United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 07-353**
	)	**Issued: June 7, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Southbury, CT, Employer	)	

Appearances:
Katherine Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2006 appellant filed a timely appeal from a November 18, 2005 merit decision of the Office of Workers' Compensation Programs that denied her request for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision.

ISSUE

The issue is whether the Office properly refused to authorize appellant's request for surgery.

FACTUAL HISTORY

On September 21, 1999 appellant, then a 41-year-old rural mail carrier, sustained injury to her left back and hip area when she tripped and fell over a pile of mail. She stopped work on September 22, 1999, briefly returned to work and stopped again on November 3, 1999. The Office accepted appellant's claim for left hip contusion and a lumbar disc herniation and paid appropriate benefits.

Appellant initially sought treatment from Dr. Christopher J. Cassels, a Board-certified orthopedic surgeon, who diagnosed contusion to the lateral aspect left hip and possible articular injury. Dr. Cassels referred appellant to Dr. David S. Kloth, a Board-certified anesthesiologist with a subspecialty certification in pain management. In a March 31, 2000 report, Dr. Kloth stated that appellant would be a good candidate for an intradiscal treatment. He noted that a February 2, 2000 discogram revealed mild herniation and an annular tear at L4-5. Dr. Kloth concluded: "Clearly, her symptoms are related to the degenerative disc disease at L4-5 and this annular tear. The herniation, although present and perhaps encroaching upon the left L4 root, is not particularly sizeable and, therefore, if surgery could be avoided, it would probably be in her best interest." Appellant underwent intradiscal electrothermal therapy (IDET) treatment at the L4-5 level on June 2, 2000. In an August 2, 2000 report following the IDET procedure, Dr. Kloth indicated that appellant continued to have symptoms. He recommended trigger point injections.

Appellant reported no relief or improvement in symptoms following the IDET procedure. In a September 6, 2000 report, Dr. Cassels recommended that she consider "surgical intervention in the form of a lumbar fusion." He referred appellant to Dr. F. Scott Gray, a Board-certified orthopedic surgeon.

Dr. Gray examined appellant on September 27, 2000. He noted that diagnostic testing revealed "degenerative L4-5 disc with annular leaking and bulging to the left side." Dr. Gray indicated that appellant's disc bulge is "still not significant and although it may butt up against the L5 nerve root, it does n[o]t appear remarkable enough to require surgery in my opinion just yet." He recommended epidural treatment. Dr. Gray also noted that appellant's "surgical option would include a far lateral discectomy and/or a discectomy and fusion." Dr. Kloth performed a second epidural injection. In a November 14, 2000 follow-up report, he indicated that appellant had not experienced significant relief from the epidural injection and accordingly he was "not convinced that the current residual symptoms are related to this disc herniation."

In a November 15, 2000 report, Dr. Gray recommended that appellant continue to undergo conservative treatment. He indicated that appellant's situation did not require surgery, as she had "no new disc herniation, has scar tissue around the left S1 nerve root and has some very mild annular bulging at L4-5 all of which I do n[o]t believe are minimal to surgical treatment." Dr. Gray concluded that, if appellant considered surgery in the future, "it would have to be some sort of a discectomy and fusion, but I probably would want to try immobilization on her first. I am not willing to discuss it at this point because I do n[o]t think she is a good candidate." In a December 13, 2000 report, Dr. Gray reiterated his opinion that appellant was not a surgical candidate "based on her lack of size of the disc herniations."

By letter dated December 18, 2000, the Office informed appellant that she would be referred for evaluation by a specialist. Dr. Robert J. Orlandi, a Board-certified orthopedic surgeon, performed a second opinion examination on January 5, 2001. He noted that appellant had a prior history of sciatica affecting the left leg that was associated with two pregnancies. Dr. Orlandi concluded that his examination of appellant "did not document the presence of a disability or the need for additional treatment, including surgery."

