United States Department of Labor
Employees' Compensation Appeals Board

B.I., Appellant	)	
and	)	**Docket No. 18-0988**
	)	**Issued: March 13, 2020**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Milwaukee, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 16, 2018 appellant, through counsel, filed a timely appeal from a February 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for authorization for spinal surgery.

FACTUAL HISTORY

On July 22, 2016 appellant, a 59-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that he sustained a "lower back and left leg" injury that day when he tripped over a coworker's leg and fell on the floor while in the performance of duty. He stopped work that same day. OWCP accepted the claim for contusion of back left wall of the thorax, a contusion of left lower leg, and a contusion of left knee. It paid appellant wage-loss compensation on the periodic rolls effective November 13, 2016.[3]

September 12, 2016 x-rays of the lumbosacral spine demonstrated that there were degenerative changes of the lumbar spine, posterior elements, L3-4 to L5-S1. There were anterior spurs at L4-5 vertebral bodies, but no obvious spondylolisthesis with flexion and extension films. There was slight loss of lumbar lordosis and sclerosing sacroiliac (SI) joints bilaterally.

A September 21, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed an eight millimeter osseous lesion within the posterior aspect of the T12 vertebral body concerning for a neoplasm.

A bone scan of the whole body dated September 26, 2016 showed degenerative uptake in the thoracic and lumbar spine, most prominent at T9-10 anteriorly and the L3-4 facet joint on the right.

In a January 18, 2017 report, Dr. Thomas Perlewitz, a Board-certified orthopedic surgeon, evaluated appellant for low back pain and noted that he had obtained cervical imaging studies. He attributed his condition to a July 22, 2016 fall at work when he tripped on a coworker's leg, injuring his back. Dr. Perlewitz noted that appellant had experienced low back and knee pain at the time of injury, but subsequently had experienced neurological changes of the hands bilaterally and was unable to walk without a cane. He noted, "[Appellant] had no history of low back pain, lumbar radicular pain, cervical pain, or symptoms of myelopathy, or knee pain prior to this injury and it is without doubt that these symptoms are related to his work injury. On examination, Dr. Perlewitz found a positive Hoffman sign predominately on the left side, and bilateral ankle clonus. He reviewed a cervical MRI scan showing C5-6 central stenosis, severe foraminal stenosis at C4-5, and severe central stenosis at C3-4. Dr. Perlewitz diagnosed positive neurogenic changes in the upper extremities with myelopathy including a positive Hoffmann sign and sustained ankle clonus, hyperreflexia, the inability to ambulate or walk without a cane secondary to myelopathic gait, a large posterior disc protrusion at L3-4 with severe central stenosis, severe arthropathic grade 1

[3] OWCP had previously accepted that appellant sustained a temporary aggravation of asthma with acute exacerbation under File No. xxxxxx540 and a recurrent inguinal hernia without obstruction or gangrene under File No. xxxxxx761. Appellant also had claims under File No. xxxxxx425 (date of injury March 5, 2004), File No. xxxxxx023 (date of injury May 26, 2004), File No. xxxxxx722 (date of injury April 30, 2007), and File No. xxxxxx179 (date of injury January 29, 2008), none of which were formally adjudicated.

anterolisthesis at L3-4, moderate-to-severe central stenosis at L4-5 with severe right more than left foraminal lateral recess stenosis, neurogenic claudication line with severe cervical multilevel central stenosis, and severe multilevel cervical disc degeneration and collapse at C3-6 and C7-T1. He recommended a cervical discectomy and fusion at C3 to C6 and noted that appellant should subsequently undergo an L2-S1 lumbar laminectomy and L3-4 laminectomy and fusion with instrumentation. Dr. Perlewitz attributed his low back, neck, radiculopathy, and neurological changes to his July 22, 2016 employment injury as his symptoms had begun on that date.

In an addendum report also dated January 18, 2017, Dr. Perlewitz noted that he had evaluated appellant on September 30 and November 9, 2016 and January 18, 2017 related to a work-related trip and fall on July 22, 2016. He noted that OWCP had accepted that he sustained a contusion of the left back wall of the thorax, a left lower leg contusion, and a left knee contusion due to his July 22, 2016 employment injury. Dr. Perlewitz found that the accepted conditions were "superficial and clinical manifestations" of more severe cervical and lumbar conditions. He related that appellant had experienced a "[w]ork-related fall with severe exacerbation and marked progression of underlying cervical disc degeneration, spondylosis, cervical and lumbar spinal stenosis, and now progressive neurological complaints of neurogenic claudication, radiculopathy and cervical spondylotic myelopathy, previously asymptomatic." Dr. Perlewitz diagnosed cervical myelopathy and radiculopathy, a lumbar disc herniation with myelopathy, lumbar spinal stenosis with radiculopathy and myelopathy, and lumbar spondylolistheses. He opined that the diagnosed conditions were causally related to the accepted employment injury and caused a progression of clinical symptoms and risk to the spinal cord. Dr. Perlewitz opined that appellant would not benefit from further conservative treatment and recommended an urgent anterior cervical decompression correction and fusion with instrumentation from C3 through C6. He related, "[Appellant] was completely asymptomatic prior to his work-related injury and as such, beyond a reasonable degree of medical certainty, the following diagnoses and disability are born out of the work-related fall and associated injury with progressive sequelae, which now necessitate surgical intervention."

