

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHY B. MILLIN and DEPARTMENT OF VETERANS AFFAIRS,
WILLIAM S. MIDDLETON MEMORIAL HOSPITAL, Madison, WI

*Docket No. 97-2898; Submitted on the Record;
Issued February 10, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the surgical procedure performed on May 22, 1996 and subsequent disability were causally related to appellant's employment injury; and (2) whether the surgical procedure performed on March 27, 1997 and subsequent disability were causally related to the employment injury.

On November 22, 1995 appellant, then a 36-year-old management assistant, sustained an employment-related lumbar strain. She returned to full duty on December 5, 1995. Her treating Board-certified orthopedic surgeon, Dr. Jeffrey J. Welch, recommended that she undergo a percutaneous lumbar discectomy procedure for her back condition and this was performed on May 22, 1996. On June 7, 1996 appellant filed a Form CA-7, claim for compensation, for the period May 22 to June 16, 1996. On June 11, 1996 the Office of Workers' Compensation Programs accepted that she sustained employment-related disc ruptures at L4-5 and L5-S1 and referred the medical record to Dr. A.H. Conley, an orthopedic surgeon serving as an Office medical consultant, for an opinion regarding the need for the May 22, 1996 surgery. In a June 26, 1996 report, Dr. Conley advised that surgery had not been indicated. By decision dated September 30, 1996, the Office denied authorization for the May 22, 1996 surgical procedure and found that the subsequent disability from May 22 to June 16, 1996 was not causally related to the November 11, 1995 employment injury. On December 10, 1996 appellant requested reconsideration and submitted additional reports from Dr. Welch. Finding that a conflict existed between the opinions of Drs. Welch and Conley regarding the need for surgery, on February 26, 1997 the Office referred appellant's medical records to Dr. James T. Bianchin, a Board-certified orthopedic surgeon, for a referee review of the record. In a March 24, 1997 decision, the Office denied modification of the prior decision, based on the opinion of Dr. Bianchin who advised that surgery was not needed.

On February 20, 1997 Dr. Welch recommended that appellant undergo a second surgical procedure,¹ that was performed on March 27, 1997. On March 24, 1997 appellant filed a Form CA-7 claim for compensation for the period March 30 to April 12, 1997. On April 22, 1997 the Office referred the record to Dr. Carlo Bellabarba, an orthopedic surgeon who served as an Office medical consultant, for an opinion regarding the need for the second surgical procedure. In a May 17, 1997 report, Dr. Bellabarba opined that appellant's disc herniation was not employment related and, therefore, the March 27, 1997 procedure should not be authorized. Again finding that a conflict in the medical evidence existed, the Office referred the case file to Dr. John Dowdle, a Board-certified orthopedic surgeon, for a referee review of the record. By decision dated June 27, 1997, the Office denied authorization of the March 27, 1997 surgical procedure and subsequent disability, based on Dr. Dowdle's June 17, 1997 report. On July 24, 1997 appellant submitted a request for a review of the written record by the Branch of Hearings and Review. On September 2, 1997 she filed an appeal with the Board. An Office hearing representative issued a decision dated October 16, 1997 in which he remanded the case to the Office for further development.

The Board notes that that the decision issued by the Office on October 16, 1997 was issued subsequent to September 2, 1997, the date that appellant filed an appeal with the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case.² As the October 16, 1997 decision was a review of the written record of the prior decisions over which the Board has jurisdiction, the decision addressed the same issues that would be addressed by the Board on appeal. The October 16, 1997 Office decision is, therefore, null and void.

The Board finds that this case is not in posture for decision regarding whether the May 22, 1996 and March 27, 1997 surgical procedures and subsequent periods of disability were warranted.

In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical evidence.³ Therefore, in order to prove that the surgical procedures of May 22, 1996 and March 27, 1997 were warranted, appellant must submit evidence to show that each procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

¹ Appellant underwent hemilaminectomy and discectomy at L4-5 with removal of free fragment.

² *Douglas E. Billings*, 41 ECAB 880 (1990).

³ See *Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

In this case, the Office found that a conflict in the medical evidence existed regarding the necessity for both the 1996 and 1997 surgical procedures.⁴ Office procedures provide for an examination of the case file only (without a physical examination) only in the narrow instance where prior authorization for surgery is not requested and an Office medical adviser subsequently concludes that the surgery was not medically indicated.⁵ In all other instances, Office procedures provide that a physician selected as referee examiner should physically examine a claimant and also have available for review the entire case record.⁶ In this case, appellant requested authorization for surgery before undergoing both the 1996 and 1997 procedures. It was, therefore, improper for the Office to refer the file only for examination to Drs. Bianchin and Dowdle who respectively served as referee examiners to determine if the 1996 and 1997 surgical procedures were employment related. The case will, therefore, be remanded to the Office. On remand the Office should compile a statement of accepted facts and refer appellant, together with the complete case record and questions to be answered regarding the necessity for both surgical procedures, to a Board-certified specialist for a physical examination and a detailed opinion. The specialist should also determine whether the right-sided herniated disc at L4-5 demonstrated on the February 10, 1997 magnetic resonance imaging (MRI) scan was caused by the November 22, 1995 employment injury.⁷ After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁴ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to resolve the conflict in the medical opinion. 5 U.S.C. § 8123(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.10(f) (April 1993).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11 (April 1993); Federal (FECA) Procedure Manual, Part 3 -- *Medical Examinations*, Chapter 3.500.4 (March 1994).

⁷ Appellant should be advised to bring the MRI scans dated April 29 and July 17, 1996 and February 10, 1997 as well as the plain x-ray films dated February 10, 1997.

The decisions of the Office of Workers' Compensation Programs dated June 27 and March 24, 1997 and September 30, 1996 are hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Dated, Washington, D.C.
February 10, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member