

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

J.P., Appellant)	
)	
and)	Docket No. 24-0929
)	Issued: October 28, 2024
U.S. POSTAL SERVICE, INTERNATIONAL)	
SERVICE CENTER, JOHN F. KENNEDY)	
INTERNATIONAL AIRPORT, Jamaica, NY,)	
Employer)	
)	

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 16, 2024 appellant, through counsel, filed a timely appeal from an April 2, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to

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.

the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied authorization for L4-5 and L5-S1 percutaneous discectomy surgery.

FACTUAL HISTORY

On November 17, 2021 appellant, then a 51-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on November 11, 2021 he experienced left hip, left knee, and left back pain when his powered industrial vehicle (PIV) was hit by a PIV driven by a contractor while in the performance of duty. He stopped work on November 15, 2021. OWCP initially accepted the claim for lumbar spine ligament sprain, strain of muscle, fascial, and tendon of lower back, strain of left thigh, and sprain of left knee. It subsequently expanded acceptance of the claim to include cervical disc bulge at C2-3, C3-4, C4-5, C5-6, and C6-7; thoracic disc bulge at T12-L1; and lumbar disc bulge at L1-2, L2-3, L4-5, and L5-S1.

In a September 7, 2022 report, Dr. Mohan Tripathi, an attending Board-certified orthopedic surgeon, related that appellant had complaints following a work-related motor vehicle accident on November 11, 2021. He noted that appellant had no prior neck or back injury. Dr. Tripathi reviewed appellant's lumbar and cervical spine magnetic resonance imaging (MRI) scans of March 6, 2022. Regarding the lumbar spine, he noted findings of bulging disc at T12-L1 with thecal sac impingement; bulging discs at L1-2 and L2-3 without stenosis; bulging disc at L4-5 with left foraminal annular tear and near impingement upon exiting left L4 root; and bulging disc at transitional L5-S1 level, with midline annular tear and thecal sac impingement. Dr. Tripathi provided assessments of cervical spine pain, cervical radiculopathy, lumbar strain, and lumbar radicular pain. He opined that appellant's diagnosed conditions were caused by his November 11, 2021 work-related accident. Dr. Tripathi further opined that he was temporarily totally disabled. He proposed percutaneous discectomy at L4-5 and L5-S1.

On September 14, 2022 OWCP referred a statement of accepted facts (SOAF) and the case record, including Dr. Tripathi's September 7, 2022 report, to Dr. Kenechukwu Ugokwe, Board-certified neurosurgeon serving as an OWCP district medical adviser (DMA), for review and an opinion on whether the lumbar surgery proposed by Dr. Tripathi was medically warranted and causally related to the accepted November 11, 2022 employment-related conditions.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that OWCP received additional evidence following the April 2, 2024 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP at the time of its final decision will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In an October 6, 2022 report, the DMA, Dr. Ugokwe, agreed with Dr. Tripathi that the proposed lumbar percutaneous discectomy was causally related to the accepted employment-related conditions because appellant did not have neck or back injury prior to his employment injury. However, the procedure was not medically necessary because there was a lack of large sample size long-term data to support the efficacy of the treatment.

In a November 18, 2022 report, Dr. Tripathi explained why his proposed lumbar discectomy at L4, L5, and S1 levels was medically necessary. He noted that despite appellant's extensive treatment, including weekly physical therapy visits, medications, and pain management since his November 11, 2021 employment injury, he continued to have intractable pain with associated and consistent neurological deficits. Thus, Dr. Tripathi advised that associated clinical features represent the appropriate indication for surgical intervention. He again noted that findings from appellant's March 6, 2022 lumbar spine magnetic resonance imaging (MRI) scan. Dr. Tripathi explained that appellant's physical and neurological examination of the lumbar spine and S1 joint revealed neurological deficits. He concluded that failure to respond appropriately or delay the proposed percutaneous discectomy could significantly negatively impact the overall prognosis for appellant's recovery, and ultimately would preclude him from achieving a full recovery.

On November 22, 2022 OWCP requested that Dr. Ugokwe review Dr. Tripathi's November 18, 2022 report and a SOAF, and comment regarding the medical necessity of the proposed lumbar percutaneous discectomy.

On November 30, 2022 Dr. Ugokwe noted that he reviewed Dr. Tripathi's November 18, 2022 report. He reiterated his prior opinion that the proposed lumbar surgery was causally related to the accepted employment-related conditions, but that it was not medically necessary because there was a lack of large sample size long-term data to support the efficacy of the treatment.

