United States Department of Labor
Employees' Compensation Appeals Board

CARL KATZMAREK, Appellant	)	
and	)	
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, APACHE-SITGREAVES NATIONAL FOREST, Springerville, AZ, Employer	)	**Docket No. 04-2172** **Issued: February 16, 2005**

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 7, 2004 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated April 27 and May 12, 2004, which denied authorization for lumbar spine decompressive surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUE

The issue is whether the Office properly denied authorization for lumbar spine surgery.

FACTUAL HISTORY

On September 14, 2001 appellant, then a 59-year-old forest electrician, filed a Form CA-1, traumatic injury claim, alleging that on September 1, 2001 he injured his lower back when he was severely jolted while riding in an employing establishment vehicle. He returned to work on September 13, 2001, stopped on October 17, 2001 and has not returned. A computerized

tomography (CT) scan myelogram done on November 8, 2001 was read by Dr. Edgar T. Clark, Board-certified in radiology and nuclear medicine, as demonstrating moderate L4-5 central canal stenosis. On November 8, 2001 the Office accepted that appellant sustained aggravation of low back strain and he received appropriate compensation.

On January 31, 2002 appellant filed a recurrence claim, alleging that on January 27, 2002 he fell on the stairs at his brother's home when his legs gave out. He came under the care of Dr. Nathan C. Avery, a neurosurgeon, who in a March 14, 2002 report, noted a negative straight-leg raising test and the CT scan findings. He recommended against any type of surgical intervention.

The Office continued to develop the claim and referred appellant, along with a set of questions, a statement of accepted facts and the medical record, to Dr. N.R. Chandragiri, Board-certified in neurology. In an April 9, 2002 report, Dr. Chandragiri advised that appellant had no residuals of the September 1, 2001 employment injury. An electromyographic study dated April 10, 2002, was interpreted by Dr. John Ledington, a Board-certified physiatrist, as showing chronic neuropathic motor unit potentials in the distal lower extremities.

By decision dated April 23, 2002, the Office denied that appellant sustained a recurrence of disability and in a notice dated June 28, 2002, the Office proposed to terminate appellant's compensation on the grounds that he had no continuing residuals. The termination was finalized in a decision dated August 2, 2002. On April 15, 2003 appellant, through his attorney, requested reconsideration and submitted additional medical evidence including reports dated October 7, 2002 and February 18, 2003, in which Dr. Claude D. Gelinas, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease at L4-5 and L5-S1 with severe spinal stenosis at L4-5. He recommended surgery.

The Office determined that a conflict in medical evidence had been created between the opinions of Drs. Chandragiri and Gelinas and referred appellant, along with an amended statement of accepted facts, a set of questions and the medical record, to Dr. E. Kenneth Mladinich, a Board-certified neurologist, for an impartial evaluation. In a report dated July 15, 2003, Dr. Mladinich noted the CT scan findings, a history of cervical fusion surgery in April 2003 and appellant's subjective complaints of pain. Physical examination findings included a positive straight-leg raising test with moderate weakness of hip flexors, quadriceps and anterior tibialis muscles. The physician diagnosed severe lumbar stenosis and lumbar radiculopathy aggravated by the September 10, 2001 employment injury and opined that the fall on January 27, 2002 was caused by weakness and pain due to the radiculopathy. He advised that appellant should not work due to pain, weakness and dependence on medication and recommended lumbar spine surgery. In an attached work capacity evaluation, Dr. Mladinich advised that appellant could not work unless he had surgery.

In a decision dated August 21, 2003, the Office vacated the prior decision and upgraded appellant's accepted condition to include severe lumbar stenosis and lumbar radiculopathy aggravated by the September 10, 2001 employment injury. Appellant was returned to the periodic roll.

Appellant thereafter came under the care of Dr. Andrew K. Metzger, Board-certified in neurosurgery. In a September 8, 2003 report, the physician noted the history of cervical fusion surgery and lumbar spine CT scan findings. He advised that appellant had full lower extremity strength on examination and recommended spinal decompressive surgery at L4-5 "given the prominence of mechanical back pain" and recommended an updated CT scan myelogram to reassess appellant's lumbar spine condition.

A postmyelogram CT scan of the lumbar spine dated October 3, 2003, was read by Dr. Richard S. Nenoff, Board-certified in diagnostic radiology, as demonstrating multilevel degenerative disc disease with some far left lateral disc protrusion extending into the left neural foramen that could impinge on the left L4 nerve and moderate central stenosis at L4-5 related to degenerative changes and no significant central stenosis elsewhere as well as right and left L5-S1 foraminal stenosis and left L2-3 foraminal stenosis related to degenerative changes.

By report dated October 14, 2003, Dr. Metzger advised that the CT scan demonstrated disc degeneration at L4-5 and L5-S1 with moderate to severe stenosis due to bilateral facet hypertrophy with mild disc degeneration noted at L2-3. He opined that, given the persistence of symptoms and failure of medical treatment, it was reasonable to consider surgery, with the most conservative approach decompression at L4-5 alone. He further opined that, as appellant described 90 percent of his pain as low back rather than leg pain and with the degree of prominent disc degeneration at L4-5 and L5-S1, consideration should be given to decompression from L4 to S1.

