United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 11-1332**
	)	**Issued: September 12, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Sequim, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument March 6, 2012

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2011 appellant, through her attorney, filed a timely appeal from a January 6, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence claim. 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 appellant established that her October 1, 2002 surgery was causally related to her accepted May 2, 2000 lumbar subluxation injury.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated June 11, 2009, the Board set aside OWCP's March 26 and September 22, 2008 merit decisions which denied appellant's recurrence claim for total disability as a result of her October 1, 2002 back surgery

[1] 5 U.S.C. § 8101 *et seq.*

and remanded the case for further development.[2] The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference.

OWCP accepted appellant's May 2, 2000 occupational disease claim for temporary aggravation of preexisting degenerative disc disease at L3-4, L4-5 and L5-S1 and lumbar subluxation.[3]

On November 14, 2003 appellant filed a notice of recurrence (Form CA-2a) of total disability as of October 1, 2002 due to her back surgery.[4] By decision dated July 12, 2005, OWCP denied her recurrence claim for the period beginning October 1, 2002.

By decision dated May 24, 2006, an OWCP hearing representative remanded the case to obtain an opinion from a district medical adviser (DMA) regarding whether appellant's October 1, 2002 surgical procedure was necessitated by the accepted lumbar subluxation.

In an October 3, 2006 medical report, the medical adviser opined that appellant's October 1, 2002 lumbar surgery was in part necessitated by the L5-S1 lumbar subluxation because an L5-S1 fusion was required, in addition to the standard L5-S1 discectomy, for decompression of the L5-S1 disc space and nerve roots.[5]

In a January 3, 2008 decision, a hearing representative instructed OWCP to issue a *de novo* decision regarding whether appellant sustained a recurrence of her work injury on October 1, 2002.[6]

On remand, OWCP referred appellant's case to Dr. K. David Bauer, a Board-certified orthopedist, for a second opinion examination and opinion on whether appellant had a lumbar subluxation prior to October 1, 2002 and whether the surgery performed on that date was medically necessitated by the lumbar subluxation.

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[2] Docket No. 09-125 (issued June 11, 2009).

[3] By decision dated October 31, 2001, OWCP terminated appellant's wage-loss compensation for temporary aggravation of lumbar degenerative disc disease finding that the condition had been resolved. Medical treatment for lumbar subluxation continued.

[4] The Board notes that appellant did not request prior authorization for surgery.

[5] The DMA noted that L5-S1 subluxation was also referred to in appellant's medical reports as L5-S1 retrolisthesis with spondylosis.

In an October 30, 2006 memorandum to the file, OWCP's senior claims examiner found the medical evidence warranted further development and requested x-ray films from appellant and her physicians to refer the case to a medical specialist.

[6] By decision dated April 19, 2007, OWCP suspended appellant's compensation effective April 19, 2007 for failing to cooperate with a medical examination when she failed to submit copies of her lumbar x-ray films. By decision dated January 3, 2008, the hearing representative set aside the April 19, 2007 decision, finding that appellant did not obstruct a directed medical examination when she failed to provide x-rays that were requested by the district OWCP.

In a February 16, 2008 report, Dr. Bauer stated that appellant's medical records showed degenerative disc disease and that her chiropractic subluxation was no longer present on October 1, 2002. He opined that she was strictly treated for degenerative disc disease and that there was no evidence to show that the May 2000 lifting injury had any lasting effect which would have been present in October 2002.

By decision dated March 26, 2008, OWCP denied appellant's recurrence of disability as of October 1, 2002 finding the evidence did not establish the surgery was necessary due to the accepted subluxation. By decision dated September 22, 2008, a hearing representative affirmed the March 26, 2008 decision for failing to establish a recurrence of total disability as a result of the October 1, 2002 back surgery. On October 17, 2008 appellant requested an appeal before the Board.

By decision dated June 11, 2009, the Board set aside OWCP's September 22, 2008 merit decision, finding that OWCP failed to properly notify appellant in advance of Dr. Bauer's second opinion evaluation. The Board remanded the case for referral to another second opinion evaluation with appropriate notification provided to appellant consistent with OWCP procedures.