On December 9, 2022 OWCP referred appellant, along with a SOAF and the case record, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature of appellant's employment-related conditions, the extent of disability, and whether the proposed lumbar surgery should be approved at the expense of OWCP.

In a January 3, 2023 report, Dr. Sultan noted appellant's history of injury and medical course. He reviewed appellant's medical record, discussed his examination findings, and diagnosed traumatic derangement of the cervical and thoracolumbar spines, and internal derangement of the left hip. Dr. Sultan advised that appellant's work-related conditions involving his neck, mid and lower back, and left hip were not clinically resolved. There was clinical evidence to support that the above-note work-related conditions were still active and causing objective examination findings. Additional medical recovery could be expected with the passage of time and additional treatment. Appellant had not yet reached maximum medical improvement. Dr. Sultan opined that there was no need for the proposed L4-5 and L5-S1 discectomy based on his examination findings. He explained that appellant presented with the noted lumbar spine motion restrictions without any lower extremity neurological impairment. Dr. Sultan recommended that he continue with home exercise to maintain muscle tone and joint mobility and with a pain management specialist to control his subjective complaints.

In December 22, 2022 and January 23, 2023 reports, Dr. Daniel Giangrosso, a Board-certified physiatrist, noted a history of appellant's November 11, 2022 employment injury and his medical treatment. He provided appellant's physical examination findings and reviewed diagnostic test results. Dr. Giangrosso related assessments of cervical spine and lumbar radicular pain, cervical radiculopathy, and lumbar strain. He advised that appellant was temporarily totally disabled. Dr. Giangrosso discussed appellant's treatment plan, which included a lumbar percutaneous discectomy at L4-5 and L5-S1. He indicated that a lumbar L4-5 and L5-S1 percutaneous discectomy, without fusion, was indicated as appellant's MRI scan was positive for herniated disc, and he had failed conservative medical treatment, including physical therapy.

On February 3, 2023 OWCP determined that a conflict of medical opinion evidence existed between Dr. Sultan, the second opinion physician, and Dr. Giangrosso, appellant's treating physician, regarding whether the proposed percutaneous discectomy at L4-5 and L5-S1 was medically necessary.

On February 16, 2023 OWCP referred appellant, along with the case record, a SOAF, and a series of questions, to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical evaluation, to resolve the conflict of medical opinion.

In a March 20, 2023 report, Dr. Pecker, the impartial medical examiner (IME), reviewed appellant's history of injury, medical treatment, and the SOAF. He examined appellant and provided extensive physical examination findings.

Dr. Pecker diagnosed early arthritis of the left hip with senescent labral tearing, degenerative disc disease in the cervical spine with milder changes in the lumbar spine, and tendinitis of the left shoulder with no evidence of trauma. He agreed with the opinion of Dr. Sultan, OWCP's second opinion physician, that the proposed lumbar discectomy at L4-5 and L5-S1 was not medically necessary. Dr. Pecker explained that there was no evidence of radiculopathy or neural element impingement to support the need for surgery. He further explained that his review of a lumbar spine MRI scan showed good preservation of disc height at L4-5 and L5-S1 with no significant disc herniation. Dr. Pecker noted that a very tiny one-millimeter protrusion of disc into the annulus was consistent with appellant's age, and showed no evidence of trauma or any evidence that it was causing pain. He further noted that there were multiple positive Waddell signs and decreased sensation below the knee to pin on the left side, but this was not consistent with radiculopathy or the MRI scan findings. Dr. Pecker concluded that the proposed lumbar discectomy was not warranted as his findings on physical examination and MRI scan findings were consistent with mild degenerative changes consistent with appellant's age and there was no evidence of radiculopathy.

By decision dated April 6, 2023, OWCP denied authorization for percutaneous discectomy surgery at L4-5 and L5-S1 levels. It explained that the evidence of record, as represented by the IME, did not support that the proposed surgery was medically necessary to address the effects of his work-related conditions under FECA.

On January 5, 2024 appellant, through counsel, requested reconsideration.

OWCP received medical evidence including a February 26, 2024 report from Dr. Jay K. Shah, an osteopathic physician specializing in orthopedic surgery. Dr. Shah noted appellant's history of injury on November 11, 2021 and medical treatment. He reported his findings on physical examination and reviewed diagnostic test results. Dr. Shah diagnosed cervical spine and lumbar radicular pain, cervical radiculopathy, and lumbar strain. He advised that there was an indication for lumbar discectomy at L4, L5, and S1 surgery.

