

United States Department of Labor  
Employees' Compensation Appeals Board

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**M.B., Appellant**

**and**

**DEPARTMENT OF DEFENSE, OVERSEAS  
DEPENDENTS EDUCATION, Quantico, VA,  
Employer**

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**Docket No. 07-413  
Issued: July 5, 2007**

*Appearances:*

*Stephen Scavuzzo, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 5, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 12 and September 14, 2006 merit decisions denying his request for authorization of lower back surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly denied appellant's request for authorization of lower back surgery.

**FACTUAL HISTORY**

On May 12, 2004 appellant, then a 57-year-old maintenance supervisor, filed a traumatic injury claim alleging that he injured his back and left leg on May 3, 2004 when he picked up a

portion of a stage. The Office accepted that appellant sustained a lower left leg strain, lower back strain and herniated disc at L5-S1 and paid compensation for periods of disability.<sup>1</sup>

Appellant received periodic treatment for his medical condition from Robert G. Squillante, an attending Board-certified orthopedic surgeon. The findings of June 1, 2004 magnetic resonance imaging (MRI) scan testing showed a small central herniated nucleus pulposus at L5-S1 which abutted but did not significantly displace the S1 nerve root. Some hypertrophic facet changes were seen, but no severe central canal stenosis was observed.<sup>2</sup>

In an October 4, 2004 report, Dr. Squillante noted that appellant reported that he continued to have significant lumbar and right lower extremity pain on the right five months after his May 3, 2004 employment injury. He discussed the merits of a lumbar decompression versus decompression and fusion and noted that a fusion might be considered if instability was noted during the decompression surgery. Dr. Squillante reviewed the risks, benefits, alternatives and postoperative course of lumbar surgery with appellant. In another October 4, 2004 report, Dr. Squillante indicated that appellant had a disc herniation at L5-S1 and recommended lumbar surgery due to the May 3, 2004 employment injury. In late October 2004, appellant requested authorization for the surgery recommended by Dr. Squillante.

In February 2005, the Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for evaluation of his need for surgery. On February 18, 2005 Dr. Smith indicated that examination of appellant's back revealed no spasms, atrophy or trigger points, that neurological examination of the lower extremities was normal and that straight leg raising testing did not reveal any radiculopathy. He noted that MRI scan findings from October 2, 2003 and June 1, 2004 were similar and determined that appellant had no referable pathology at the L4-5 level due to the May 3, 2004 employment injury. Dr. Smith stated that appellant's employment-related injuries had resolved and concluded that surgery at the L5-S1 level was not medically necessary or necessitated by the May 3, 2004 employment injury.

In a March 2, 2005 decision, the Office denied appellant's request for authorization of lower back surgery. The Office indicated that it had based its decision to deny such authorization on the opinion of Dr. Smith.

In mid March 2005, the employing establishment offered appellant a light-duty job as a maintenance supervisor with accommodations. On April 15, 2005 appellant underwent an L5-S1 laminectomy and L4 to S1 fusion which was paid for by his primary insurance carrier.

In a July 22, 2005 decision, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. In a decision dated and finalized August 29, 2005, an Office hearing representative reversed the termination of appellant's compensation finding that the Office had not presented sufficient medical evidence to show that the offered

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<sup>1</sup> Appellant underwent a discectomy at L4-5 in 1998 and an L4-5 fusion in 2002 following a recurrent herniation at L4-5.

<sup>2</sup> Preinjury MRI scan testing obtained on October 2, 2003 showed a mild broad-based disc bulge at L5-S1 which entered the inferior neural foramina bilaterally.

position was suitable. The Office hearing representative also set aside the Office's March 2, 2005 denial of authorization for surgery finding that there was a conflict in the medical opinion between Dr. Squillante and Dr. Smith regarding whether appellant required surgery due to his employment injury. In order to resolve the conflict, she directed the Office to refer appellant to an impartial medical specialist for a medical examination and an opinion regarding his need for surgery.

The Office referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Wylie Lowery, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. On December 6, 2005 Dr. Lowery provided a description of appellant's factual and medical history, including the results of diagnostic testing obtained before and after his May 3, 2004 employment injury and his medical treatment since May 3, 2004. He indicated that there was no significant change in appellant's lower back condition between his October 2, 2003 and June 1, 2004 MRI scan testing and that neither test showed significant displacement of the S1 nerve root. Dr. Lowery stated that on examination of the lower extremities appellant exhibited no strength deficits or significant muscle spasms and that sensation was intact to light touch in the L4, L5 and S1 nerve root distributions. He concluded that appellant did not have any active residuals of the May 3, 2004 employment injury and stated, "Since there is no objective material change in [appellant's] preexisting condition prior to the work incident of May 3, 2004, I cannot conclude that the surgery of April 15, 2005 was necessitated by the May 3, 2004 work incident."