OWCP referred appellant's case to Dr. William Dinenberg, Board-certified in orthopedic surgery, for a second opinion examination and opinion on whether appellant continued to suffer from a lumbar subluxation prior to October 1, 2002 and whether her surgery on that date was necessitated by the lumbar subluxation.[7]

In an August 12, 2009 report, Dr. Dinenberg reviewed the case file and provided a summary of appellant's medical reports. He reported that an October 31, 2001 magnetic resonance imaging (MRI) scan revealed minimal grade retrolisthesis of L5 on S1, which appellant's previous chiropractor referred to as a lumbar subluxation. Dr. Dinenberg reported that this condition would only resolve with surgical treatment and was still present during the surgical intervention on October 1, 2002. He further opined that appellant's October 1, 2002 surgery was not necessitated by her lumbar subluxation and was done secondary to degenerative disc disease at L5-S1 and secondary to neuroforaminal narrowing.

By decision dated September 18, 2009, OWCP denied appellant's claim for recurrence of disability on October 1, 2002 because the medical evidence did not establish that the surgery was necessitated by the accepted lumbar subluxation.

On September 28, 2009 appellant requested an oral hearing before the Branch of Hearings and Review. At the February 23, 2010 hearing, appellant's attorney argued that OWCP failed to send all of the medical evidence to Dr. Dinenberg, specifically the October 3, 2006 report of the medical adviser. He also argued that OWCP's June 24, 2009 referral letter improperly advised Dr. Dinenberg that only a chiropractor could diagnose a subluxation.

By decision dated May 6, 2010, the hearing representative set aside the September 18, 2009 decision. The hearing representative found that Dr. Dinenberg did not review all of the medical evidence provided or have a copy of all of the evidence, noting that the physician made

[7] By letter dated July 28, 2009, appellant was notified of the referral to Dr. Dinenberg.

no mention of the October 3, 2006 report of the medical adviser or Dr. Bauer's February 16, 2008 report. The hearing representative found that OWCP incorrectly advised Dr. Dinenberg that the law only permitted a chiropractor to diagnose a subluxation which could explain why the physician chose another word to diagnose the subluxation as retrolisthesis.[8] The case was remanded to OWCP to refer a copy of all of the medical evidence and properly cited law to Dr. Dinenberg to determine if his diagnosis of retrolisthesis was synonymous with subluxation, why he determined the surgery was not needed for the subluxation and whether the fusion portion of the surgery was needed to correct the subluxation.

On May 13, 2010 OWCP referred appellant's case to Dr. Dinenberg for clarification on his report. It informed him of the error in the previously cited law and provided him with a series of questions referenced from the May 6, 2010 decision. OWCP stated that it was enclosing the medical documents on file, including the October 3, 2006 DMA report and Dr. Bauer's February 16, 2008 report.

In a May 19, 2010 report, Dr. Dinenberg stated that minimal retrolisthesis condition is synonymous to the term subluxation condition. He further stated that the presence of minimal retrolisthesis of L5-S1 is not something that would resolve spontaneously and would require surgical treatment to resolve. However, the mere presence of a minimal retrolisthesis of L5 on S1 does not require surgical intervention. Dr. Dinenberg noted that appellant had degenerative disc disease at L5-S1, neural foraminal narrowing and very mild retrolisthesis of L5 on S1. He opined that the surgical intervention was not performed for the mild retrolisthesis of L5-S1 and that the fusion portion of the surgery was not performed to correct the subluxation condition. Dr. Dinenberg stated that the October 1, 2002 surgery was performed secondary to degenerative disc disease and secondary to neural foraminal narrowing and was not necessitated by the very mild retrolisthesis of L5 on S1.

By decision dated June 30, 2010, OWCP denied appellant's recurrence claim finding that the October 1, 2002 surgery was not due to the accepted lumbar subluxation of the spine. On July 20, 2010 appellant requested an oral hearing before the Branch of Hearings and Review.

At the October 19, 2010 hearing, appellant's attorney argued that the senior claims examiner and Dr. Dinenberg both failed to comment on the medical adviser's report which supported that appellant's October 1, 2002 surgery was a result of her accepted lumbar subluxation.

By decision dated January 6, 2011, the hearing representative affirmed OWCP's June 30, 2010 decision and denied appellant's claim for recurrence of total disability on October 1, 2002.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by

[8] 5 U.S.C. § 8101(2).

