United States Department of Labor
Employees' Compensation Appeals Board

T.O., Appellant	)	
and	)	**Docket No. 13-1739**
	)	**Issued: February 3, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 15, 2013 appellant, through her attorney, filed a timely appeal of a May 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for back surgery including lumbar disc annuloplasty or lumbar discography.

On appeal, counsel argued that Dr. Paul Foddai, a Board-certified orthopedic surgeon, selected to serve as the impartial medical examiner, failed to provide the necessary medical opinion evidence as his report was vague, speculative and not based on a proper medical history because he did not mention the February 27, 2002 accepted work injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 5, 2009 appellant, then a 43-year-old mail carrier, filed an occupational disease alleging that she developed bilateral carpal tunnel syndrome as well as back and neck conditions due to her work duties of sorting mail. She underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on December 24, 2008 which demonstrated mild degenerative and posterior bulging disc disease at L5-S1. Appellant underwent a cervical MRI scan on the same date which demonstrated slight degenerative disc disease C3-6 with no focal disc herniation. She underwent nerve conduction studies (NCS) on December 30, 2008 which demonstrated mild bilateral C5-6 radicular dysfunction, cervical radiculopathy and mild bilateral median nerve entrapment across the wrists. Dr. Mark A. P. Filippone, a physician Board-certified in physical medicine and rehabilitation, examined appellant on January 27, 2010 and noted that she had been reporting low back pain intermittently since 2002 when she sustained a work-related injury. He also noted that appellant had a low back injury in the mid-1990's when she was chased by a dog in the performance of duty. Appellant was involved in a motor vehicle accident accepted in the early 1990's which resulted in back injury. Dr. Filippone diagnosed lumbosacral radiculitis and possible lumbar radiculopathy. On March 25, 2010 he opined that appellant's work duties resulted in bilateral carpal tunnel syndrome, cervical radiculopathy, bulging disc at C4-5 and bulging disc at L5-S1.

By decision dated July 2, 2010, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and cervical radiculopathy.

Dr. Filippone examined appellant on July 28, 2010 and performed electromyogram (EMG) and NCS. He found electrodiagnostic evidence of bilateral carpal tunnel syndrome, right C5-7 radiculopathy and bilateral L5-S1 lumbosacral radiculopathy. Dr. Filippone opined that appellant's diagnosed conditions were due to her employment.

Appellant filed a notice of recurrence of disability on August 2, 2010 alleging a recurrence of her December 30, 2008 employment injury. By decision dated November 4, 2010, OWCP accepted her claimed recurrence of disability. Appellant underwent a right carpal tunnel surgical release on November 10, 2010. She underwent a left carpal tunnel release on February 9, 2011.

In reports dated March 2 and April 20, 2011, Dr. Alfred Mauro, a Board-certified anesthesiologist, noted that appellant reported persistent lower back pain with radiation into both legs as well as neck pain with radiation into the shoulder and arm region. On examination, he found no sensory deficit or loss of motor strength in the lower extremities. Dr. Mauro diagnosed lumbar and cervical strain, spondylosis, radiculopathy and myofascial pain. He performed lumbar epidural steroid injection due to chronic lumbar radiculopathy on May 17 and June 4 and 28, 2011. In a report dated May 23, 2011, Dr. Mauro opined that appellant had pathology in the lumbar disc as well as right-sided spondylosis of the facet joints and that noted that her leg pain had not been ameliorated.

Dr. Mauro examined appellant on July 17 and 25, 2011 and stated that she had 50 percent improvement in her lumbar spine. On August 24, 2011 appellant reported persistent back pain with radiation down her legs bilaterally. Dr. Mauro examined her on November 2, 2011 due to

disc herniations in the lumbar region due to disc disease. He noted that following lumbar epidural steroid injections appellant had improved palpatory pain with less evidence of radiculopathy and improved range of motion in the lumbar spine.

In a note dated December 19, 2011, Dr. Mauro stated that appellant had axial pain in the lumbar region, which was aggravated by prolonged sitting, standing and lifting. He diagnosed L5-S1 bilateral lumbar radiculopathy. Dr. Mauro recommended a provocative discography.

