U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALLEN J. THUNEM and U.S. POSTAL SERVICE,
POST OFFICE, Lakewood, CO

Docket No. 03-411; Submitted on the Record;
Issued July 16, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied authorization for appellant's July 23, 2001 surgery.

On December 27, 1996 appellant, then a 41-year-old letter carrier, sustained a low back injury at work while lifting mail into a truck. The Office accepted his claim for a lumbar sprain and lumbar disc displacement. The Office authorized a microdiscectomy on February 20, 1997[1] and a discectomy with fusion on March 20, 1997.[2] Appellant received compensation benefits, including a schedule award for a 19 percent permanent impairment of his right leg.

On June 13, 2000 appellant's orthopedic surgeon, Dr. Eric R. Jamrich, a specialist in spine surgery, reported as follows:

> "[Appellant] returns a year and two months after his last visit. He still has occasional low back and buttock pain. This gets worse with sitting for any length of time and this is bothersome to [him]. It interferes with any activity that requires sitting. It is somewhat worse and waxes and wanes with activity. Again, this is not back pain, but primarily buttock and some leg pain.
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> "To review [appellant's] history, he had a discectomy followed by a BAK procedure with a posterior decompression. He subsequently has had MRIs

[1] Appellant underwent a microdiscectomy L5-S1 with limited laminotomy of L5 inferior lamina on the right and S1 superior lamina on the right. His postoperative diagnosis was right L5-S1 disc herniation.

[2] Appellant underwent an anterior interbody fusion of L5-S1, using a BAK device and left iliac crest bone graft; as well as a posterior right L5-S1 exploration and discectomy. His postoperative diagnosis was recurrent disc at L5-S1. A BAK device is a hollow, threaded cylinder packed with bone graft material that surgeons place between the vertebrae to maintain disc space while allowing the graft material to fuse the vertebrae into a single piece of bone, thereby reducing pressure on the nerves of the spine.

[magnetic resonance imaging scan], which have shown no neurocompressive lesion.

"AP [anterior-posterior] and lateral x-rays were taken today and show what appears to be a solid union through L5-S1 with a BAK.

"[Appellant's] pain seems to be very real and [he] is a very reasonable individual. I [have] suggested that we get a CT [computerized tomography] myelogram and then review this in case conference when it [is] available."

On July 18, 2000 Dr. Jamrich reported that a careful examination of the CT myelogram showed no evidence of a neurocompressive lesion and no evidence of anything that could explain appellant's leg pain from a radicular standpoint. Dr. Jamrich reviewed the films with appellant in detail.

Dr. Jamrich referred appellant to Dr. Khoi D. Pham, a neurologist. On August 10, 2000 Dr. Pham reported no nerve entrapment or neuropathy seen on nerve conduction studies in the right leg and no lumbar radiculopathy seen on an electromyogram (EMG). On October 18, 2000 appellant underwent a successful right lumbar sympathetic nerve block.

On April 24, 2001 Dr. Jamrich reported:

"[Appellant] is here in follow-up. He is having right[-]sided neck pain, right[-]sided arm pain, right[-]sided low back pain and right[-]sided leg pain. In particular his low back and leg pain have been getting worse over the last several months. For the neck and arm pain he has had selective nerve root blocks without any improvement. For the low back pain [appellant] has had numerous epidurals, has been in therapy, has done exercises and is frustrated as this pain is getting worse.

"Neurologically [appellant] has 5/5 strength in dorsiflexors, plantar flexors, evertors, invertors, quads, hamstrings and hip abductors and adductors. Reflexes are symmetrical at the patella tendon, decreased at the right [a]chilles tendon versus the left [a]chilles tendon. Straight leg raise is negative bilaterally.

"I discussed options with [appellant]. At the last CT myelogram he did have some stenosis beginning at the 4-5 level. Since his symptoms are getting worse I [have] suggested that we repeat the MRI [scan] and evaluate him after this."

On May 1, 2001 Dr. Jamrich's office faxed the April 24, 2001 office note to an Office claims examiner with the following message: "Office note on [appellant] requesting authorization for an MRI [scan] of the lumbar spine to be done at Medical Center of Aurora South [OWCP file number]." At the bottom of the facimile the Office claims examiner replied: "Auth[orized] [an] MRI [scan] on May 3, 2001."

Dr. Jamrich obtained an MRI scan on May 8, 2001. On May 22, 2001 he reported:

> "[Appellant] is here in follow-up. He had the MRI [scan,] which shows no significant neurocompressive lesion and wide open foramen at 5-1 with no degenerative changes at 4-5.
>
> "I discussed this with him. The only explanation that I can think of is that he may not have healed [at] the bottom level.
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> "I [have] suggested that we simply do an exploration to see if he [is] solid and if he [is] not, do a fusion of that level."

On June 4, 2001 Dr. Jamrich's office faxed the May 8, 2001 MRI scan and a May 22, 2001 office note to the same Office claims examiner with the following message: "[o]ffice notes on [appellant] requesting authorization for an inpatient exploration of fusion surgery to be done at Medical Center of Aurora South by Dr. Jamrich [OWCP file number]." At the bottom of the facimile the Office claims examiner replied: "Will send to DMA [district medical adviser] for auth[orization]."