On March 21, 2017 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the medical evidence of record and found that appellant's accepted conditions did not include severe degenerative changes of the cervical and lumbar spine. The DMA opined that the cervical and lumbar spine surgery proposed by Dr. Perlewitz should not be approved as he had not exhausted conservative treatment and as both surgeries had a high rate of complications. He noted that the proposed lumbar procedure of operating from L2 to S1 was "highly irregular and not consistent with the standard of care." The DMA opined that the cervical and lumbar degenerative changes were not caused or aggravated by the July 22, 2016 employment injury.

OWCP referred appellant to Dr. David S. Haskell, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his accepted employment-related conditions.

In his June 7, 2017 report, Dr. Haskell reviewed the statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant walked with a cane, exhibited an antalgic limp on the left, and walked with an exaggerated kyphosis. Examination of the cervical spine showed reduced range of motion due to

complaints of pain. A neurological examination of the upper extremities revealed no motor or strength deficit, but some hypoesthesia at the dorsum distribution of the left thumb and radial aspect of the left wrist. Examination of the lumbar spine and back showed a failure of reversal of lumbar lordosis with attempted forward flexion and a limited straight leg raising to 30 degrees. Dr. Haskell found that appellant had well-established longstanding preexisting degenerative cervical disc disease and degenerative lumbar disc disease with cervical and lumbar spinal stenosis, which were not caused, aggravated, or accelerated by the work slip and fall on July 22, 2016. He opined that appellant had sustained a left knee contusion due to his July 22, 2016 fall that should have resolved within four weeks. Dr. Haskell concurred that appellant may be a reasonable candidate for a cervical discectomy and fusion at C5-6 and a decompressive laminectomy and disc excision at L3-4, but opined that the procedures were not causally related to the July 22, 2016 employment injury, which he opined had not caused or aggravated a preexisting condition.

By decision dated August 4, 2017, OWCP denied authorization for cervical and lumbar spinal surgery.

On August 16, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On August 31, 2017 Dr. Perlewitz performed cervical laminectomies at C5 and C6 and a spinal canal decompression at C4-7.

In an August 2, 2017 report, Dr. Perlewitz reiterated his diagnoses and medical opinions.

Appellant submitted a progress report dated October 11, 2017 from Dr. Perlewitz who diagnosed status-post complete cervical laminectomy at C5-6 and fusion at C3-6, improvement of degenerative cervical spondylotic myelopathy, anterior disc collapse at C6-7 causing cervicothoracic kyphosis and uncovering of the facet joints, and erythema along the posterior incision site now resolved.

Appellant further submitted x-rays of the cervical spine dated September 20, October 11, and November 3, 2017 demonstrating status post cervical discectomy and fusion.

A telephonic hearing was held before an OWCP hearing representative on January 5, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted progress reports from a physician assistant and x-rays of the cervical spine dated December 7, 2017 and January 4, 2018 demonstrating stable appearance of instrumentation.

Appellant also submitted a January 24, 2018 report from Dr. Perlewitz who interpreted x-rays of the cervical spine dated January 24, 2018 and found complete loss of disc collapse at the C6-7 disc space with 4.3 mm of anterolisthesis.

By decision dated February 27, 2018, OWCP's hearing representative affirmed the August 4, 2017 decision. The hearing representative determined that Dr. Haskell's report

constituted the weight of the evidence and established that the proposed surgery was not causally related to the accepted employment injury.[4]

LEGAL PRECEDENT

Section 8103 of FECA[5] 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.[6] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, and the only limitation on OWCP's authority is that of reasonableness.[7]

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.[8] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[9] In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[10]

ANALYSIS

The Board finds that the case is not in posture for decision.

In a June 7, 2017 report, Dr. Haskell, acting as a second opinion physician, reviewed appellant's history of injury and provided detailed findings on examination of the cervical and lumbar spine. He diagnosed preexisting cervical and degenerative lumbar disc disease and stenosis which he opined had not been caused or aggravated by the July 22, 2016 employment injury. Dr. Haskell found that appellant might require a cervical discectomy and fusion at C5-6 and a

[4] The hearing representative referred to Dr. Haskell as an impartial medical examiner, but the record indicates that appellant was referred to Dr. Haskell as a second opinion physician.

[5] *Supra* note 2.

[6] 5 U.S.C. § 8103; *see N.G.*, Docket No. 18-1340 (issued March 6, 2019).

[7] *D.W.*, Docket No. 19-0402 (issued November 13, 2019); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP 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).

[8] *See R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 203, 209 (1992).

[9] *Id.*; *see also K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[10] *See T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

decompression laminectomy and disc excision at L3-4. He opined, however, that such procedures would not be causally related to the accepted employment injury.

In support of his request for authorization, appellant submitted January 18, 2017 reports from Dr. Perlewitz, his attending physician. Dr. Perlewitz discussed appellant's history of a trip and fall at work on July 22, 2016. He diagnosed cervical myelopathy and radiculopathy, a lumbar disc herniation with myelopathy, lumbar spinal stenosis with radiculopathy and myelopathy, and lumbar spondylolistheses. Dr. Perlewitz opined that the diagnosed conditions were causally related to the accepted employment injury and caused a progression of clinical symptoms and risk to the spinal cord. He opined that appellant would not benefit from further conservative treatment and recommended an urgent anterior cervical decompression correction and fusion with instrumentation from C3 through C6.

As Dr. Haskell, for the government, and Dr. Perlewitz, appellant's attending physician, disagree on the issue of whether appellant's requested surgical procedures were for a condition causally related to an employment injury and are medically warranted, the Board finds that there is a conflict in the medical opinion evidence. The case must therefore be remanded for referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a). Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 13, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

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