Dr. Mauro performed a lumbar discogram on January 26, 2012. He found a herniated disc, lumbar disc disease, low back syndrome and lumbalgia. Dr. Mauro found a L5-S1 annular bulge, that appellant was symptomatic with pain and that there was evidence of posterior tears and leakage of dye into the epidural space. Appellant underwent a computerized tomography (CT) scan on January 26, 2012 which revealed an annual bulge at L5-S1 with contrast coating the posterior annulus.

In a note dated February 6, 2012, Dr. Mauro stated that appellant had a provocative lumbar discography on January 26, 2012 followed by a CT scan, which demonstrated tears at L3-4, L4-5 and L5-S1. He recommended a two-level endoscopic lumbar disc decompression.

Appellant underwent a surgical release of a right pulley thumb on February 22, 2012.

On March 5, 2012 OWCP referred appellant's claim to the medical adviser. OWCP's medical adviser reviewed her request for surgery on March 6, 2012 and noted her history of injury including the February 27, 2002 lumbar strain and the February 5, 2009 occupational disease claim accepted for carpal tunnel syndrome and a neck injury. He stated that there was no causal connection between appellant's 2009 claim and lumbar radiculopathy. OWCP's medical adviser further noted that the 2002 lumbar strain had resolved by March 21, 2004 when she returned to full-time work.

In a decision dated March 23, 2012, OWCP denied appellant's claim for lumbar discography and endoscopic decompression of lumbar disc annuloplasty. Counsel requested an oral hearing on March 27, 2012 before an OWCP hearing representative.

Dr. Mauro completed a report on April 2, 2012 and stated that appellant's repetitive work resulted in both lumbar and cervical conditions. He stated, "I feel that there is a direct connection between [appellant's] symptoms, treatment and the request for further decompression surgical procedures…. There is direct correlation if one reads the history of this patient's pain, the history of interventional procedures and her findings. There is no question that a direct connection exists."

In a letter dated July 13, 2012, counsel requested that the oral hearing be converted to a review of the written record.

OWCP referred appellant for a second opinion with Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon. In his August 7, 2012 report, Dr. Lakin noted her claim that she developed pain in her hands, neck and lower back due to her repetitive work motions. He reviewed appellant's history of injury and medical history, including her 2002 employment injury. On physical examination Dr. Lakin found that her lumbosacral spine demonstrated minimal

tenderness midline with no spasms and negative straight leg raising. He found that sensation was intact in both lower extremities and that appellant's gait was normal with normal motor strength. Dr. Lakin reviewed electrodiagnostic studies and found that her July 26, 2010 lumbar MRI scan showed a left lateral posterior disc herniation at L5-S1 with left neuroforaminal narrowing and right-sided facet changes. He diagnosed cervical radiculopathy, bilateral carpal tunnel syndrome and lumbosacral sprain as work related. Dr. Lakin found that appellant had no disability for work and that her subjective complaints were not consistent with her objective findings. He stated that she could return to her regular job and that she did not require any corrective surgery. Dr. Lakin concluded that appellant's current lumbar condition was related to her repetitive motion claim noting her 2002 back injury and her "reonset" of lower back pain, which she stated was related to repetitive motion and activities at work.

On August 23, 2012 OWCP found a conflict between Dr. Lakin and Dr. Mauro regarding causal relationship and continuing disability. It included a statement of accepted facts and a list of specific questions. The statement of accepted facts included appellant's February 27, 2002 traumatic injury accepted for lumbar sprain. Appellant returned to work following this injury on March 21, 2004.

Dr. Mauro completed a report on September 5, 2012 and noted that when he first examined appellant on March 2, 2011 she reported lower back pain with radiation down the left leg into the foot as well as bilateral thigh numbness. He stated that she had increasing severity of pain likely from a L5-S1 posterior lateral herniation with left neural foraminal stenosis. Appellant reported transient relief from two lumbar epidural steroid injections and a lumbar discogram on January 26, 2012 revealed a positive L5-S1 disc. She wanted to pursue definitive treatment mainly a lumbar endoscopic discectomy. Dr. Mauro stated that the best course for appellant was surgical intervention to alleviate the impingement of the nerve root on the left.

Dr. Filippone examined appellant on September 10 and 12, October 9 and November 9, 2012 and found that she had neck, mid-back and lower back pain of 8 out of 10. He noted that she remained symptomatic without working and with medication. Dr. Filippone found that appellant was totally disabled.

