U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHA L. RAY and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Las Vegas, NV

Docket No. 00-15; Submitted on the Record;
Issued May 4, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for back surgery.

On February 11, 1998 appellant, then a 48-year-old special agent, injured her back and neck when the government vehicle in which she was a passenger was struck from the rear by a truck. Appellant stopped work on February 11, 1998 and returned on February 16, 1998. Appellant's claim was accepted for back and neck sprain, traumatic internal disc disruption at L5-S1 and cervical radiculopathy.

In a report dated May 6, 1998, Dr. Mark B. Kabins, a Board-certified orthopedic surgeon, a history of appellant's automobile accident and noted her preexisting mild cervical, thoracic and lumbosacral spondylosis, asymptomatic.

In a report dated June 17, 1998, Dr. Mark D. Kraft, a Board-certified anesthesiologist, recommended nerve root blocks as a pain management procedure. Appellant underwent a right and left L2 nerve root block and a bilateral L2-3 intraforaminal epidural corticosteroid injection. Dr. Kraft noted "95 pecent postblock pain relief across the lumbar spine and into the right thigh and normalization of ambulation and range of motion, lumbar, without pain."

Dr. Kabins indicated on July 13, 1998 that an x-ray demonstrated no marked pelvic abnormality, but a magnetic resonance imaging (MRI) scan of the lumbar spine revealed central disorganization at levels L4-5 and L5-S1 suggestive of mild degenerative changes, unaccompanied by disc protrusion or additional abnormality. Lumbar radiographs of August 4, 1998 revealed minimal ventral end-plate hypertrophy in the lower spine, which is "not inconsistent with the patients age." The radiographs were otherwise unremarkable without signs of disc degeneration, facet atrophy or other abnormality.

Dr. Kabins concluded that appellat's pain had been "unamenable to conservative care." She had internal disc disruption at the L4-5 level, along with disc degeneration and restricted range of motion of the lumbosacral spine. He recommended a wide anterior discectomy, anterior interbody fusion, at the L5-S1 level.

On September 14, 1998 the Office referred appellant for a second opinion to Dr. Reynold Rimoldi, a Board-certified orthopedic surgeon. In a report dated September 14, 1998, he summarized the findings on various diagnostic studies and described appellant's condition as a cervical sprain and disc degeneration at L5-S1. Dr. Rimoldi noted that the accepted injury in all probability aggravated appellant's preexisting disc degeneration. He "strongly recommend[ed] against" surgery because the MRI scan revealed no acute emergent medical situation and the results of selective nerve root block and discography were "inconsistent". Dr. Rimoldi stated that the L2 selective nerve root block produced 95 percent relief of the lumbar spine and thigh pain, suggesting that the L2-3 was the pain generator. The discogram indicated that the pain generator was at the L5-S1 level, from which Dr. Kabins recommended L5-S1 fusion. Based on these conflicting results, Dr. Rimoldi concluded that surgery was unnecessary.

The Office determined that a conflict in medical evidence existed between Dr. Kabins and the second opinion physician, Dr. Rimoldi and referred the case to a referee physician, Dr. Deborah Henry, a Board-certified neurologist, to resolve the conflict.

Appellant submitted a September 24, 1998 report from Dr. Kazem Fathie, a neurological surgeon, who reviewed appellant's medical records and performed a physical examination. He diagnosed possible facet neuralgia, left L5-S1 and degenerative osteoarthritis. However, Dr. Fathie indicated that he did not "see any indication or reason for surgery." Appellant also submitted two follow-up reports from Dr. Kabin, which documented appellant's continued pain in her back and thigh and recommended fusion surgery.[1]

In a medical report dated November 12, 1998, Dr. Henry reviewed appellant's past x-rays and MRI scan. She noted objective findings of minimal tenderness in both sciatic notches and a negative straight leg raising test. Appellant had fairly good flexion of her spine but limited extension. Dr. Henry diagnosed low back pain and cervical radiculopathy, which was "probably permanent." Given the fact that appellant's x-rays were fairly unremarkable and her physical examination was normal, Dr. Henry concluded that she would take a "conservative edge" and not pursue surgery.