The Office referred the medical record to an Office medical adviser for an opinion regarding the need for surgery. In a report dated December 11, 2003, the Office medical adviser noted that there had been an adequate trial of conservative treatment and that the necessity for the recommended procedure was related to the accepted injury but that the record did not support that the performance of the recommended procedure as there was no supporting diagnostic information that established that the intervertebral discs were pain generators. He recommended a second opinion evaluation.

On January 28, 2004 the Office referred appellant along with the statement of accepted facts, a set of questions and the medical record, to Dr. William K. Jones, a Board-certified orthopedist, for a second opinion evaluation. In a report dated February 12, 2004, Dr. Jones noted his review of the medical record including Dr. Metzger's findings and recommendation for surgery. Dr. Jones provided a history that appellant was taking high doses of pain medication and stated that physical examination revealed appellant to be in "continuous misery." He found straight-leg raising normal in the seated position and found no reliable evidence of significant motor or sensory deficits in appellant's lower extremities. X-rays that day demonstrated narrowing of the L2-3 and L5-S1 disc spaces.[1] The physician stated that he was aware of appellant's "MRI [magnetic resonance imaging]" scan findings[2] opining "I am also aware that these findings could be considered as not reliably contributory or as having a causal relationship

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[1] The x-ray was of poor quality due to evidence of barium from a previous study.

[2] Dr. Jones refers to "MRI" scan findings. The record before the Board does not contain an MRI scan study and it is assumed that Dr. Jones is referring to the CT scan findings.

to [appellant's] subjective complaints. I say this especially in view of the negative neurological testing of straight[-]leg raising and reflexes and sensory findings." Dr. Jones concluded that appellant would be a poor candidate for surgery, "most importantly," because he felt that appellant was dependent on oxycodone medication. He "strongly" recommended that appellant undergo a functional capacity evaluation and recommended pain management consultation.

By decision dated April 27, 2004, the Office denied authorization for surgery. The Office found that the weight of the medical evidence rested with the opinion of Dr. Jones. On April 30, 2004 appellant's attorney requested reconsideration, arguing that a conflict in medical evidence existed between the opinions of Drs. Metzger and Jones. In a May 12, 2004 decision, the Office denied modification of the prior decision, again finding that the weight of the medical evidence rested with the opinion of Dr. Jones.

LEGAL PRECEDENT

Section 8103 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] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.[5] 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.[6] 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.[7]

Proof of causal relationship must include supporting rationalized medical evidence. In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[8]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[5] *James R. Bell*, 52 ECAB 414 (2001).

[6] *Claudia L. Yantis*, 48 ECAB 495 (1997).

[7] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[8] *Id.*

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9]

ANALYSIS

The Office accepted that appellant sustained severe lumbar stenosis and lumbar radiculopathy aggravated by a September 10, 2001 employment injury. The Board finds that a conflict in medical opinion has been created regarding whether the Office properly denied authorization for lumbar spine surgery.[10]

In 2003 appellant came under the care of Dr. Metzger, a Board-certified neurosurgeon, who noted CT scan findings of degenerative disc disease at L4-5 and L5-S1 with moderate to severe stenosis. He recommended surgery based on the persistence of appellant's mechanical back pain, the degree of disc degeneration and the failure of medical treatment. Dr. William K. Jones, Board-certified in orthopedic surgery, provided a second opinion evaluation in which he advised that appellant was not a good candidate for surgery "most importantly" due to appellant's dependency on oxycodone medication but also because he had negative physical findings. He further opined that he was not sure that the objective findings contributed to appellant's complaints.

The Board further notes that, in February 2003, Dr. Gelinas, an attending Board-certified orthopedic surgeon, recommended surgery for appellant's degenerative disc disease and Dr. Mladinich, who provided an impartial evaluation regarding appellant's continued disability,[11] advised in a July 15, 2003 report that appellant needed surgery. Lastly, in a report dated December 11, 2003, an Office medical adviser stated that appellant had an adequate trial of conservative treatment and that the recommended surgery was for the employment-related condition.

Due to the difference of opinion between appellant's attending neurosurgeon, Dr. Metzger and the Office referral physician, Dr. Jones, the Board finds that there is a conflict of medical opinion regarding the necessity for surgery to cure, give relief or reduce the degree of or period of disability.[12] Therefore, on remand the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical evaluation regarding whether the recommended surgery is suitable in this case. After such further development as the Office deems necessary, the Office shall issue an appropriate decision.

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[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[10] *Id.*

[11] The Office did not ask Dr. Mladinich for an opinion regarding the need for surgery.

[12] *Supra* note 4.

CONCLUSION

The Board therefore finds that a conflict in medical evidence exists regarding whether the Office properly denied authorization for the recommended surgical procedure.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 12 and April 27, 2004 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: February 16, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member