U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA C. DANIELS and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

Docket No. 01-2275; Submitted on the Record;
Issued August 16, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 5, 2000; (2) whether the Office abused its discretion when it denied appellant's request for back surgery; and (3) whether appellant had any disability after January 5, 2000.

On February 24, 1999 appellant, then a 38-year-old letter carrier, filed a claim for traumatic injury (CA-1) alleging that while delivering mail on February 18, 1999 she slipped while going down a wet embankment and landed on her behind. In progress notes receive dated February 22, 1999, Dr. Kenneth O'Beirne diagnosed lumbar strain and ruled out herniated disc.

The Office accepted appellant's claim for lumbar strain on March 11, 1999. Appellant was released to light duty on March 23, 1999 with restrictions of lifting nothing heavier than a telephone.

In a March 22, 1999 report from Dr. Ira Hardy, a spinal surgeon, it was noted that appellant had a history of back problems. In 1997 his Office performed a lumbar myelogram that revealed some facet degeneration and lateral recess stenosis slightly. X-rays were taken and his impressions were "severe degenerative disc disease at L5-S1, negative for fracture or subluxation. He diagnosed "lumbar disc syndrome with bilateral sciatica, left greater than right. A lumbar myleography was taken and in a July 7, 1999 report Dr. Gregory K. Lewis found:

> "Lumbar sacral spondylosis, predominantly from L3 through S1, as described. There is mild central canal and bilateral recess stenosis at L3-4, perhaps slightly worse than in 1997 but without evidence of the significant perineural impingement. There are two prominent dorsal end plate osteophytes centrally and to the right at L4-5 that mildly deform the ventral thecal sac and may possibly efface the right L5. Correlate clinically."

In a July 19, 1999 report, Dr. Hardy wrote that appellant's "spinal stenosis is significant but I also think that the effacement of the L5 nerve root on the right side is significant enough to warrant operative treatment. Since she has no weakness and only discomfort and numbness, any decision to proceed has to be made on the basis of her discomfort."

Appellant stopped work on January 5, 2000 due to pain and requested authorization for surgery. In a February 2, 2000 letter, the Office indicated it needed more information before it could approve surgery and compensation.

In a February 18, 2000 letter, Dr. Hardy wrote that appellant has "bilateral L3-4 and right L4-5 lateral recess spinal stenosis. This was [a] preexisting condition that was made worse by her injury of February 18, 1999…. She now has pain with associated needles and pins sensations in both lower legs and heels. She probably has superimposed lumbosacral strain…. The lumbar strain has not resolved. The lateral recess stenosis at L3-4 and on the right at L4-5 will require surgical treatment for relief."

In a February 29, 2000 report, the Office medical adviser recommended not authorizing the surgery finding the spinal stenosis and degenerative disc disease were preexisting conditions and only a lumbar strain had been accepted.

By letter dated March 10, 2000, appellant was referred for a second opinion to Dr. Andrew Bush, a Board-certified orthopedic surgeon on the issue of authorization of the surgery.

In an April 8, 2000 report, Dr. Bush opined that appellant's lumbar strain had resolved. According to Dr. Bush, appellant's current subjective complaints of pain were not related to the accepted strain but more likely the result of her preexisting back condition. Dr. Bush opined that the requested spine surgery was not appropriate. He wrote: "there is no indication of any form of conservative treatment having been offered or provided to [appellant]. Also based on the reports … there is [only] mild stenosis. There is no loss of function and only diffuse and 'ill defined' … subjective complaints.…" He recommended as treatment "physical therapy, back school, (sic) work hardening and FCE [functional capacity evaluation] and the consideration of epidural steroid injection."

On July 11, 2000 Dr. Hardy performed the bilateral L3-4 partial laminectomy, facetectomies and foraminotomy, with excision of a fractured left L4 superior facet, right L4-5 partial laminectomies and foramintomy.

In an August 10, 2000 decision, the Office found the weight of the medical evidence with Dr. Bush and the Office medical adviser and denied appellant's request for surgery, denied compensation after January 5, 2000 and terminated appellant's benefits.

In a September 11, 2000 letter, through her representative, appellant requested reconsideration and submitted a report from Dr. Hardy. In his September 11, 2000 report, Dr. Hardy opined:

> "[Appellant's] superior facet fracture was probably caused by her injury. She had an old hard protruded disc at the L4-5 level on the right side impacting the right

> L5 nerve root…. I believe the incident in which she slipped on the wet embankment injuring her back is when the left L4 superior facet fracture occurred. I think her stenosis the L3-4 level was probably made symptomatic, and there was an old hard L4-5 dis[c] protrusion on the right side which adequately explained her right leg pain. This may have preexisted her injury but, in my opinion was certainly made symptomatic by the injury.
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> "Slipping accidents can produce injuries to the back in numerous ways including landing hard after slipping, jerking one's body in an attempt to maintain an upright position and, of course, rotation movements which may or may not fracture facet joints….
>
> "In essence this patient had a right L4-5 old, hard dis[c] protrusion which may have been a preexisting … condition following the injury of February 19, 1999, but if so, in my opinion it was made symptomatic. It could also have been caused by her injury.
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> "If [her lumbar problem] was preexisting there was no evidence of it in July of 1984 when she underwent a left L4-5 partial laminectomy with excision of a protruded disc… There was no evidence of a traumatic episode, [other than the fall on February 18, 1999] that could explain … the fracture … or protruded dis[c]. It remains my opinion that this patient's pain in her back and legs ... produced the injuries for which she was treated surgically."

