United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 12-332**
	)	**Issued: June 20, 2012**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Latham, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) merit decision dated November 16, 2011. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP abused its discretion by denying appellant authorization for lumbar fusion surgery.

FACTUAL HISTORY

On September 12, 2006 appellant, a 46-year-old nondestructive tester, experienced pain in his back while lifting equipment into a van. He filed a claim for benefits on September 18, 2006, which OWCP accepted for back sprain, lumbar region and displacement of lumbar intervertebral

[1] 5 U.S.C. § 8101 *et seq.*

disc at L5-S1 without myelopathy. OWCP paid wage-loss compensation for temporary total disability.

On November 30, 2006 appellant underwent surgery for a right-sided L5 hemilaminectomy, excision of herniated lumbar disc, right side L5-S1, right-sided L5 and S1 foraminotomy. The procedure was performed by Dr. Edward Scheid, Board-certified in neurosurgery, and was authorized by OWCP.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on March 26, 2010, the results of which indicated mild disc bulges at L1-2; disc desiccation and disc degeneration at L4-5; a mild disc bulge with a central L4-5 disc bulge with central annular tear; with a right L4 hemilaminotomy; and Grade 1 spondylolisthesis of L5 on S1 associated with a broad pseudo disc and secondary to bilateral L5 spondylolysis.

In an April 5, 2010 report, Dr. Scheid recommended that appellant undergo surgery, an L4-S1 interbody and posterolateral instrumented fusion. He advised that the procedure was necessary to ameliorate degenerative disc disease at L4-S1 and spondylolysis at L5-S1, which were indicative of spinal instability. Dr. Scheid noted that appellant had severe incapacitating back pain and right-sided radiculopathy. On May 18, 2010 he requested authorization for surgery.

On May 21, 2010 OWCP advised Dr. Scheid that it required additional information regarding the spinal surgery he recommended for appellant.

In a report dated June 14, 2010, an OWCP medical adviser reviewed the medical record and recommended that OWCP deny authorization for the requested surgery. He advised that the medical records and diagnostic tests did not establish that appellant had the spinal instability found by Dr. Scheid. The medical adviser stated that Grade 1 L5-S1 spondylolisthesis, another reason for the proposed surgery, was a preexisting condition and unrelated to the September 12, 2006 work injury. He indicated that appellant had not undergone an aggressive program of conservative treatment by medication, physical therapy, home exercise or weight reduction, as was commonly done prior to the lumbar fusion surgery Dr. Scheid proposed.

In order to determine whether appellant's proposed lumbar fusion surgery was causally related to his accepted conditions, OWCP referred him to Dr. Edwin E. Mohler, a specialist in orthopedic surgery, for a second opinion examination. In a report dated August 12, 2010, he stated that appellant continued to experience residuals from the accepted conditions and required further treatment. Dr. Mohler stated, however, that the proposed surgical procedure was not appropriate for appellant's accepted conditions and would not benefit him. He asserted that an L4-S1 posterolateral fusion would not resolve appellant's dysesthesias or the hypesthesia on his right foot; it would not resolve his back pain but result in an additional degenerative effect on the remainder of his lumbar spine. Appellant did not have any spinal instability as indicated by diagnostic tests and could manage his condition in a nonoperative manner. Dr. Mohler noted that appellant had not had physical therapy since 2006 or undergone pain management, physical therapy or pool therapy as prescribed by Dr. Scheid. He recommended that appellant work with a physical therapist three times a week to strengthen his lumbar spine and ameliorate his accepted low back conditions. Dr. Mohler advised that appellant was not currently disabled and was currently able to do his work without restrictions.

OWCP found that there was a conflict in the medical opinion between Dr. Scheid and Dr. Mohler as to whether the lumbar fusion surgery was necessary to ameliorate the accepted conditions. It referred appellant to Dr. Bryan S. Bilfield, Board-certified in orthopedic surgery, for an impartial examination to resolve the conflict. In a report dated October 21, 2010, Dr. Bilfield found that appellant's accepted lumbar conditions did not warrant the proposed fusion surgery from L4 to S1. He stated that such procedure would not relieve appellant's back or foot pain. Dr. Bilfield advised that the diagnostic findings of record did not reflect any evidence of spinal instability, in contrast with Dr. Scheid's opinion. He also noted that appellant had not undergone conservative, nonoperative treatment for his back condition and recommended a trial of pain management, epidural injections and medication to alleviate his symptoms.

By decision dated February 1, 2011, OWCP denied authorization for lumbar fusion surgery. It found that the weight of the medical evidence, as represented by Dr. Bilfield's impartial medical opinion, established that the recommended surgery was not necessary to ameliorate appellant's work-related accepted conditions.

Appellant submitted progress reports from Dr. Scheid dated February to September 2011. Dr. Scheid noted continued complaints of low back pain for which appellant received epidural injections and physical therapy.

