# United States Department of Labor
# Employees' Compensation Appeals Board

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| **S.C., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1241** |
| | ) | **Issued: January 13, 2016** |
| **U.S. POSTAL SERVICE, BULK MAIL CENTER, Pittsburgh, PA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On May 12, 2015 appellant filed a timely appeal from an April 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[3]

[1] On February 23, 2015 OWCP issued a decision denying appellant's claim for a schedule award. Appellant requested reconsideration and on April 23, 2015 OWCP found that the evidence was not sufficient to warrant review of the decision. By letter dated August 3, 2015, she requested that the appeal to the Board of the schedule award decision be withdrawn. In an August 31, 2015 clarification letter, appellant indicated that she only wished to withdraw her appeal of the schedule award decision.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its April 23, 2015 merit decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. *See* 20 C.F.R. § 501.2(c)(1).

## ***ISSUE***

The issue is whether OWCP abused its discretion by denying authorization for anterior cervical discectomy and fusion at C6-7, which was performed on September 29, 2014.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[4] Briefly, the relevant facts are as follows. On June 15, 2006 appellant, then a 53-year-old mail flow controller, filed an occupational disease claim (Form CA-2) alleging that she aggravated her preexisting neck and shoulder condition as a result of her federal duties. She noted that her work duties involved looking up to view four to eight large computer monitors while simultaneously operating a mouse and answering the telephone.

OWCP denied appellant's claim on September 18, 2006. Appellant subsequently requested reconsideration several times, and requested a hearing before the Branch of Hearings and Review. OWCP continued to deny the claim. Following a December 4, 2009 decision, again denying modification of the denial of the claim, appellant appealed to the Board. By decision dated January 1, 2011, the Board remanded the case to OWCP, finding an unresolved conflict in the medical evidence. The Board concluded that the case should be referred to an impartial medical examiner.[5] The facts as presented in the prior decision are incorporated herein by reference.

After further development of the medical evidence on May 18, 2011 OWCP accepted appellant's claim for aggravation of preexisting cervical spondylosis.

The record reveals that on February 20, 2007 appellant underwent surgery, specifically C4, C5, and C6 laminectomies, bilateral C7 laminotomy and forminotomy, C4 to C6 posterolateral fusion using local autograft, allograft and instrumentation and application of a Mayfield head holder. The record does not confirm that this surgery was authorized by OWCP as the case was in a "denied" status until May 2011. Appellant had been in receipt of Office of Personnel Management disability retirement benefits since September 2008, but elected to return to FECA benefits as of April 1, 2013. She was then placed on the periodic rolls on May 5, 2013.

On October 29, 2013 appellant was evaluated by Dr. David Oliver-Smith, a Board certified neurosurgeon, at the request of Dr. Derek J. Thomas, appellant's treating Board-certified orthopedic surgeon. Dr. Oliver-Smith related appellant's history of injury, and her complaints of neck pain. He then related that appellant's neurologic examination, as documented in her chart, was within normal limits. Dr. Oliver-Smith explained that appellant's cervical magnetic resonance imaging (MRI) scan from June 28, 2013 was reviewed and showed postoperative changes consisting of laminectomy at C4-6 with instrumentation artifact. The MRI scan, however, did not show significant spinal cord or nerve root impingement. Dr. Oliver-Smith noted that appellant complained of chronic neck and right arm pain after surgery. There

[4] Docket No. 10-1019 (issued January 11, 2011).

[5] *Id.*

was no evidence of spinal cord or nerve root impingement that would require surgical intervention. Dr. Oliver-Smith expressed doubt that further surgery would be helpful for her pain.

In a May 8, 2014 report, Dr. Thomas diagnosed cervical stenosis, and a facet cyst of the right side. He noted pain paraspinal muscles of the neck in the right upper extremity at about a C6-7 nerve distribution. Dr. Thomas also noted that appellant had an electromyogram (EMG) study consistent with C5-6 problems that were likely chronic. He noted that he had a long discussion with appellant about the risks and benefits of performing an anterior cervical discectomy and fusion at C6-7. Dr. Thomas noted that this would fuse the level and stop the cyst, or if it were an arthritic cyst, perhaps reduce it. In a June 26, 2014 report, he told appellant that a C6-7 cervical disc fusion might provide some relief, but there were no guarantees. Dr. Thomas noted that she wished to discuss this with her family.