On July 23, 2001 appellant underwent a partial laminectomy of L5 with L5 and S1 nerve root explorations on the right and exploration of the fusion. Although appellant's postoperative diagnosis was failed union L5-S1, foraminal stenosis, the operative report stated as follows:

> "Of note, the fusion mass was also tested. Towel clips were placed in the spinous processes of L5 and S1. There was no motion. At that point, the facet joints of L5-S1 were exposed. Another attempt was made to cause motion through this segment. No motion was visible although motion could clearly be caused at the level above. It was, therefore, decided that the L5-S1 segment was fused.
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> "Evoked potential monitoring, SSEP monitoring was used throughout and was unchanged throughout. There was no EMG stimulation during this."

A report of a telephone call dated August 2, 2001 responded to a June 19, 2001 telephone call from Dr. Jamrich's office: "per system and call with [appellant] today, it was auth[orized] ... no addit[iona]l action needed."

After his July 23, 2001 surgery appellant filed claims for wage loss. He called the Office on September 28, 2001:

> "Is calling regarding a surgery, has problems getting previous CE's [claims examiners] to communicate. Has the surgery that was done on July 23, [2001] been authorized? When was the latest surgery authorized. Two weeks ago a request was submitted for surgery. Also has not been paid since July 23, [2001] [Form] CA-7's have been submitted. Needs a call back as soon as possible."

An October 2, 2001 report of a telephone call shows the Office's reply:

> "October 2, 2001 [c]alled back, got his wife. Left message. Case needs on the record review 2nd opinion on medical necessity of the surgery. [Form] CA[-]7s are deferred code 30.
>
> "The surgery appears to be optional.
>
> "Will get 2nd opinion on the issue ASAP [as soon as possible]."

Appellant explained to his congressman what happened:

> "In June 2001 a request was faxed to Lorraine Maes at [the Office] from my [physician] asking for authorization for the latest back surgery. She contacted my [physician] stating that the request had to be submitted for review and authorization by the [physician] at [the Office]. On June 26[, 2001] [Ms.] Maes called from [the Office] to my surgeon's office and gave verbal authorization to perform the surgery. She was asked to also send a written authorization as well. This was never sent from [the Office]. I was called by my [physician's] office and told that the surgery had been approved and was consequently scheduled and performed on July 23, 2001 with the knowledge [that] it had been authorized."

The Office referred the medical record and a statement of accepted facts to Dr. Mark Krautheim, a neurosurgeon, for a consulting opinion on whether the July 23, 2001 surgery was medically justified and necessitated by appellant's employment injury and surgeries performed in 1997.

On November 27, 2001 Dr. Krautheim reviewed appellant's chart and replied to the questions posed:

> "In reviewing the records, in particular looking for diagnostic studies leading up to this surgery, I do not find any evidence from the [MRI] [scans] provided that there was any evidence of nerve root compression. The consulting neurologist did perform an EMG/nerve conduction study in August 2000, which revealed no evidence of lumbar nerve root involvement at the time. From Dr. Jamrich's office notes, I do not see any evidence that lumbosacral flexion/extension films were performed to document any instability to suspect that there was a failed fusion at the involved level.
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> "Therefore, with the records provided to me, I do not see a medical indication for the surgery of July 23, 2001. There may be additional information that I do not have available, but as I said above in reviewing the records that I have, I do not see the medical necessity of the surgery that was performed on July 23, 2001 as it relates to his injury while lifting working for the [employing establishment]."

In a decision dated December 4, 2001, the Office denied appellant's claim for approval of the July 23, 2001 surgery and resulting disability for work. The Office found that appellant's time off work beginning July 23, 2001 was "supported by your treating physician as being

recouperative due to an elective surgery, which you underwent on July 23, 2001. The [O]ffice did not approve this surgery, as the record did not support that it was medically necessary." The Office found that the surgery performed on July 23, 2001 was at appellant's own initiative.

Appellant requested an oral hearing before an Office hearing representative. He submitted, among other things, a December 27, 2001 report from Dr. Jamrich, who reviewed the Office's December 4, 2001 decision and Dr. Krautheim's assessment:

> "[Appellant] underwent an exploration due to the fact that he had persistent pain. As [Dr.] Krautheim may know, there have been numerous studies looking at BAKs and attempting to determine whether or not a solid fusion is present. These numerous studies have reported that there is no absolute way of being sure whether or not there is a solid fusion other than exploration. Given [appellant's] persistent pain, this was the appropriate surgery to do.
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> "I recommend that you have this reviewed by an orthopedic surgeon who understands the concept of fusion in the lumbar spine and is also aware of the literature on the difficulty of determining whether or not there is a pseud-arthrosis in the lumbar spine.
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> "In addition, our office did receive verbal authorization for this surgery from [Ms.] Maez in your office. This was documented in our chart by an employee in our office on June 26, 2001. We have a record of the date and the individual who gave approval for the surgery.
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> "I believe it is extremely inappropriate for your office to now subsequently deny approval after verbal approval had been given.
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> "I have directed [appellant] to discuss this with his attorneys and we will provide them with any and all information they need to pursue this matter."