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.[9]

In interpreting section 8103, 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 or her injury to the fullest extent possible, in the shortest amount of time. It has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.[10] 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 by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.[11] While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[12]

In order to be entitled to reimbursement of medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical evidence.[13]

ANALYSIS

The Board finds this case is not in posture for a decision. OWCP accepted that appellant sustained a lumbar subluxation on May 2, 2000 from her employment duties as a rural letter carrier. Appellant is alleging that her October 1, 2002 surgery was necessitated by her accepted lumbar subluxation. Thus, the issue on appeal is not whether she sustained a recurrence of disability but whether she has established that her October 1, 2002 surgery was causally related to her accepted lumbar subluxation of May 2, 2000.

OWCP initially referred appellant's case file to a medical adviser for an opinion on whether her October 1, 2002 surgical procedure was necessitated by the accepted lumbar subluxation. In an October 3, 2006 medical report, the DMA opined that appellant's October 1, 2002 lumbar surgery was in part necessitated by the L5-S1 lumbar subluxation because an L5-S1 fusion was required, in addition to the standard L5-S1 discectomy, for decompression of the L5-S1 disc space and nerve roots. OWCP, however, found that the DMA report failed to provide a

[9] 5 U.S.C. § 8103(a).

[10] Dr. *Mira R. Adams*, 48 ECAB 504 (1997).

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

[12] *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[13] *John R. Benton*, 15 ECAB 48 (1963).

rationalized opinion on the cause of surgery and referred appellant to Dr. Dinenberg for a second opinion evaluation.[14]

In an August 12, 2009 medical report, Dr. Dinenberg reviewed the case file and provided a summary of appellant's medical reports. He reported that an October 31, 2001 MRI scan revealed minimal grade retrolisthesis of L5 on S1 which her previous chiropractor referred to as a lumbar subluxation. Dr. Dinenberg opined that appellant's lumbar subluxation was still present during the surgical intervention on October 1, 2002 and could only resolve with surgical treatment. He further stated that her October 1, 2002 surgery was not necessitated by her lumbar subluxation and was done secondary to degenerative disc disease at L5-S1 and secondary to neuroforaminal narrowing.[15]

On May 13, 2010 OWCP referred appellant's case back to Dr. Dinenberg for clarification on his report. It informed him of the error in the previously cited law and asked him to determine if his diagnosis of retrolisthesis was synonymous with subluxation, why he determined the surgery was not needed for the subluxation and whether the fusion portion of the surgery was needed to correct the subluxation. OWCP stated that it was enclosing the medical documents on file, including the October 3, 2006 DMA report and Dr. Bauer's February 16, 2008 report.

In a May 19, 2010 report, Dr. Dinenberg responded to OWCP's May 13, 2010 development letter and stated that minimal retrolisthesis condition is synonymous to the term subluxation condition. He further stated that the presence of minimal retrolisthesis of L5-S1 is not something that would resolve spontaneously and would require surgical treatment to resolve. However, the mere presence of a minimal retrolisthesis of L5 on S1 does not require surgical intervention. Dr. Dinenberg noted that appellant had degenerative disc disease at L5-S1, neural foraminal narrowing and very mild retrolisthesis of L5 on S1. He opined that the surgical intervention was not performed for the mild retrolisthesis of L5-S1 and that the fusion portion of the surgery was not performed to correct the subluxation condition. Dr. Dinenberg stated that the October 1, 2002 surgery was performed secondary to degenerative disc disease and secondary to neural foraminal narrowing and was not necessitated by the very mild retrolisthesis of L5 on S1.

The Board finds that the opinion of Dr. Dinenberg is not well rationalized. In its May 6, 2010 decision, OWCP found Dr. Dinenberg's August 12, 2009 medical report insufficiently rationalized to represent the weight of the medical opinion in the case as he failed to address all of the medical reports in the case file and was incorrectly advised that the law only permitted a

[14] OWCP initially referred appellant to Dr. Bauer for a second opinion evaluation. In a February 16, 2008 report, Dr. Bauer opined that appellant was strictly treated for degenerative disc disease and that her chiropractic subluxation was no longer present on October 1, 2002. By decision dated June 11, 2009, the Board set aside OWCP's September 22, 2008 decision denying appellant's claim for failing to properly notify appellant of Dr. Bauer's second opinion evaluation.

