U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRAVIS R. WARREN and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 98-2339; Submitted on the Record;
Issued May 18, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for proposed spinal surgery.

The Office accepted that on May 6, 1995 appellant, then a 26-year-old temporary carrier, sustained cervical and lumbar soft tissue muscular strains, a left shoulder strain and a rotator cuff tear while in the performance of duty.[1] He underwent authorized surgical repair of the torn rotator cuff on May 21, 1996.

A magnetic resonance imaging (MRI) scan of the lumbar spine performed on February 6, 1998 was reported as revealing mild disc dessication within five millimeters of a broad-based posterior subligamentous disc herniation at L4-5 with mild ligamentum and facet hypertrophy resulting in moderate to severe relative spinal canal stenosis and mild narrowing of both neural foramina. The MRI also revealed a six millimeter broad-based posterior subligamentous disc herniation that lateralized minimally to the left impinging on both S1 nerve roots and moderately to severely narrowing the thecal sac. Mild retrolisthesis of L5 on S1 was noted with the disc herniation extruding slightly caudally. An MRI of the cervical spine that same date was reported as revealing a posterior disc herniation at C3-4 that flattened the thecal sac and resulted in a moderate to severe relative spinal canal stenosis, with mild flattening of the ventral aspect of the cord and mild narrowing of both neural foramina and anterior disc bulges at C4-5, C5-6 and C6-7 that flattened the ventral thecal sac resulting in spinal canal stenosis and narrowing of the neural formina. Desiccation was noted in all cervical discs.

By report dated February 16, 1998, Dr. Jeffrey A. Kozak, a Board-certified orthopedic surgeon, noted that at that time appellant reported continued L'hermitte's phenomenon, which involved shocking sensation that extended from the neck down through the low back and

[1] Appellant's postal vehicle lurched forward, dropped back and spun, causing appellant to be thrown around inside. His contract with the employing establishment expired on the date of injury, May 6, 1995.

occasionally into the right lower extremity. He reviewed appellant's MRI results and recommended cord decompression and a central laminectomy from C3 to C7 to relieve neural compression. Dr. Kozak opined:

> "[T]he causal relationship of [appellant's] cervical problems to the injury of May 6, 1995 are reviewed. There is certainly an element of preexisting stenosis and degeneration in the cervical region, but the annular protrusions at C3-4, C4-5 and C5-6 as well as C6-7 are likely causally linked to the accident of May 6, 1995 and, therefore, the cervical region is compensable.
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> "A lumbar condition is likely solely related to the May 6, 1995 accident."

By form report dated February 25, 1998, Dr. Kozak diagnosed "cervical pain [and] lumbar disc degeneration," and he checked "yes" to the question of whether he believed the condition(s) found was caused or aggravated by an employment activity. No further explanation was provided.

A March 6, 1998 cervical myelogram was reported as revealing "canal stenosis extending from C2 to C7, most pronounced at C3-4, C4-5 and C5-6."

An unsigned spinal treatment evaluation process (STEP) performed on appellant from March 2 to 5, 1998 resulted in the recommendation that appellant be treated with a central laminectomy from C3 to C7 to address spinal cord compression.

On April 13, 1998 Dr. Kozak indicated that appellant's treatment plan consisted of "cervical laminectomy." He indicated that appellant had elected to proceed with the C3 to C7 cervical laminectomy, understanding that it would relieve his spinal cord pressure but not his neck pain. A second dictated report that date from Dr. Kozak noted that appellant remained under his care "due to a cervical disorder related to an accident of May 6, 1995." Dr. Kozak noted that cervical pain with definite L'hermitte's phenomenon had developed and persisted and that a cervical myelogram and computerized tomography scan "reveal[ed] moderate definite and stenosis from C3-4 through C6-7 with AP diameter of eight millimeters and flattening of the spinal cord." Dr. Kozak explained that he recommended the cervical laminectomy to totally decompress the spinal cord and opined that the procedure should be performed over the next one to two months as appellant was predisposed to significant neural compromise including quadriplegia.