By letter dated July 22, 2014, appellant requested authorization for a second cervical surgery.

On July 29, 2014 OWCP referred the case to an OWCP medical adviser to provide an opinion with regard to the proposed cervical neck revision surgery. OWCP's medical adviser, Dr. Arnold T. Berman, Board-certified in orthopedic surgery, responded on August 18, 2014 that, although it is agreed that appellant had ongoing progressive degenerative disease, there was "no evidence of any acute injury due to the condition, and any proposed surgery should be considered to be nonwork related."

On August 28, 2014 Dr. Thomas noted that appellant previously underwent a two-level posterior laminectomy and fusion with screws at C4-5, C5-6. He noted that appellant had now developed an adjacent level problem at C6-7 with foraminal stenosis especially on the right side. Dr. Thomas noted that this was common and typical continuation of her prior problem and that he believed it should still be considered part of her employment-related injury. He related that an MRI scan showed cervical stenosis and foraminal stenosis, with facet cyst. Dr. Thomas noted that appellant had been through multiple nonoperative treatments including injections, medications, and therapeutic exercise, and that at this point, surgical intervention would be the next logical step.

On September 17, 2014 OWCP referred the updated report, along with the case record to a new OWCP medical adviser. It noted that appellant had undergone a prior authorized surgery of her cervical spine in 2007, and asked for his opinion whether the requested cervical surgery should be authorized.[6] In response, an OWCP medical adviser, Dr. Morley Slutsky, Board-certified in occupational medicine, noted that there was limited objective evidence to support that the pain was coming from a specific cervical level, that there were progressive neurologic defects related to this level, or that there was spinal instability at this level. He noted that the objective evidence therefore did not support that fusion surgery at C6-7 level would in any way

[6] The Board notes that while the referral letter indicated that the prior 2007 cervical surgery was authorized, this appears to be a typographic error as the statements of accepted facts of record do not indicate that the surgery was authorized.

improve claimant's symptoms. Dr. Slutsky recommended a second opinion examination as to whether surgery was warranted.

On September 29, 2014 Dr. Thomas performed an anterior cervical discectomy and fusion at C6-7.

OWCP referred appellant's file to Dr. Paul E. Di Cesare, a Board-certified orthopedic surgeon, to provide an opinion as to whether the anterior discectomy and fusion at C6-7 on September 29, 2014 was related to the accepted conditions. In a November 19, 2014 report, Dr. Di Cesare concluded that the anterior discectomy and fusion at C6-7 of September 29, 2014 was not medically necessary and the association between the current surgery and the previous surgery was unclear. He determined that certain criteria needed to be met prior to determining whether surgery would be indicated. Although Dr. Di Cesare found that appellant met some of the criteria, appellant did not exhibit weakness and the C6-7 cyst was present previously. Accordingly, he found that the anterior discectomy and fusion would not have been medically necessary. Dr. Di Cesare noted that literature was not clear that adjacent-segment pathology would be directly related to the prior fusion surgery or due to the natural history of spondylosis at the adjacent segment.

On December 2, 2014 OWCP denied authorization for the neck spine fusion and removal of insert spine fixation device.

By letter dated January 7, 2015, OWCP requested from appellant an updated medical report to confirm his continued disability. On January 25, 2015 appellant requested reconsideration.

In a March 3, 2015 report, Dr. Thomas related that he had performed surgery in September 2014 which improved the arm pain, but appellant continued to exhibit neck pain. He noted that she had no restrictions at this point, but her motion was going to be significantly restricted as she now had three levels in her neck fused.

By decision dated April 23, 2015, OWCP declined to modify its prior decision as the requested surgery was not medically necessary or related to the accepted condition.

## ***LEGAL PRECEDENT***

Section 8103 of FECA 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.[7] 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.[8]

[7] 5 U.S.C. § 8103; *see L.D.*, 59 ECAB 648 (2008).

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

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being that of reasonableness.[9] 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.[10] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[11] In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[12]

## ***ANALYSIS***

The Board finds that OWCP did not abuse its discretion by denying authorization of the anterior cervical discectomy and C6-7 fusion which was performed on September 29, 2014.