By decision dated September 25, 2012, OWCP found that appellant was not entitled to augmented compensation for the period August 31, 2011 through September 22, 2012.

In a letter dated September 26, 2012, OWCP stated that there was a conflict of medical opinion evidence between Drs. Lakin and Mauro requiring referral to Dr. Foddai for an impartial medical examination.

By decision dated September 28, 2012, the hearing representative vacated OWCP's March 23, 2012 decision, noting that OWCP had initiated the referral process for a second opinion physician following the March 23, 2012 decision and on August 23, 2012 determined that there was a conflict between Dr. Mauro and Dr. Lakin. The hearing representative remanded for completion of the case development including Dr. Foddai's report and a *de novo* decision.

OWCP noted that Dr. Foddai referred appellant to a neurologist on October 18, 2012. It referred her for this medical examination on October 18, 2012. On October 23, 2012 Dr. James A. Charles, a Board-certified neurologist of professorial rank, examined appellant noting her history of hand, neck and back pain in December 2008 as well as her 2002 back injury. He diagnosed degenerative cervical spondylosis without radiculopathy, bilateral carpal tunnel syndrome resolved following surgery and spinal stenosis exacerbated by obesity with functional embellishment. Dr. Charles stated that appellant's neck and back pain were degenerative disorders not related to her work, which were being perpetuated and exacerbated by her obesity.

Dr. Foddai completed a report on November 14, 2012. He provided appellant's reported history and her current complaints. Dr. Foddai's physical examination found that she had voluntarily limited range of motion of the lumbar spine, normal muscle tone and power and in the lower extremities and patchy decreased sensation in both lower extremities, but not in a clear-cut dermatomal distribution. He reviewed the medical records and found that appellant had evidence of chronic lumbar sprain and strain. Dr. Foddai stated, "As indicated by [appellant's] job description, I do not see how her job description caused any lumbar derangement." He found no evidence of lumbar radiculopathy with chronic lumbosacral sprain and strain made worse by obesity and degenerative disease. Dr. Foddai opined that appellant could return to work without restrictions. He stated, "I do not think that [appellant] requires any additional corrective surgery…. It is my opinion that her back pain is probably chronic and degenerative in nature. I did not find any cause and effect relationship between [appellant's] lumbar complaints and her job description."

By decision dated November 30, 2012, OWCP denied appellant's request for surgery based on the reports from Drs. Foddai and Charles.

Dr. Filippone submitted a cervical MRI scan dated December 3, 2012, which demonstrated a central herniated disc at C4-5. A lumbar MRI scan of the same date demonstrated left foraminal annulus tear at L5-S1 and a bulging disc at L4-5. Dr. Filippone examined appellant on December 11, 2012

Counsel requested an oral hearing on December 6, 2012.

Dr. Mauro examined appellant on December 19, 2012 and stated that her lumbar range of motion was mildly restricted due to pain and that straight leg raising was positive on the right. He diagnosed lumbar radiculopathy and lumbar spondylosis.

On January 15, 2013 Dr. Filippone noted that appellant continued to report neck and back pain as well as numbness and tingling in both hands and wrists. He found that EMG and NCS continued to show bilateral carpal tunnel syndrome, right C5-6 cervical radiculopathy. Dr. Filippone also stated that appellant gave evidence of lumbosacral radiculitis with a possibility of lumbar radiculopathy. He opined that all of her conditions were due to her work at the employing establishment. Dr. Filippone examined appellant on February 15, 2013 and noted that she did not believe that epidural steroid injections impacted her lumbar pain. He opined that her condition had proceeded beyond the previously accepted condition of lumbar sprain.

Counsel requested that the oral hearing be changed to a review of the written record on March 21, 2013. He argued that Dr. Foddai's report was not sufficient to carry the weight of the medical evidence as he did not comment on appellant's request for surgery.

In a report dated April 11, 2013, Dr. Filippone opined that appellant's conditions were worsening with pain, guarding and spasm in the cervical and lumbar paraspinals. He found that she was totally disabled. Dr. Filippone examined appellant on April 22, 2013 and repeated his findings.

By decision dated May 14, 2013, the hearing representative found that Dr. Foddai's November 14, 2012 report was entitled to the weight of the medical evidence and did not support the medical need for any further treatment. He found that this report, while it did not specifically address the need for surgery, was sufficiently detailed to establish that appellant did not require lumbar surgery.