The Office, thereafter, created a statement of accepted facts and referred appellant's case to the Office medical adviser for an opinion as to whether the conditions for which the requested surgery was proposed, cervical stenosis and L'hermitte's phenomenon, were causally related to the accepted work injuries and as to whether such surgery was medically warranted.

The Office medical adviser replied by report dated April 21, 1998 opining:

> "The described cervical stenosis is most likely the result of a congenital condition of spinal canal stenosis. It seems that the present problem is the result of spinal stenosis that may have been aggravated by injury to the disc structures anteriorly. There is imaging evidence of posterior disc bulging at C4-7. It is for this reason that my opinion is the present problem is related to the accepted work-related injury. It is my opinion that to treat this surgically is not clear cut. There does not seem to be imaging evidence of changes in the spinal cord due to pressure…."

The Office medical adviser recommended referral to another Board-certified specialist who was qualified to provide care for complex problems of the spine for a second opinion.

On May 1, 1998 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Robert A. Hughes, a Board-certified neurosurgeon, for a second opinion as to whether appellant's cervical problems were causally related to his accepted muscular strain injuries and as to whether surgery was indicated for appellant's cervical problems.

By report dated May 18, 1998, Dr. Hughes reviewed appellant's history of injury and treatment, evaluated the medical records provided and performed a complete physical examination. Dr. Hughes noted that "[a]ll Waddell's testing was inappropriate in five out of five examinations." He opined that appellant was not exhibiting his best efforts on any subjective testing, that all Waddell's signs were positive and that there were no really good localizing neurological findings or abnormalities. Dr. Hughes concluded as follows:

> "I believe the spinal canal stenosis is predominantly on a congenital basis, although there was some evidence of further narrowing at the C5-6 level due to some disc protrusion. There was no evidence, however, that it was actually causing any compression against the spinal cord."
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> "I am inclined to think, however, that the main problem of the questionable spinal stenosis and L'hermitte's phenomenon are really more on the basis of a congenital problem."
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> * * *
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> "I feel that there is no absolute indication for [posterior decompression]."

By letter dated May 29, 1998, to Dr. Kozak, the Office advised that authorization for surgery was denied and it enclosed copies of the Office medical adviser's and Dr. Hughes' reports.

Also by decision that date the Office rejected appellant's request for decompression laminectomy surgery, finding that the weight of the medical opinion evidence, which consisted

of the report of Dr. Hughes, established that C2-7 decompression laminectomy surgery was not indicated.

The Board finds that this case is not in posture for decision.[2]

Section 8103 of the Federal Employees' Compensation Act[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 or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of any disability, or aid in lessening the amount of any monthly compensation. Further, the Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[4] In the present case, however, the Board finds that the Office abused its discretion in denying appellant's request for surgical authorization as there existed an unresolved conflict in the medical opinion evidence of record on the issue of whether surgical intervention was warranted and was appropriate to appellant's accepted condition and was likely to cure, give relief, or reduce the period of disability.

Dr. Kozak, appellant's treating physician, opined that appellant was in need of spinal decompression, but the Office's second opinion specialist, Dr. Hughes, reached the opposite conclusion. Therefore, a conflict was created.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." No such impartial medical examination was conducted in this case.

Therefore, the case must be remanded so that the Office may refer appellant, together with the case record, a statement of accepted facts and specific questions to be addressed, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether spinal surgery was indicated for appellant's accepted back conditions.

[2] The Board docketed appellant's appeal on August 5, 1998. However, a subsequent Office decision issued on August 18, 1998 on the subject of appellant's wage-earning capacity, is not null and void for lack of jurisdiction as it is on a different subject and is not now before the Board upon this appeal; *see* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. §§ 8101-8193.

[4] *James E. Archie*, 43 ECAB 180 (1991); *Daniel J. Perea*, 42 ECAB 214 (1990); *William F. Gay*, 38 ECAB 599 (1987).

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 29, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
May 18, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member