On October 29, 2013 appellant was referred by her treating physician to Dr. Oliver-Smith, due to her continuing pain complaints relating to her neck and upper extremities. Dr. Oliver-Smith explained that appellant's June 28, 2013 MRI scan did not show significant spinal cord or nerve root impingement that would require surgical intervention. He therefore expressed doubt that further cervical surgery would be helpful.

Dr. Thomas, appellant's treating Board-certified orthopedic surgeon, noted that on May 8, 2014 he had a long discussion with appellant about the risks and benefits of doing an anterior cervical discectomy and fusion at C6-7. He noted on June 26, 2014 that he told appellant that he thought the proposed surgery would give her some relief, but that there were no guarantees. On August 28, 2014 Dr. Thomas noted that appellant had a two-level posterior laminectomy and fusion done previously at levels C4-5 and C5-6, and that appellant had now developed an adjacent level problem at C6-7 with foraminal stenosis especially on the right side. He noted that this was a common continuation of her prior problem and that he believed it should still be considered part of her employment-related injury. Dr. Thomas noted that as appellant had not had lasting success with nonoperative treatments, that surgical intervention would be the next logical step.

Dr. Thomas performed the anterior cervical discectomy and fusion at C6-7 on September 29, 2014 without obtaining prior approval from OWCP.

[9] *See D.K.*, 59 ECAB 141 (2007).

[10] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[11] *M.B.*, 58 ECAB 588 (2007).

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

The Board notes that the record was reviewed by two OWCP medical advisers, Dr. Berman on August 18, 2014 and Dr. Slutsky on September 17, 2014. Both found the requested surgery nonwork related as there was no objective evidence to support that further fusion would improve appellant's symptoms.

Dr. Di Cesare, the second opinion physician, also disagreed with the need for the surgery. He specifically opined that the anterior discectomy and fusion at C6-7 on September 29, 2014 was not medically necessary and that the association between the surgery and the prior surgery was not clear. Dr. Di Cesare reviewed criteria established for evaluating the need for cervical surgery and found that appellant's symptoms, specifically the lack of weakness and a preexisting cyst, warranted against surgery. He found the literature unclear whether adjacent-segment pathology would be directly related to prior fusion surgery or the natural progression of spondylosis. The Board finds that Dr. Di Cesare's opinion is based upon a complete history and objective diagnostic findings and is entitled to the weight of the medical evidence.

The Board finds that Dr. Thomas has not provided a rationalized medical explanation that appellant's August 28, 2014 surgery was medically necessary due to the accepted injury. Dr. Thomas indicated that in his discussion with appellant he had advised that the proposed surgery could possibly provide some relief, and that surgery was the next step in treatment, but he did not explain, however, that the surgery was in fact medically necessary by discussing which treatments had failed and why no other nonsurgical treatment options would be open to him.[13] Further, Dr. Oliver-Smith was not of the opinion that the surgery was indicated.

While Dr. Thomas argued that the current adjacent level problem should now be considered a part of her employment-related injury, he failed to offer sufficient medical rationale to support his opinion. His reports were equivocal and not based on specific diagnostic tests or clinical findings. The Board has held that medical opinions that are speculative or equivocal in nature are of diminished probative value. Dr. Thomas also offered no discussion regarding the June 28, 2013 MRI scan evaluation, which Dr. Oliver-Smith found did not evidence spinal cord or nerve root impingement requiring further surgical treatment.

The Board notes that the record does not confirm that appellant's prior surgery in 2007 had been authorized by OWCP. As Dr. Thomas recommended the second surgery, in part as a continuation of the first surgery, it is especially important that he provide a rationalized medical opinion as to how any surgery would have been medically necessary due to the accepted injury. For these reasons, the Board concludes that OWCP properly denied appellant's request for the September 29, 2014 cervical surgery as it was found not to be medically necessary due to the accepted injury.

The only limitation on OWCP's authority in approving, or disapproving, services under FECA is that of reasonableness.[14] The Board finds that OWCP did not abuse its discretion.

[13] *See J.M.*, Docket No. 13-1089 (issued November 5, 2013).

[14] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that OWCP did not abuse its discretion in denying authorization of appellant's September 29, 2014 anterior cervical discectomy and fusion at C6-7.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 23, 2015 is affirmed.

Issued: January 13, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board