United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 08-855**
	)	**Issued: October 6, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
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 January 29, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 19 and December 5, 2007 merit decisions denying authorization for 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 abused its discretion when refusing to authorize appellant's request for cervical disc arthroplasty surgery.

FACTUAL HISTORY

On March 1, 2006 appellant, a 52-year-old physician, sustained injuries to his neck while lifting a patient. His claim was accepted for temporary aggravation of preexisting cervical degenerative disc disease.[1]

In a report dated February 28, 2006, Dr. Kim J. Burchiel, a Board-certified neurological surgeon, diagnosed spondylosis at the C5-6 level with some encroachment on the left at the C6 foramen. She recommended surgery to decompress the left C6 nerve root and C5-6. On March 6, 2006 Dr. Burchiel stated that C5-6 fusion was an option. She noted that appellant might not be able to "hold out" another two to three years until cervical disc replacement surgery was available.

In a March 21, 2006 report, Dr. Howard C. Chandler, Jr., a Board-certified neurological surgeon, diagnosed cervical spondylotic radiculopathy. He noted that appellant had undergone a C6-7 anterior cervical discectomy and fusion in 2000, and was now experiencing recurrent symptoms, including axial neck pain radiating down both upper extremities, and decreasing sensation at left C6-8. Dr. Chandler agreed with Dr. Burchiel's opinion that appellant was an excellent candidate for C5-6 anterior cervical fusion. Noting that a total disc arthroplasty involving a one-level artificial cervical disc, adjacent to a fused segment, would not be an option in the United States until 2008 or 2009, he referred appellant to physicians in Belgium and Switzerland who routinely perform such surgery.

On April 17, 2006 Dr. M. Patrice Eiff, a Board-certified family practitioner, diagnosed cervical degenerative disc disease, with significant C5-6 myelopathy. She stated that appellant had undergone an anterior cervical fusion at C6 and C7 in August 2000. Appellant's neck pain was severely exacerbated by lifting a patient on March 1, 2006, resulting in constant pain and increased radiculopathy, with right hand numbness in C6-7 distribution. Dr. Eiff recommended surgical repair at C5-6 level, but indicated that disc replacement above the level of fusion was not available in the United States. On April 27, 2006 she stated that appellant had developed degeneration of the C5-6 cervical disc as a result of his prior surgery, and noted that the degeneration had compressed his cervical nerves, resulting in severe, constant pain. In order to correct appellant's condition, Dr. Eiff recommended additional surgery involving "taking down part of his original C6-7 fusion surgery, and extending the surgery to cover the C5-6 disc."

On May 2, 2006 appellant's treating physician, Dr. Chandler stated that appellant had developed degenerative disc disease as a result of the C6-7 anterior cervical discectomy and fusion, which occurred in 2000. He opined that appellant was a good candidate for a C5-6 anterior cervical discectomy and fusion at that time.

The Office consulted with its medical adviser in order to ascertain whether the proposed surgery was both medically necessary and causally related to appellant's employment injury. On

[1] Appellant's original June 29, 2000 claim was accepted for C6-7 disc herniation. (Claim No. 120191600) Under this claim, appellant underwent a C6-7 anterior cervical discectomy and fusion in August 2000. On May 4, 2007 Claim No. 120191600 was combined with the instant Claim No. 142051589, which became the master file.

June 1, 2006 the medical adviser opined that appellant required surgery which involved "taking down part of the original C6-7 fusion surgery, and extending the surgery to cover the C5-6 disc."

The Office referred appellant to Dr. Jau-Shin Lou, a Board-certified neurologist, and Dr. Stephen J. Thomas, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to a recommended course of treatment. In a March 16, 2007 report, Drs. Lou and Thomas provided a history of injury and treatment, noting that appellant's previous claim had been accepted for displacement of the cervical intervertebral disc without myelopathy, and intervertebral disc disorder with myelopathy in the cervical region. Examination revealed reduced cervical range of motion; tenderness in the midline at the C6-7 level, as well as in the right trapezius area and right lateral acromion; reduced grip strength on the right; and reduced (to 30 percent) light touch and pinprick sensation in the C5-7 distributions on both arms. The physicians diagnosed C5-6 spinal neuroforaminal stenosis, "most likely due to previous fusion in 2000," and bilateral C5-6 radiculopathy. They agreed with Dr. Chandler that appellant would be an excellent candidate for C5-6 anterior cervical fusion. However, they opined that he would not be a good candidate for total disc arthroplasty, as the procedure was not expected to be performed in the United States until sometime in 2009. In a letter of clarification dated April 6, 2007, Dr. Thomas stated that appellant was in need of surgery and that his employment capacity was very minimal, if any, due to severe neck pain with raduculopathy. It was anticipated that within six months after surgery, appellant would be able to perform the duties of his regular job.

On May 4, 2007 the Office corrected appellant's accepted conditions to reflect temporary aggravation of preexisting cervical degenerative disc disease, determining that his current disability was due to the accepted March 1, 2006 lifting incident.

On July 19, 2007 the Office denied appellant's request for total disc arthroplasty, finding that the evidence did not establish that the procedure was medically necessary. It noted that there was no evidence that the requested procedure had been approved by the Food and Drug Administration (FDA).