On August 15, 2011 appellant requested reconsideration.

In an October 7, 2011 report, Dr. Scheid stated that he had attempted to ameliorate appellant's low back symptoms with multiple conservative measures, including physical therapy and epidural injections but they had not been successful. He scheduled appellant to undergo a posterolateral interbody fusion from L4 to S1 on October 26, 2011. Appellant continued to work full time at the employing establishment and from a neurosurgical standpoint, he had no restrictions.

By decision dated November 16, 2011, OWCP denied modification of the February 1, 2011 decision.

LEGAL PRECEDENT

Section 8103 of FECA[2] 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 OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[3] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.

[2] *Id*. at § 8101 *et seq.*

[3] *Id*. at § 8103.

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.[4]

Section 8123(a) provides that, 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.[5] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain and displacement of a lumbar intervertebral disc at L5-S1, without myelopathy. Dr. Scheid, appellant's treating neurosurgeon, performed a right-sided L5 hemilaminectomy, excision of herniated lumbar disc, right side L5-S1, right-sided L5 and S1 foraminotomy on November 30, 2006. On April 5, 2010 he recommended that appellant undergo additional surgery for an L4-S1 interbody and posterolateral instrumented fusion, which he found necessary to ameliorate degenerative disc disease at L4-S1 and spondylolysis at L5-S1. The findings were indicative of spinal instability which required corrective surgery. Dr. Scheid requested authorization for surgery on May 18, 2010.

In a report dated June 14, 2010, an OWCP medical adviser recommended denial of the requested surgery. He disagreed with Dr. Scheid's opinion, stating that the medical reports and diagnostic tests of record did not establish spinal instability warranting a fusion procedure. The medical adviser also noted that appellant had no conservative treatment for his lower back conditions, a prerequisite to having lumbar fusion surgery. OWCP referred appellant to Dr. Mohler, the second opinion examiner, who found that the proposed surgical procedure was not appropriate for appellant's accepted conditions and that it would not benefit him. He concurred with the medical adviser that appellant did not have spinal instability as indicated by diagnostic tests and recommended a course of conservative treatment, such as physical therapy and pain management. Dr. Mohler opined that an L4-S1 posterolateral fusion would not relieve appellant's dysesthesias or the hypesthesia in his right foot and would not resolve his back pain. The posterolateral fusion could also produce an additional degenerative effect on the remainder of his lumbar spine.

OWCP found that there was a conflict in medical opinion between Drs. Scheid and Mohler regarding whether appellant's lumbar fusion surgery was necessary to ameliorate the accepted conditions. It referred appellant to Dr. Bilfield, the referee examiner, to resolve this conflict.

[4] *Daniel J. Perea*, 42 ECAB 214 (1990).

[5] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

[6] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

In an October 21, 2010 report, Dr. Bilfield found that appellant's accepted conditions did not warrant the proposed fusion from L4 to S1 and it would not relieve his back or foot pain. He agreed with the medical adviser and Dr. Mohler that the diagnostic findings of record did not evidence any spinal instability and that appellant should undergo conservative, nonoperative treatment for his back condition. The Board finds that OWCP properly found that Dr. Bilfield's referee opinion negated a causal relationship between appellant's conditions and the proposed lumbar fusion surgery. Dr. Bilfield's opinion is sufficiently probative, rationalized and based upon a proper factual background. OWCP properly accorded his opinion the special weight of an impartial medical examiner.[7] Based on Dr. Bilfield's referee medical opinion, OWCP did not abuse its discretionary authority by denying appellant's request for surgery. The Board finds that his report is well rationalized and thorough on the issue of the need for surgery.

Following the February 1, 2011 decision, appellant submitted progress reports from Dr. Scheid, who treated appellant for his work-related lower back conditions. Dr. Scheid did not provide any additional opinion as to whether appellant required additional surgery. In an October 7, 2011 report, he stated that he had administered a program of conservative treatment, including physical therapy and epidural injections, which failed to alleviate appellant's low back symptoms. Dr. Scheid scheduled appellant for a posterolateral interbody fusion from L4 to S1 on October 26, 2011. However, he did not further address why the surgical procedure was warranted in light of the findings by Dr. Bilfield. Dr. Scheid's report was not sufficient to negate Dr. Bilfield's impartial referee report as the special weight of the medical evidence. His October 7, 2011 report does not provide adequate medical rationale in support of his opinion that the lumbar fusion procedure was necessary to ameliorate appellant's accepted lower back conditions.[8] The Board will affirm OWCP's November 16, 2011 decision.

CONCLUSION

The Board finds that OWCP did not abuse its discretion to deny appellant authorization for lumbar fusion surgery.

[7] *Gary R. Seiber*, 46 ECAB 215 (1994).

[8] *William C. Thomas*, 45 ECAB 591 (1994).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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