

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

_____)	
B.L., Appellant)	
)	
and)	Docket No. 23-0574
)	Issued: September 19, 2023
U.S. POSTAL SERVICE, SAN ANTONIO)	
PROCESSING & DISTRIBUTION CENTER,)	
San Antonio, TX, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 7, 2023 appellant filed a timely appeal from a January 20, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 surgery.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the January 20, 2023 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

On December 5, 2018 appellant, then a 40-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on December 3, 2018 he sustained a lower back injury when he engaged in stooping, bending, and twisting to repair a staircase while in the performance of duty. He stopped work on December 4, 2018. By decision dated January 17, 2019, OWCP accepted appellant's claim for sprain of lumbar spine ligaments.

In a report dated August 16, 2022, Dr. Jordan Jude, a Board-certified neurosurgeon, indicated that appellant complained of lower back pain at its worst of 10/10, and denied any bilateral lower extremity pain, numbness, or weakness. He described his physical examination findings, noting that appellant reported lower back pain of 7/10 and exhibited normal gait and station. Appellant had full range of motion and 5/5 motor strength in his lower extremities. Dr. Jude discussed abnormalities seen on diagnostic testing and diagnosed low back pain, intervertebral lumbar disc degeneration, lumbar spondylolisthesis, lumbar spinal instabilities and sprain of lumbar spine ligaments. He noted, "[appellant] has failed extensive conservative measures and his symptoms are grossly affecting his normal activities of daily living and decreasing his quality of life. In my opinion, he would be an appropriate candidate for an L2 to S1 posterior lumbar interbody fusion surgery." Dr. Jude requested authorization from OWCP, on behalf of appellant, for L2 to S1 posterior lumbar interbody fusion surgery.

On September 13, 2022 OWCP requested that Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), review the case record and provide an opinion regarding whether the lumbar fusion surgery requested by appellant was necessitated by the accepted December 3, 2018 employment injury. In a September 16, 2022 report, Dr. Katz discussed physical examination and diagnostic testing findings of record, and noted that diagnostic testing revealed pathology of the lumbar spine. He indicated that Dr. Jude proposed a complex four-level fusion construct (at L2-L3, L3-L4, L4-L5, and L5-S1) with a significant morbidity risk including pseudarthrosis. Dr. Katz opined that authorization of a procedure of such magnitude on the basis of a medical records review alone was not appropriate, and recommended a second surgical opinion from a Board-certified neurosurgeon or orthopedic surgeon.

In September 14, 29, October 1, and November 7, 19, 2022 reports, Dr. Kyriakos Tsalamandris, a Board-certified emergency medicine specialist, reported his physical examination findings and diagnosed lumbar sprain. He recommended that appellant participate in physical therapy. Dr. Tsalamandris continued to produce similar reports regarding appellant's back condition, including a December 21, 2022 report.

On November 1, 2022 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Charles Kennedy, Jr., a Board-certified orthopedic surgeon. It requested that Dr. Kennedy provide an opinion regarding the nature of appellant's injury-related residuals, and the question of whether the L2 to S1 posterior lumbar interbody fusion surgery requested by appellant was necessitated by the accepted December 3, 2018 employment injury.

In a December 12, 2022 report, Dr. Kennedy detailed appellant's factual and medical history, including his present complaints of lower back pain. He reported the findings of his physical examination, noting that appellant complained of mild tenderness in his lower back but

was able to climb onto the examination table and walk on his heels and toes without difficulty. Dr. Kennedy advised that no numbness or weakness was observed in appellant's lower extremities, and that bilateral straight leg testing was negative. He noted that magnetic resonance imaging (MRI) scan testing of appellant's lumbar spine showed a disc protrusion at L4-5, but lumbar radiculopathy was not found. Dr. Kennedy determined that appellant still had residuals of his work-related sprain, but his condition had improved. He opined that the L2 to S1 posterior lumbar interbody fusion surgery requested by appellant was not necessitated by the accepted December 3, 2018 employment injury. Dr. Kennedy explained that appellant did not have a clinical lower extremity radiculopathy, and did not meet the requirements for any kind of surgery to the lumbar spine. In a December 12, 2022 work capacity evaluation (Form OWCP-5c), he indicated that appellant could perform light work with a restriction from lifting more than 30 pounds.

