United States Department of Labor
Employees' Compensation Appeals Board

JOHN E. BABBAGE, Appellant	)	
and	)	**Docket No. 05-1069**
	)	**Issued: August 5, 2005**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Fulton, CA, Employer	)	

Appearances:
John E. Babbage, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 12, 2005 appellant filed a timely appeal of the March 21, 2005 merit decision of the Office of Workers' Compensation Programs, which denied medical authorization for a cervical discectomy and fusion. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied medical authorization for a discectomy and fusion at C5-6 and C6-7.

FACTUAL HISTORY

Appellant, a 66-year-old former food inspector (slaughter), has an accepted occupational disease claim for right lateral epicondylitis arising on or about June 1, 2000. He stopped work January 8, 2001. The Office authorized an April 2, 2001 surgical repair of the right lateral elbow tendon. Appellant was released to return to limited duty effective April 10, 2001, however, the

employing establishment could not accommodate his work restrictions. The Office, therefore, paid him wage-loss compensation for temporary total disability.

On October 25, 2002 appellant underwent right shoulder subacromial decompression with acromioplasty. His orthopedic surgeon, Dr. Fred S. Bennett, provided a postoperative diagnosis of right shoulder subacromial impingement. After further development of the record, including a December 17, 2003 referral to an impartial medical examiner, the Office, on March 8, 2004 expanded the claim to include right shoulder impingement syndrome, cervical strain and aggravation of cervical degenerative disease.

In April 2004, Dr. Bennett diagnosed mild bilateral cubital and carpal tunnel syndrome. At the time, appellant's carpal tunnel syndrome was asymptomatic and did not require treatment. However, he noted that he might require transposition of the right ulnar nerve if conservative management proved unsuccessful in resolving appellant's symptoms. A month later, Dr. Bennett recommended right ulnar nerve transposition and right carpal tunnel release. He performed both surgical procedures on June 25, 2004. While the Office authorized the ulnar nerve transposition as employment related, it initially declined medical authorization for the right carpal tunnel release. In response to the denial of authorization, Dr. Bennett advised the Office that appellant's right carpal tunnel syndrome was, in fact, employment related and he reiterated his request for medical authorization. The Office medical adviser reviewed the record and concurred with Dr. Bennett's opinion. Accordingly, the Office expanded the claim to include right carpal tunnel syndrome and it retroactively authorized appellant's June 25, 2004 right carpal tunnel release.

While Dr. Bennett was familiar with appellant's cervical condition, he was not the treating physician with respect to those particular medical issues. Dr. Eldan B. Eichbaum, a neurosurgeon, provided medical services relevant to appellant's cervical condition and on December 30, 2004 the Office requested that he provide a medical update.[1]

A January 10, 2005 cervical magnetic resonance imaging (MRI) scan revealed normal discs from C1-2 through C4-5 and at C7-T1. At C5-6 there were mild degenerative disc changes and very mild broad-based bulging, without evidence of significant neural compromise. The C6-7 disc revealed a slightly greater degree of degenerative disc changes, without evidence of significant disc bulge or evidence of neural compromise.

In a report dated January 11, 2005, Dr. Eichbaum reviewed the results of the January 10, 2005 cervical MRI scan and noted severe neck pain with right, greater than left, upper extremity pain and probable C6 and C7 radiculopathy. He also noted C5-6 and C6-7 severe disc degeneration with bilateral foraminal stenosis. Dr. Eichbaum indicated that appellant's persistent, significant neck pain and upper extremity pain and numbness had been present for over four years without improvement. His symptoms were consistent with cervical spondylosis and cervical radiculopathy. Dr. Eichbaum recommended a discectomy and fusion at C5-6 and C6-7. He requested authorization for surgery on January 26, 2005.

[1] Dr. Eichbaum first examined appellant on February 14, 2003.