In a January 12, 2006 decision, the Office denied appellant's request for authorization of the lower back surgery which was performed on April 15, 2005. The Office indicated that it had based its determination to deny such authorization on the opinion of Dr. Lowery. It found that his opinion was sufficiently well rationalized to constitute the weight of the medical evidence regarding this matter.

Appellant continued to submit treatment notes of Dr. Squillante and other attending physicians, but none of these notes contained an opinion that his April 15, 2005 surgery was necessitated by his May 3, 2004 employment injury.

Appellant requested a review of the written record by an Office hearing representative. In a July 19, 2006 statement, his attorney argued that, because Dr. Squillante observed appellant's condition prior to the April 15, 2005 surgery, he was in a better position than Dr. Lowery to evaluate his need for surgery. In a decision dated and finalized September 14, 2006, the Office hearing representative affirmed the January 12, 2006 decision.<sup>3</sup>

### **LEGAL PRECEDENT**

Section 8103(a) of the Act states in pertinent part: "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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the

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<sup>3</sup> Appellant submitted additional evidence after the Office's September 14, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

amount of the monthly compensation.”<sup>4</sup> In order to be entitled to reimbursement of medical expenses, appellant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.<sup>5</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>6</sup>

Section 8123(a) of the Act provides in pertinent 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.”<sup>7</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>8</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

### ANALYSIS

The Office accepted that appellant sustained a lower left leg strain, lower back strain and herniated disc at L5-S1 on May 3, 2004. In late October 2004, appellant requested authorization for surgery at L5-S1 recommended by Dr. Squillante, an attending Board-certified orthopedic surgeon. The Office denied appellant’s request for authorization. However, on April 15, 2005 he underwent an L5-S1 laminectomy and L4 to S1 fusion which was paid for by his primary insurance carrier. Appellant continued to request authorization for the April 15, 2005 surgery.

The Board finds that the Office properly determined that there was a conflict in the medical opinion between Dr. Squillante and Dr. Smith, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding whether appellant needed lower back surgery due to his May 3, 2004 employment injury.<sup>10</sup> In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lowery, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 8103.

<sup>5</sup> *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

<sup>6</sup> *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

<sup>9</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>10</sup> In October 4, 2004 reports, Dr. Squillante posited that appellant’s May 3, 2004 employment injury required him to undergo decompression and possibly fusion surgery at L5-S1. In contrast, Dr. Smith found on February 18, 2005 that appellant did not have any notable residuals of his May 3, 2004 employment injury and indicated that the lower back surgery recommended by Dr. Squillante was not necessitated by the May 3, 2004 employment injury.

<sup>11</sup> See *supra* notes 7 and 8 and accompanying text.

The Board finds that the weight of the medical evidence with respect to the necessity of appellant's lower back surgery is represented by the thorough, well-rationalized opinion of Dr. Lowery.<sup>12</sup> The December 6, 2005 report of Dr. Lowery establishes that appellant's April 15, 2005 surgery was not necessitated by his May 3, 2004 employment injury.

On December 6, 2005 Dr. Lowery provided a description of appellant's factual and medical history, including the results of diagnostic testing obtained before and after his May 3, 2004 employment injury and his medical treatment since May 3, 2004. He stated that on examination of the lower extremities appellant exhibited no strength deficits or significant muscle spasms and that sensation was intact to light touch in the L4, L5 and S1 nerve root distributions. Dr. Lowery concluded that appellant did not have any active residuals of the May 3, 2004 employment injury and stated, "Since there is no objective material change in [appellant's] preexisting condition prior to the work incident of May 3, 2004, I cannot conclude that the surgery of April 15, 2005 was necessitated by the May 3, 2004 work incident."

The Board has carefully reviewed the opinion of Dr. Lowery and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>13</sup> Dr. Lowery provided medical rationale for his opinion that appellant did not require lower back surgery due to his May 3, 2004 employment injury by explaining that there was no significant change in his lower back condition between his preinjury October 2, 2003 MRI scan testing and his postinjury June 1, 2004 MRI scan testing. He also noted that neither test showed significant displacement of the S1 nerve root. Dr. Lowery further explained the lack of necessity for lower back surgery by indicating that appellant did not exhibit any objective residuals of his May 3, 2004 employment injury.<sup>14</sup>

### **CONCLUSION**

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

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<sup>12</sup> See *supra* note 9 and accompanying text.

<sup>13</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>14</sup> Appellant's attorney argued that, because Dr. Squillante observed appellant's condition prior to the April 15, 2005 surgery, he was in a better position than Dr. Lowery to evaluate his need for surgery. However, Dr. Lowery reviewed all of appellant's medical records, including those from before the time of his April 15, 2005 surgery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 14 and January 12, 2006 decisions are affirmed.

Issued: July 5, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board