On July 30, 2007 appellant requested a review of the written record, noting that the FDA had recently approved the marketing of the Prestige Cervical Disk System (a two-piece metal device attached to two adjacent vertebral bodies with bone screws to replace a diseased cervical disc). He submitted a copy of a July 16, 2007 letter from the FDA which contained an approval to market the Prestige Cervical Disk System (a two-piece metal device attached to two adjacent vertebral bodies with bone screws to replace a diseased cervical disc), as well as numerous publications discussing how the Prestige Cervical Disk System provided an alternative to spinal fusion surgery. In a separate letter dated July 30, 2007, appellant noted that, although total disc arthroplasty had been approved, no one in the United States had been approved to perform the procedure he required, which was disc arthroplasty over a previous fusion. Further, he anticipated that such approval would not be forthcoming until 2009. Appellant requested that the Office approve his request to have his surgery performed in Switzerland, due to his urgent need for the surgery. He also stated that the opinions of his physicians, who are neurosurgeons, should carry more weight than the opinions of the Office physicians, who are not credentialed to perform the surgery he required.

By decision dated December 5, 2007, an Office hearing representative affirmed the July 19, 2007 denial of authorization for the requested total disc arthroplasty surgery. The hearing representative found that the Office had not abused its discretion in denying appellant's request, as the requested procedure had not been established to be the best or only reasonable treatment option.[2]

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."[3] 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.[4] 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.[5]

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.[6] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[7] 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.[8]

[2] Appellant submitted additional evidence after the Office's December 5, 2007 decision; however, the Board cannot consider such evidence for the first time on appeal. The Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

[3] 5 U.S.C. § 8103(a).

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

[5] *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).

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

[7] *Id.*; *see also Bertha L. Arnold*, 38 ECAB 282 (1986).

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

ANALYSIS

The Board finds that the Office did not abuse its discretion when it denied appellant's request for total disc arthroplasty. Although the requested procedure was deemed to be work related, appellant did not meet his burden to establish that it was medically warranted.[9]

The medical evidence of record does not establish that the requested cervical disc replacement, which would require travel outside the United States, is the best or only reasonable treatment available. Appellant's physicians, Dr. Burchiel and Dr. Chandler, opined that appellant was an excellent candidate for anterior cervical fusion.[10] They stated that a total disc arthroplasty involving a one-level artificial cervical disc adjacent to a fused segment might be considered "as a possible option." However, both doctors acknowledged that the total disc replacement procedure would not be performed in the United States until 2008 or 2009. Moreover, neither doctor opined that the disc replacement procedure was preferable to cervical fusion.

Dr. Eiff diagnosed cervical degenerative disc disease, with significant C5-6 myelopathy. She stated that appellant had undergone an anterior cervical fusion at C6 and C7, status post traumatic disc herniation in August 2000, and that his neck pain was severely exacerbated by lifting a patient on March 1, 2006, resulting in constant pain and increased radiculopathy, with right hand numbness in C6-7 distribution. Dr. Eiff recommended surgical repair at the C5-6 level involving "taking down part of his original C6-7 fusion surgery, and extending the surgery to cover the C5-6 disc." She noted that disc replacement above the level of fusion was not available in the United States. On June 1, 2006 the medical adviser agreed that appellant required surgery which involved "taking down part of the original C6-7 fusion surgery, and extending the surgery to cover the C5-6 dis[c]."

Dr. Lou and Dr. Thomas, the Office's second opinion physicians, agreed with Dr. Chandler that appellant would be an excellent candidate for C5-6 anterior cervical fusion. However, they opined that he would not be a good candidate for total disc arthroplasty, as the procedure was not expected to be performed in the United States until sometime in 2009. Dr. Thomas stated that, within six months after surgery, appellant would be able to perform the duties of his regular job. Neither physician opined that total disc arthroplasty would be a more desirable procedure, even if it were available.

Appellant argues that, since the FDA has recently approved total disc arthroplasty, the Office is obliged to cover his surgery in Switzerland. However, appellant acknowledged that the specific procedure required to correct his diagnosed condition, *i.e.*, disc arthroplasty over a previous fusion, has not been approved in the United States. Therefore, this contention is without merit. He also contends that the opinions of his physicians, who are neurosurgeons, should carry more weight than the opinions of the Office physicians, who are not credentialed to

[9] *Id.*

[10] The Board notes that the Office stated in its July 19, 2007 decision that the C5-6 anterior fusion would be authorized if so requested.

perform the type of surgery he requires. However, as noted above, the medical reports of appellant's physicians do not support his claim that the procedure is medically necessary.

The only limitation on the Office's authority in approving, or disapproving, services under the Act is that of reasonableness.[11] In the instant case, appellant requested authorization of a total disc arthroplasty procedure outside the United States. The Office obtained the opinions of two second-opinion examiners and consulted with its medical adviser to ascertain whether or not the proposed surgery was medically necessary. After considering all of the medical evidence of record, the Office concluded that authorization for the requested surgery should be denied. The Board finds that the Office's refusal to authorize the total disc arthroplasty was reasonable and did not constitute an abuse of discretion. Appellant has not met his burden of showing that the proposed total disc arthroplasty was medically warranted.

CONCLUSION

The Board finds that the Office did not abuse its discretion in refusing to authorize appellant's request for total disc arthroplasty.

ORDER

IT IS HEREBY ORDERED THAT the December 5 and July 19, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 6, 2008
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

[11] *Daniel J. Perea, supra* note 5.