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 the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening in the amount of monthly compensation.[2] In interpreting the section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[3] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[4] 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.[5]

While OWCP 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

[2] 5 U.S.C. § 8103; *J.W.*, Docket No. 13-606 (issued November 15, 2013); *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[3] *W.T.*, Docket No. 08-812 (issued April 3, 2009); *A.O.*, Docket No. 08-580 (issued January 28, 2009).

[4] *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

[5] *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

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

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

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 OWCP to authorize payment.[8]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, 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 and resolve the conflict of medical evidence.[9] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] In situations where there are 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 on a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain in 2002 and she returned to full-duty work as a mail carrier in 2004 following this injury. It further accepted her occupational disease claim in 2009 for bilateral carpal tunnel syndrome and cervical radiculopathy. Appellant had also alleged a back condition on her claim form. OWCP has not accepted any additional low back injuries. Appellant stopped work following her accepted recurrence of disability on August 2, 2010.

On February 6, 2012 Dr. Mauro recommended back surgery as a result of appellant's employment injuries. His April 2, 2012 report included the statement that her repetitive work resulted in both lumbar and cervical conditions. Dr. Mauro opined that there was a direct connection between appellant's symptoms and the request for further decompression surgical procedures.

OWCP referred appellant for a second opinion examination with Dr. Lakin. In his August 7, 2012 report, Dr. Lakin found that she had no disability for work and that her subjective complaints were not consistent with her objective findings. He concluded that appellant did not require any corrective surgery. The Board finds that OWCP properly determined that there was a conflict of medical opinion evidence between Drs. Mauro and Lakin regarding her need for low back surgery, pursuant to 5 U.S.C. § 8123(a).

Due to this conflict of medical opinion, OWCP referred appellant to Dr. Foddai for an impartial medical examination. Dr. Foddai requested a neurological evaluation from Dr. Charles who completed a report on October 23, 2012. Dr. Charles provided an accurate and complete history of injury and diagnosed degenerative cervical spondylosis without radiculopathy,

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

[9] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[10] *R.C.*, 58 ECAB 238 (2006).

[11] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

bilateral carpal tunnel syndrome resolved following surgery and spinal stenosis exacerbated by obesity with functional embellishment. On November 14, 2012 Dr. Foddai found that appellant had voluntarily limited range of motion of the lumbar spine, normal muscle tone and power and in the lower extremities and patchy decreased sensation in both lower extremities, but not in a clear-cut dermatomal distribution. He found no evidence of lumbar radiculopathy. Dr. Foddai opined that appellant could return to work without restrictions and opined that she did not require any additional surgery. He concluded that there was no relationship between her lumbar complaints and her job description.

The Board finds that Dr. Foddai's report is sufficiently detailed and well reasoned to constitute the special weight of the medical opinion accorded an impartial medical examiner regarding whether low back surgery was medically necessary. Dr. Foddai reviewed appellant's history and job duties as well as Dr. Charles' report. He conducted an orthopedic examination and reviewed a neurological examination and found that there was no relationship between her current lumbar complaints and her employment. Thus, the Board finds that Dr. Foddai's opinion as set forth in his November 14, 2012 report is probative and reliable evidence. Accordingly, Dr. Foddai's opinion constitutes the special weight of the evidence and is sufficient to justify OWCP's denial of authorization for back surgery.

The Board further finds that the medical evidence submitted by appellant after Dr. Foddai's impartial medical examination is insufficient to overcome the weight of this report or to create another conflict in medical evidence. Appellant submitted various reports by Dr. Filippone noting that she had evidence of lumbar radiculitis, that all her conditions were due to her employment and that her condition had developed beyond the previously accepted condition of lumbar sprain. The Board finds, however, that these reports are of limited probative value as he offers conclusions unsupported by medical rationale. The Board finds that his opinion constitutes the special weight of the medical evidence and supports OWCP's decision that the need for low back surgery was not established.

On appeal, counsel argues that Dr. Foddai's report is insufficient. The Board finds that the report of Dr. Foddai and his review of Dr. Charles' report are sufficient to establish an accurate history of injury and to provide sufficient medical opinion evidence.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for surgical authorization.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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