In a March 20, 2001 report, Dr. Gray indicated that appellant underwent a magnetic resonance imaging (MRI) scan, which revealed no significant change in her condition. In a March 27, 2001 report, Dr. Kloth stated that appellant may require "greater debulking of the foraminal herniation via a percutaneous laser endoscopic discectomy. We do not perform that procedure and that would need to be explored elsewhere." In an April 24, 2001 follow-up report, Dr. Kloth noted that he had performed a discogram and that he was "not convinced that this small disc herniation at L4-5 is really the cause of her symptoms and the original provocative discogram really did not reproduce her symptoms in that regard."

In a May 22, 2001 report, Dr. Gray stated that appellant's diagnostic testing results were not "consistent with anything that I can offer her surgically" and referred her to Dr. Michael J. Murphy, a Board-certified orthopedic surgeon. In a June 13, 2001 report, Dr. Murphy stated that, "if all other sources can be ruled out as pain generators, I do not feel that it would be unreasonable to consider L4-5 disc excision." On July 27, 2001 Dr. Gray noted Dr. Murphy's opinion and stated that appellant had undergone sacroiliac joint treatments to no avail. He opined that appellant was now a candidate for a percutaneous discectomy trial.

On August 28, 2001 the Office approved appellant's request for a percutaneous discectomy. The Office medical adviser reviewed the evidence and concurred that a percutaneous discectomy was warranted. However, the record reflects that appellant did not undergo the authorized procedure as she contracted Lyme disease and accordingly postponed her surgery.

On November 18, 2002 Dr. Gray noted that appellant continued with persistent low back pain and that it was "possible she may have to consider a discectomy infusion, however, with her workers' compensation status, the percentage of success may be less." In a January 28, 2003 MRI scan report, Dr. Scott Berger, a Board-certified radiologist, diagnosed "stable/persistent left far lateral/foraminal focal protrusion at L4-5 via an annular tear with mild mass effect upon the left L4 root on this basis." On February 11, 2003 Dr. Gray found appellant to be disabled and recommended surgery. He noted that diagnostic testing results were "consistent with prior MRI [scan] findings of the extra foraminal borderline foraminal disc herniation to the left sided L4-5. There is some pressure on the L4 nerve root. This would be consistent with her thigh discomfort." Dr. Gray concluded that it was "finally reasonable for her to consider a microdiscectomy at the L4-5 level. We can either do a partial facet resection or go extra foraminal, however, nevertheless it is reasonable to try." Dr. Gray requested that the Office provide an updated surgical authorization.

On May 27, 2003 the Office referred appellant to Dr. John Mazella, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 10, 2003 report, Dr. Mazella indicated that his physical examination of appellant was unremarkable. Upon review of the January 2003 MRI scan results, he did not see a disc herniation nor did he find impingement or nerve root deformity. Dr. Mazella characterized the MRI scan as "underwhelming." He noted that appellant appeared to have a trigger point, "which is a nonsurgical condition," in her left buttock. Dr. Mazella concluded that appellant was not a surgical candidate and able to perform her full work without restrictions.

On July 9, 2003 appellant contended that Drs. Gray, Kloth and Murphy had supported surgery and she had tried trigger point injections, as Dr. Mazella recommended. In a July 1, 2003 report, Dr. Kloth noted that he had performed trigger point injections in the past and that appellant was now ready for discectomy surgery. He stated that appellant was no longer seeing Dr. Gray and that the prior surgery was delayed when she contracted Lyme disease. Dr. Kloth recommended that appellant undergo the percutaneous discectomy to relieve her L4-5 disc herniation and a second IDET treatment to relieve her annular tear, at which point she would have exhausted her treatment options and reached maximum medical improvement. He noted that appellant had consulted Dr. David L. Kramer, a Board-certified orthopedic surgeon. In a June 26, 2003 report, Dr. Kramer concluded that, "based on my review of the radiographic data available, I see no indication to proceed with a microdiscectomy. [Appellant] has minimal disc protrusion at this level and no L5 nerve root signature on her exam[ination]. I do not believe that the discectomy procedure would allow her to return to work." He informed appellant that "given my opinion that no surgery is indicated, she should prepare herself to return to work."

In a September 29, 2003 report, the Office medical adviser concurred with Dr. Mazella's assessment that surgery was not necessary. The medical adviser stated: "I would not approve surgery as proposed as there is insufficient evidence to include a disc herniation at L4-5 as the cause of the claimant's symptoms. The medical record contains evidence of other pain sites which may be more consistent with a myofascial pain syndrome unrelated to her [September] 1999 injury."