[15] By decision dated May 6, 2010, OWCP's hearing representative set aside OWCP's September 18, 2009 decision denying appellant's recurrence claim. The hearing representative found that Dr. Dinenberg did not review all of the medical evidence provided or did not have a copy of all of the evidence because he made no mention of the DMA report. The hearing representative also found that OWCP incorrectly advised Dr. Dinenberg that the law only permitted a chiropractor to diagnose a subluxation.

chiropractor to diagnose a subluxation. It remanded the case for clarification on the issues. Dr. Dinenberg's May 19, 2010 report, however, does not provide an unequivocal or fully rationalized opinion on the issue of causal relation. He noted that appellant had a minimal retrolisthesis condition of L5-S1, synonymous to the term subluxation, which required surgical treatment to resolve. While Dr. Dinenberg opined that the October 1, 2002 surgery was not performed to correct the subluxation condition, he did not address why surgery was not needed in light of his prior statement that a minimal subluxation could be surgically resolved. He stated that the October 1, 2002 surgery was performed secondary to degenerative disc disease and secondary to neural foraminal narrowing but failed to discuss whether the foraminal narrowing was due in part to the subluxation, as suggested by the DMA. It is also unclear from Dr. Dinenberg's report if appellant's lumbar subluxation was corrected by the October 1, 2002 surgery. The Board further notes that he made no mention of the DMA's medical report, it is therefore still unclear as to whether he reviewed the DMA's findings.

An employee who claims benefits under FECA has the burden of establishing the essential elements of her claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.[16] However, it is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[17]

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[18] Given the continued deficiencies in Dr. Dinenberg's reports, OWCP should not have denied appellant's claim regarding whether her October 1, 2002 surgery was necessitated by her accepted lumbar subluxation.[19] Accordingly, the Board will remand the case to OWCP for further appropriate medical development. On remand, OWCP should refer appellant's case file to another second opinion physician for examination and evaluation. After further development as deemed necessary, it should issue an appropriate merit decision on appellant's claim.[20]

[16] *See Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *see also Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

[17] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, *supra* note 16; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

[18] Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996).

[19] To be entitled to reimbursement of medical expenses, the employee must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. *John R. Benton*, 15 ECAB 48 (1963).

[20] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *see also Horace Langhorne*, 29 ECAB 820 (1978).

CONCLUSION

The Board finds this case is not in posture for decision as to whether appellant's October 1, 2002 surgery was causally related to her accepted lumbar subluxation of May 2, 2000.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: September 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

Haynes, J., Alternate Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand this claim for further development. The facts make the exercise futile.

Appellant had back surgery on October 1, 2002 which remedied the effect of her degenerative disc disease and her subluxation but which also destroyed all physical evidence of her presurgery condition. That evidence is reflected only in the medical records. No additional physical examination can add any new information to that which exists.

The best evidence of why appellant had surgery is provided by her surgeon in his contemporaneous reports from 2002. Dr. Hsiang explained the reasons why he recommended and ultimately performed surgery. In his notes he gives little attention to appellant's subluxation compared to his diagnosis of degenerative disc disease and stenosis. No physician writing in 2012 can discern any reason for surgery that Dr. Hsiang did not, himself, identify almost 10 years ago. On the contrary, all contemporary opinion rests on information observed and noted by Dr. Hsiang.

It is speculation on the part of Dr. Weaver to suggest that surgery on the appellant's back was performed to correct subluxation although it is a fact that the subluxation was corrected through fusion of two discs. It is also speculation by Dr. Dinenberg to express his "feeling" that the existence of subluxation was irrelevant to Dr. Hsiang's decision to go forward with surgery.

The record, as it exists, indicates that appellant's subluxation was neither the primary diagnosis nor the primary reason for the surgery of October 1, 2002. The record also demonstrates that within the small anatomical space between appellant's fifth lumbar disc and first sacral disc, she had stenosis, a deteriorated disc and a defect in the alignment of the vertebral bones themselves.

It is not clear in the record that any surgery could have effectively corrected the first two problems without resolving the third. In situations like this, the party with the burden of proof must tip the scale. Appellant has not offered evidence which would warrant a remand or a reversal.

I would affirm OWCP.

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