports dated April 21 and June 20, 2021, that the requested surgical procedures were not medically necessary. He explained that appellant's MRI scan revealed no radiographic evidence of significant element compression or instability. The DMA further explained that the MRI scan revealed mild-to-moderate central canal and foraminal stenosis at L5-S1.

OWCP's second opinion physician, Dr. Deutsch, in a July 17, 2022 report, concurred with the DMA that appellant would not benefit from the requested surgery. He explained that there was no significant stenosis or instability, and the physical examination and MRI scan were both consistent with mild degenerative changes. Dr. Deutsch further explained that his physical examination findings were inconsistent with appellant's reported history, that a diagnosis of lumbar herniated disc did not make appellant a candidate for lumbar fusion, and that appellant was able to return to work in a full-time capacity without further treatment. As Dr. Mekhail, appellant's attending physician, Dr. Ugokwe, OWCP's DMA, and Dr. Deutsch, OWCP's second opinion physician, disagreed as to whether appellant's request for surgery was medically warranted for the treatment of his accepted back conditions, the Board finds that there is a conflict in the medical opinion evidence. The case must therefore be remanded for referral to an impartial medical examiner, pursuant to 5 U.S.C. § 8123(a). Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2022 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: September 11, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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