By letter dated October 10, 2003, the Office referred appellant for a second opinion evaluation with Dr. David Bomar, a Board-certified orthopedic surgeon. In an October 28, 2003 report, Dr. Bomar noted examining appellant and diagnosed degenerative disc disease of the lumbar spine with a bulging L4-5 disc. Regarding whether an L4-5 discectomy was warranted he stated:

> "She has had numerous opinions regarding … surgery on her lower back. In my opinion, her symptoms and findings do not indicate that her pain is coming from the L4-5 bulging and lateral herniation, which was seen on her MRI scan. In my opinion, there is insufficient evidence that this is causing her pain to recommend surgery directed at the L4-5 disc."

Dr. Bomar also noted that there was some evidence that appellant's groin and low back pain arose several years before the accepted 1999 employment injury. He opined: "Further, treatment of any type is not indicated. She has had no improvement with any type of treatment in the past and I think further treatment is unlikely to be of any benefit."

By decision dated January 30, 2004, the Office denied appellant's request for surgery authorization, finding that the weight of the medical evidence rested with Dr. Bomar's opinion.

On February 11 2004 appellant requested an oral hearing. A hearing was held on August 30, 2004. In a June 16, 2005 decision, a hearing representative affirmed the denial of the surgery authorization request.

On August 17, 2005 appellant requested reconsideration. She submitted a February 20, 2004 report from Dr. Kloth, noting Dr. Bomar's findings. Dr. Kloth stated that he disagreed with Dr. Bomar's conclusion that the discogram did not demonstrate that appellant's L4-5 disc herniation was the cause of her symptoms. He noted that the discogram in question was "performed many years ago," and recommended that another discogram be conducted for diagnostic purposes.

By decision dated November 18, 2005, the Office denied modification of the June 16, 2005 decision.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act provides for the furnishing of "services, appliances and supplies prescribed or recommended by a qualified physician" which the Office, under authority delegated by the Secretary, "considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation."[1] In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[2] The Office has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.[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] 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. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[5] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[6]

[1] 5 U.S.C. § 8103(a).

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

[3] *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

[4] *Debra S. King*, 44 ECAB 203, 209 (1992).

[5] *See id.*; *Bertha L. Arnold*, 38 ECAB 282 (1986).

[6] *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

Section 8123(a), in pertinent part, provides: "If there is a 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."[7]

ANALYSIS

The Board finds that the case is not in posture for a decision as there is a conflict in the medical evidence with regard to whether the recommended surgery should be authorized.

The record reflects that appellant's treating physician, Dr. Gray, previously requested approval for surgery and that the Office, on August 28, 2001, approved appellant's request for a percutaneous discectomy at the L4-5 level. However, appellant contracted Lyme disease and surgery was not performed. Thereafter, her condition remained symptomatic and she renewed her request for surgery in 2003. On February 11, 2003 Dr. Gray again recommended surgery and requested that the Office provide an updated surgical authorization.

Drs. Mazella and Bomar, Office referral physicians, examined appellant and found that the requested surgery was not medically warranted. In a June 10, 2003 report, Dr. Mazella stated that his review of diagnostic testing did not reveal a disc herniation. He opined that the proposed surgery would not aid appellant in returning to work and that she could perform work full duty. In an October 28, 2003 report, Dr. Bomar concluded that surgery was not appropriate as there was insufficient evidence to determine that the disc herniation and bulging were, in fact, the cause of her symptoms.

The Board finds that there is a conflict in the medical evidence between Dr. Gray, for appellant, and Drs. Mazella and Bomar, for the Office, regarding whether appellant's request for surgery should be authorized. Due to the unresolved conflict of the medical opinion, the Office should refer appellant to an appropriate Board-certified specialist to resolve this issue. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision, due to a conflict in the medical evidence, with regard to whether appellant's proposed surgery is medically necessary.

[7] 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2005 decision is set aside and the case is remanded to the Office of Workers' Compensation Programs for further action consistent with this opinion.

Issued: June 7, 2007
Washington, DC

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

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

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