The Office referred the request to its medical adviser, who in a report dated March 5, 2005, indicated that appellant was not a candidate for surgery at this time.[2] H explained that the recent cervical MRI scan revealed mild degenerative changes at C5-6 and C6-7 and a mild disc bulge at C5-6 without significant foraminal or canal stenosis. The medical adviser also noted that Dr. Eichbaum's examination did not reveal any obvious objective findings of radiculopathy in the upper extremities. According to the Office medical adviser, the only noted neurological deficit was a diminished sensation in the right ulnar nerve distribution, which was a residual of the prior right ulnar nerve surgery and unrelated to appellant's current cervical problems. He recommended that before proceeding with surgery appellant obtain a discography to document whether or not he has a pain generator at either C5-6 or C6-7.

In a decision dated March 21, 2005, the Office denied authorization of the requested discectomy and fusion at C5-6 and C6-7. The Office found that the weight of the medical evidence did not establish that the proposed surgery was medically necessary.

LEGAL PRECEDENT

An employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which the Office considers necessary to treat a work-related injury.[3] While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[4] To be entitled to reimbursement of medical expenses by the Office, appellant must establish a causal relationship between the expenditure and the treatment by submitting rationalized medical evidence supporting such a connection and demonstrating that the treatment is necessary and reasonable.[5]

ANALYSIS

The Board finds that the case is not in posture for decision. The Office concluded based on its medical adviser's March 5, 2005 opinion, that the evidence did not establish that the recommended treatment was "medically necessary" for appellant's accepted work injury. In finding that he was not a candidate for surgery at this time, the Office medical adviser "strongly recommended that before proceeding with surgery, [appellant should] have [a] discography to document that he does have pain generating at either C5-6 or C6-7." Thus, while the Office medical adviser questioned whether the current examination findings and objective studies justified surgical intervention, he indicated that a discography would possibly clarify the need for surgery. The Office, however, did not authorize a discography as recommended, but instead proceeded to deny authorization for the proposed discectomy and fusion at C5-6 and C6-7.

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[2] The Office medical adviser indicated that appellant's current problem with symptomatic degenerative disc disease at C5-6 and C6-7 was causally related to his work activities.

[3] 5 U.S.C. § 8103(a); 20 C.F.R. § 10.310(a) (1999); *see Lisa DeLindsay*, 51 ECAB 634, 635 (2000).

[4] *Dale E Jones*, 48 ECAB 648, 649 (1997).

[5] *Cathy B. Millin*, 51 ECAB 331, 333 (2000); *Id*.

The Office medical adviser raised valid concerns about the adequacy of the underlying documentation Dr. Eichbaum relied on to justify surgical intervention. However, the medical adviser also acknowledged that appellant's cervical condition was currently symptomatic and required ongoing medical care. He referenced "conservative measures," but did not otherwise identify specific alternative treatment modalities for appellant's ongoing employment-related cervical condition.[6] The medical adviser's only specific recommendation was obtaining a discography to verify whether there was a pain generating at either C5-6 or C6-7. The Office chose to follow its medical adviser's recommendation regarding the proposed surgery, but inexplicably disregarded his recommendation to obtain a discography.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7] The question of whether the proposed cervical discectomy and fusion is necessary and reasonable cannot properly be determined based on the current status of the record. The Office medical adviser strongly recommended obtaining a discography and, therefore, the Board finds that the case record requires further development by the Office.[8]

On remand the Office should refer appellant, the case record and a statement of accepted facts to an appropriate specialist for an evaluation and a rationalized medical opinion regarding the need for a discectomy and fusion at C5-6 and C6-7. The evaluation should also include discography as recommended by the Office medical adviser. After such further development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

CONCLUSION

The Board finds that the case is not in posture for decision.

[6] Dr. Eichbaum noted that appellant failed all nonoperative treatment modalities and was not interested in pursuing any type of procedure except for surgical decompression and fusion. Additionally, Dr. Eichbaum acknowledged that appellant had not tried an epidural injection, but noted that he had no interest in receiving an epidural injection.

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *See John J. Carlone*, 41, ECAB 354 (1989); *Horces Langhorne*, 29 ECAB 820 (1978).

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: August 5, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board