In a statement dated January 3, 2002, Mandi Fitzjohn, an employee at Dr. Jamrich's office, wrote as follows:

> "In June 2001 the office notes and a request for authorization of a posterior spine fusion L5 to S1 were faxed to [Ms.] Maez at the [Office]. On June 26, 2001 [she] called and verbally authorized the surgery. At that time I requested a written confirmation of the authorization. This written confirmation was never received, but as we had a verbal authorization to go ahead with the surgery it was scheduled and performed."

Appellant submitted a June 26, 2001 medical note stating "[p]er [Ms. Maez] [surgery] is authorized. Asked her to fax written auth[orization]." Appellant submitted a Treasury-Financial Service TSF Form 3090 showing that the Office paid Dr. Jamrich's clinic for the July 23, 2001 surgery. Billing records from Dr. Jamrich's clinic showed that "all charges for surgery July 23, 2002 have been paid by the Office]."

In a decision dated September 4, 2002, the hearing representative affirmed the Office's December 4, 2001 decision. The hearing representative found that the weight of the medical evidence rested with Dr. Krautheim's report and established that the July 23, 2001 surgery and resultant disability were not due to the accepted work injury.

The Board finds that this case is not in posture for decision. There is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

On November 27, 2001 Dr. Krautheim, the Office's consulting neurosurgeon, reported that he saw no medical necessity for the surgery that was performed on July 23, 2001 as it related to appellant's employment injury. In reviewing the records, he found no evidence from the MRI scans provided that there was any evidence of nerve root compression. An EMG/nerve conduction study in August 2000 revealed no evidence of lumbar nerve root involvement. He saw no evidence that lumbosacral flexion/extension films were performed to document any instability or to support that there was a failed fusion at the involved level.

Dr. Jamrich, appellant's attending specialist in spine surgery, disagreed. He felt that an exploration was appropriate to determine whether the fusion at L5-S1 was solid. Despite his previous spinal fusion surgery, appellant had continued right leg pain and L5 radiculopathy. Post-surgical radiological studies showed what appeared to be a solid union of L5-S1 with no neurocompressive lesion and no evidence of anything that could explain appellant's leg pain from a radicular standpoint. Appellant's symptoms were becoming worse, but an MRI scan showed no significant neurocompressive lesion and a wide open foramen at L5-S1 with no degenerative changes at L4-5. Dr. Jamrich concluded as follows: "The only explanation that I can think of is that he may not have healed the bottom level. I [have] suggested that we simply do an exploration to see if [appellant] [is] solid and if he [is] not, do a fusion of that level." The operative report of July 23, 2001 related the following as an indication for surgery: "It could not be determined whether or not the fusion was solid. Therefore, it was decided to explore the fusion area and also perform a forminotomy."

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is 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."[3]

Office procedures provide that when authorization for certain types of elective surgery is requested the claims examiner must obtain a second medical opinion concerning the need for the procedure.[4] This includes requests for surgical procedures involving spinal surgery in which

[3] 5 U.S.C. § 8123(a).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810.10.c (April 1993).

case, the claims examiner is to obtain medical documentation and refer the medical file to an Office consultant to evaluate the request for surgery.[5] The procedure manual further provides:

> "Where the claimant fails to request prior authorization for surgery, the CE [claims examiner] will instruct the claimant to submit the minimum documentation (described in paragraph 10b above) from the attending doctor, as well as a copy of the operative report. The CE will then refer the case file to the medical unit, which will arrange for evaluation of the written record by an Office consultant. Should the consultant conclude that surgery was unnecessary, a referee examination of the case file only will be arranged. (A second opinion examination should not be requested under these circumstances since "hands on" evaluation after the surgery was performed would have limited value).
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> "Based on the results of this evaluation, the cost of surgery will be reimbursed or a compensation order will be issued denying payment for the surgery. Any such compensation order should address only the surgical bills, however, including hospitalization expenses, anesthesiologist's fees, etc. Payment of compensation for disability will not be affected by the decision to deny payment for surgery and continuing medical care after discharge from the hospital should be authorized just as it would have been if surgery had not been at issue."[6]

To resolve the conflict in opinion between appellant's physician and the Office consultant, the Office shall refer the case file and a statement of accepted facts to an impartial medical specialist for an opinion on whether the July 23, 2001 surgical exploration was medically necessary.[7]

After such further development of the evidence as may be necessary, the Office shall issue a final decision on whether the July 23, 2001 surgery should be authorized.

[5] *Id.* at Chapter 2.0810.10.d (April 1993).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810.10.f (April 1993). "Even if payment for surgery is denied, compensation for disability resulting from the surgery is payable in cases where the claimant was disabled for work during the period immediately prior to the surgery. Such payment may be made regardless of any indications that the period of disability would have been shorter without surgery. Additionally, continuing medical care after discharge from the hospital should be authorized just as it would have been if surgery had not been at issue." *Id*., Chapter 2.0810.10.e(4).

[7] *Id*., Chapter 2.0810.10.d.

The September 4, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
July 16, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member