On March 13, 2024 OWCP expanded the acceptance of the claim to include other cervical disc displacement, occipito-atlanto-axial region; other intervertebral disc displacement, thoracic and lumbar regions; other sprain of left hip; and unspecified sprain of left shoulder joint.

By decision dated April 2, 2024, OWCP denied modification of its April 6, 2023 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA⁴ 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 by 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.⁵ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in determining whether a particular type of treatment is likely to cure or give relief.⁶ 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 proof to establish that the expenditures were 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 for a surgical procedure to be authorized, appellant must establish that the procedure was for a condition

⁴ 5 U.S.C. § 8103(a).

⁵ *Id.*; see *J.K.*, Docket No. 20-1313 (issued May 17, 2021); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁶ *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-812 (issued April 3, 2009).

⁷ *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

⁸ *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

⁹ *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

causally related to the employment injury and that the procedure was medically warranted.¹⁰ Both of these criteria must be met in order for OWCP to authorize payment.¹¹

Abuse of discretion is 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.¹²

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.¹³ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

The Board finds that OWCP properly denied authorization for L4-5 and L5-S1 percutaneous discectomy surgery.

OWCP properly referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Pecker for an impartial medical examination and opinion in order to resolve the conflict in the medical opinion evidence between appellant's treating physician Dr. Giangrasso, and OWCP's second opinion physician Dr. Sultan, regarding whether the proposed percutaneous discectomy at L4-5 and L5-S1 was medically necessary.

In a March 20, 2023 report, Dr. Pecker discussed appellant's history of injury, reviewed a SOAF, and medical evidence, and conducted an extensive physical examination. He opined that the proposed lumbar discectomy at L4-5 and L5-S1 was not medically necessary to treat

¹⁰ *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

¹¹ *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹² *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹³ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *J.P.*, Docket No. 23-0075 (issued March 26, 2023); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

appellant's accepted work-related conditions. Dr. Pecker explained that there was no evidence of radiculopathy or neural element impingement to support the need for surgery. He further explained that his review of a lumbar spine MRI scan showed good preservation of disc height at L4-5 and L5-S1 with no significant disc herniation. Although Dr. Pecker noted a very tiny one-millimeter protrusion of disc into the annulus, he explained that this finding was consistent with appellant's age. He concluded that appellant's findings on physical examination and MRI scan findings were consistent with mild degenerative changes consistent with his age, and there was no evidence of radiculopathy or neural element impingement.

In situations where the case is referred to an IME for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶ The Board finds that Dr. Pecker provided a well-rationalized opinion based on the SOAF, the medical record, and his examination findings. Thus, Dr. Pecker's opinion that appellant's lumbar discectomy at L4-5 and L5-S1 was not medically warranted for the accepted conditions is entitled to the special weight of the evidence.¹⁷

The only limitation on OWCP's authority in approving or denying service under FECA is one of reasonableness.¹⁸ In the instant case, OWCP obtained a well-rationalized report from Dr. Pecker in which he opined that the requested surgery was not warranted for appellant's accepted employment injury. OWCP, therefore, had sufficient evidence to deny surgery, and did not abuse its discretion.

The Board further finds that Dr. Shah's February 26, 2024 report is insufficient to overcome the special weight accorded to Dr. Pecker or to create a new medical conflict, because he failed to provide medical rationale explaining why the proposed lumbar surgery was medically necessary to treat appellant's accepted lumbar conditions. The Board has held that a medical opinion is of limited probative value if it does not contain sufficient medical rationale in support of the physician's opinion.¹⁹ Accordingly, OWCP properly denied authorization for lumbar discectomy at L4-5 and L5-S1.

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 properly denied authorization for L4-5 and L5-S1 percutaneous discectomy surgery.

¹⁶ See *C.L.*, Docket No. 24-0249 (issued April 15, 2024); *D.S.*, Docket No. 19-1698 (issued June 18, 2020); *C.W.*, Docket No. 17-0918 (issued January 5, 2018); *Patricia J. Glenn*, 53 ECAB 159 (2001); *James P. Roberts*, *id.*

¹⁷ See *C.L.*, *id.*; *D.S.*, *id.*; *P.F.*, Docket No. 16-0693 (issued October 24, 2016).

¹⁸ See *T.A.*, *supra* note 10; *Cathy B. Millin*, *supra* note 11.

¹⁹ *R.C.*, Docket No. 21-1018 (issued September 1, 2023); *O.M.*, Docket No. 20-0640 (issued April 19, 2021).

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 28, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board