In an October 10, 2000 note, the Office medical adviser found Dr. Hardy's report neither convincing nor new, but he recommended an impartial medical examiner. In a letter dated October 19, 2000, Dr. Hardy, responding to questions from the Office, wrote that appellant's strain had not resolved because it is "associated with bilateral L3-4 and right L4-5 lateral recess spinal stenosis." He added that "[s]he will continue to have back pain and bilateral leg discomfort as long as her spinal stenosis persists. It has been made increasingly severe by her fall on February 18, 1999 and in my opinion will require bilateral L3-4 and right L4-5 partial laminectomies, facetectomies and foraminotomies." In a clarifying memorandum dated January 8, 2001, the Office medical adviser described the facet fracture found during surgery as an incidental finding and not the cause of any disability, nor requirement for surgery.

In a January 23, 2001 decision, after a merit review, the Office affirmed its denial of appellant's claim finding the medical evidence insufficient and giving the weight of the evidence to Dr. Bush, whom the claims examiner mistakenly described as an impartial medical examiner.

In a May 28, 2001 letter, appellant again requested reconsideration and submitted a March 5, 2001 letter from Dr. Hardy in which he states: "[appellant's] facet fracture in and of itself would not have required surgical treatment but would have produced the chronic pain that she has. [I]t was a contributing factor in the condition that required surgery."

In an August 2, 2001 note, the Office medical adviser wrote that "the finding at surgery of the facet fracture, (illegible words) which was not seen on computerized axial tomography

(CAT) scan is puzzling, but must be accepted. It is true the rest of the surgery for preexisting stenosis is not related to the injury. I think it must be accepted."

A second Office medical adviser was asked to comment on Dr. Hardy's comments and reported in an August 7, 2001 note that authorization for surgery should be denied because it was not related to the accepted condition and there were many preexisting conditions. At the bottom of this report is a handwritten note that says "this supercedes prior inconclusive opinion from Office medical adviser."

In an August 10, 2001 decision, the Office denied modification of its prior decision.

The Board finds the Office properly terminated appellant's benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[2]

In the present the case, the Office relied on the medical opinion of Dr. Dr. Bush, a Board-certified orthopedic surgeon, who provided a well-rationalized report based on a physical examination and a review of appellant's medical history. He concluded that appellant's accepted condition had resolved and that surgery was not indicated.

The reports of Dr. Hardy, appellant's treating physician, are not well rationalized.

In his July 19, 1999 report, Dr. Hardy found that appellant's preexisting spinal stenosis was "significant" but that the effacement of the L5 nerve root on the right side was significant enough to warrant operative treatment. He found no weakness, only discomfort and numbness. He did not explain why the effacement at L5 was the origin of her pain and not the preexisting stenosis.

In his February 18, 2000 report, Dr. Hardy stated that appellant's numerous preexisting conditions were made worse by the work incident, but he does not explain how or why that it is the case. In addition, he wrote that she probably has a superimposed lumbosacral strain though he never explains why he feels the cause of her pain is the February 24, 1999 fall and not the numerous preexisting conditions, including severe degenerative disc disease, spinal stenosis and lumbar sacral spondylosis.

Accordingly, the Office properly terminated appellant's benefits.

The Board further finds the Office did not abuse its discretion in denying appellant's request for surgery.

[1] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[2] *Id.*

Once the Office found that appellant's cervical condition was causally related to his federal employment, appellant became entitled to treatment for his cervical condition under the provisions of the Federal Employees' Compensation Act. Section 8103 of the Act provides, in part:

> "(a) The United States shall furnish to an employee who is injured while in the performance of duty, the service, 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. These service, appliances and supplies shall be furnished ... (3) by or on the order of United States medical officers and hospitals, or, at the employee's option, by or on the order of physicians and hospitals designated or approved by the Secretary."[3]

In interpreting section 8103, the Board has recognized that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under the Act.[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.[5] The only limitation on the Office's authority is that of reasonableness.[6] 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.[7]

In both of her reconsideration requests, appellant submitted additional letters from Dr. Hardy that are essentially repetitive of previous arguments, are rebutted by the Office medical adviser and do not manifest error or clearly unreasonable judgment.

Thus, the Office did not abuse its discretion in denying appellant's request for surgery.

Finally, the Board finds that the Office properly terminated appellant's wage-loss compensation after January 5, 2000.

January 5, 2000 is the day appellant stopped work to undergo surgery. Since the medical evidence does not establish that the surgery was work related, but due to other preexisting conditions, wage loss due to the surgery is not compensable.

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[3] 5 U.S.C. § 8103(a).

[4] *Daniel Wietchy,* 34 ECAB 670 (1983).

[5] *See M. Lou Riesch,* 34 ECAB 1001 (1983).

[6] *Joe F. Williamson,* 36 ECAB 494 (1985).

[7] *See M. Lou Riesch,* 34 ECAB 1001 (1983).

The decisions of the Office of Workers' Compensation Programs dated August 10 and January 23, 2001 and August 10, 2000 are affirmed.

Dated, Washington, DC
August 16, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member