By decision dated January 20, 2023, OWCP denied appellant's request for authorization of lumbar surgery, finding that the weight of the medical opinion evidence on the matter rested with the well-rationalized opinion of Dr. Kennedy, the OWCP referral physician.

LEGAL PRECEDENT

Section 8103(a) of FECA states in pertinent part: "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 the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."³

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.⁴ The only limitation on OWCP's authority is that of reasonableness.⁵ 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.⁶ It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁷ In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.⁸ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁹

³ 5 U.S.C. § 8103.

⁴ *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

⁵ *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

⁶ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Rosa Lee Jones*, 36 ECAB 679 (1985).

⁷ *Id.*

⁸ *J.R.*, Docket No. 17-1523 (issued April 3, 2018); *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

⁹ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for authorization of lumbar surgery.

In a December 12, 2022 report, Dr. Kennedy, the OWCP referral physician, reported the findings of his physical examination, noting that appellant complained of mild tenderness in his lower back, but was able to climb onto the examination table and walk on his heels and toes without difficulty. He advised that no numbness or weakness was observed in appellant's lower extremities and that bilateral straight leg testing was negative. Dr. Kennedy noted that MRI scan testing of appellant's lumbar spine showed a disc protrusion at L4-5, but lumbar radiculopathy was not found. He opined that the L2 to S1 posterior lumbar interbody fusion surgery requested by appellant was not necessitated by the accepted December 3, 2018 employment injury. Dr. Kennedy indicated that appellant did not have a clinical lower extremity radiculopathy, and thus did not meet the requirements for any kind of surgery to the lumbar spine.

The Board finds that OWCP properly relied on the opinion of Dr. Kennedy in denying appellant's request for authorization of lumbar fusion surgery. The weight of the medical evidence with respect to this matter is represented by the thorough, well-rationalized opinion of Dr. Kennedy. The December 12, 2022 report of Dr. Kennedy indicates that the proposed lumbar surgery was not necessitated by the accepted December 3, 2018 employment injury, a soft-tissue injury in the form of sprain of lumbar spine ligaments. The Board has reviewed the opinion of Dr. Kennedy and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of appellant's request for surgery authorization. Dr. Kennedy provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion by explaining that the limited objective findings on physical examination and diagnostic testing did not show that the surgery was necessitated by the accepted December 3, 2018 employment injury.¹⁰

The Board notes that Dr. Jude did not provide a rationalized medical opinion explaining how the requested lumbar fusion surgery was necessitated by the accepted December 3, 2018 employment injury.¹¹ Dr. Jude discussed abnormalities seen on diagnostic testing and diagnosed intervertebral lumbar disc degeneration, lumbar spondylolisthesis, and sprain of lumbar spine ligaments. However, only the latter condition has been accepted as work related. Dr. Jude merely noted, without elaboration, "[appellant] has failed extensive conservative measures and his symptoms are grossly affecting his normal activities of daily living and decreasing his quality of life. In my opinion, he would be an appropriate candidate for an L2 to S1 posterior lumbar interbody fusion surgery." The case record contains reports of Dr. Tsalamandris; however, he did not provide an opinion on appellant's need for surgery.¹²

¹⁰ See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion).

¹¹ See *supra* note 10.

¹² *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

As noted above, 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.¹³ For the reasons explained above, OWCP's denial of appellant's request for authorization of lumbar surgery was reasonable and did not constitute an abuse of discretion.

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 OWCP properly denied appellant's request for authorization of lumbar surgery.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *supra* note 7.