In a decision dated December 8, 1998, the Office determined that the proposed surgery was neither warranted nor advisable for appellant's work-related injury, based on the opinions of Drs. Rimoldi and Henry.

[1] Dr. Kabin also wrote a letter to the independent medical examiner, Dr. Henry, prior to appellant's appointment with Dr. Henry. Dr. Kabin documented appellant's history of injury as well as his continuing care, including his recommendation for fusion surgery at the L5-S1 level.

Appellant, through her attorney, requested a written review of the record and submitted medical reports from Drs. Thomas Dunn, a Board-certified orthopedic surgeon and Benjamin H. Venger, a Board-certified neurologist. Dr. Dunn's report of October 23, 1998 indicated that the major pain generator was at level L5-S1 and recommended surgical intervention. Dr. Venger in his report of December 30, 1998 concurred in Dr. Kabins' diagnosis and determined "that a reconstructive procedure at L5-S1 would be reasonable."[2]

In a decision dated June 24, 1999, the Office hearing representative denied appellant's request for the proposed surgery, based on Dr. Henry's report.

The Board finds that the Office properly denied appellant's request for back surgery.

Section 8103(a) 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 Office 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] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal.

The only limitation on the Office's authority is that of reasonableness. 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 so as to produce a contrary factual conclusion.[5]

In this case, appellant's physician, Dr. Kabins, treated appellant conservatively from May to August 1998, but subsequently concluded that she was unamenable to conservative care and recommended a wide anterior discectomy, anterior interbody fusion at the L5-S1 level. The Office's second opinion physician, Dr. Rimoldi, recommended against surgery, based on the fact that the MRI scan revealed no acute emergent medical situation and the results of selective nerve root blocks and the discography.

The Office properly determined that a conflict existed in the medical evidence and referred appellant to Dr. Henry to resolve the conflict.

[2] Appellant also submitted numerous reports from Dr. Kabin dating from May to December 1998, which reiterated his recommendation for surgery.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8103(a).

[5] *Francis H. Smith,* 46 ECAB 392 (1995); *Daniel J. Perea,* 42 ECAB 214 (1990).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[6]

Dr. Henry concluded that she would not recommend surgery and take a more "conservative edge" to appellant's treatment. Dr. Henry based her opinion on the fact that appellant's x-rays were fairly unremarkable and the pain was limited to her back, therefore, the fusion recommended by Dr. Kabins could be more harmful than beneficial.

The October 23, 1998 report of Dr. Dunn and a November 30, 1998 report from Dr. Venger are not sufficiently rationalized to overcome the special weight accorded to Dr. Henry's report.[7] Neither physician provided any new rationale or findings to justify their recommendations for surgery.

Similarly, Dr. Kabins' additional reports recommending surgery lack supporting medical rationale. Further, Dr. Kabins was on one side of the conflict that Dr. Henry resolved. Thus, Dr. Kabins' opinion is insufficient to overcome the weight accorded Dr. Henry's report as the impartial specialist or to create a new conflict with it.[8]

Under the circumstances of this case, the opinion of Dr. Henry is based on a proper factual background and is sufficiently well rationalized to be entitled to special weight. Therefore, the Board finds that the November 12, 1998 report of Dr. Henry carries the weight of the medical evidence that the proposed spinal surgery was not warranted and that the Office acted within its discretion in denying appellant's request for surgery.

[6] *Aubrey Belnavis*, 37 ECAB 206 (1985); *see also* 5 U.S.C. § 8123(a).

[7] *See Josephine L. Bass*, 43 ECAB 929 (1992).

[8] *Dorothy Sidwell*, 41 ECAB 857 (1990) (a doctor on one side of conflict in medical opinion that is resolved cannot come back and create a new conflict without submitting new rationale or medical evidence to support his opinion).

The June 24, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 4, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member