United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 16-1693**
	)	**Issued: July 13, 2017**
DEPARTMENT OF THE ARMY, ARMY SIGNAL CENTER, Fort Gordon, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 23, 2016 appellant filed a timely appeal from a May 25, 2016 merit decision and a July 21, 2016 nonmerit 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 this case.

ISSUES

The issues are: (1) whether OWCP abused its discretion when it denied authorization for lumbar surgery; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The Board notes that appellant timely requested an oral argument before the Board. By letter dated September 20, 2016 appellant rescinded his request.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 30, 2002 appellant, then a 39-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in the performance of duty on April 22, 2002. He alleged that he was using a fire hose and injured his back. The accepted conditions in the case are: displacement of lumbar intervertebral disc (L5-S1) without myelopathy, degeneration of lumbar/lumbosacral intervertebral disc, closed dislocation of lumbar vertebrae, and other psychogenic pain.

Appellant stopped working and has been on the periodic compensation rolls since April 18, 2004. The record indicates that appellant underwent a series of lumbar surgeries on October 31, 2002 (lumbar laminectomy and discectomy, left L5-S1), December 1, 2004 (L5 laminectomy, bilateral L5-S1 discectomies), June 17, 2010 (insertion of dorsal column spinal stimulator), November 7, 2011 (fusion, removal of hardware, L4 laminectomy), February 7, 2013 (removal of spinal stimulator), and December 2, 2013 (removal of hardware, L3 laminectomy, medial facetectomies and foraminotomies of L3 to sacrum, interbody fusion and lateral fusion).

On April 30, 2014 OWCP referred appellant for a second opinion examination by Dr. Sarveswar Naidu, a Board-certified orthopedic surgeon, with respect to continuing residuals of the employment injury. In a report dated June 5, 2014, Dr. Naidu indicated that appellant could work four hours per day in light duty. Dr. Naidu wrote that with multiple back surgeries recovery was very slow and restrictions permanent, and she felt appellant had reached maximum medical improvement after the December 2013 surgery.

In a report dated March 19, 2015, Attending Surgeon Dr. Thomas Parfenchuck, Board-certified in orthopedic surgery, indicated that appellant reported continuing low back pain. He provided results on examination and noted a March 12, 2015 magnetic resonance imaging (MRI) scan showed large facets with ligamentous thickening and some lateral recess stenosis at L2-3, with mild-to-moderate central stenosis. Dr. Parfenchuck diagnosed low back pain, lumbar radiculopathy, lumbar spinal stenosis, lumbar instability, and status post decompression and fusion. He wrote, "I think [appellant] would benefit at this time from removal of hardware with exploration of fusion, a decompressive laminectomy at L2 with PLIF [posterior lumbar interbody fusion] at [L]2-3 and extension of fusion [L]2 to 5 or S1."

OWCP referred the case to an OWCP medical adviser, Dr. H. Hogshead, an orthopedic surgeon, for an opinion with respect to the proposed surgery. In a note dated April 21, 2015, Dr. Hogshead opined that a positive outcome from further lumbar surgery was unlikely. He noted that the June 5, 2014 second opinion report had not recommended further surgery.

The record contains a June 18, 2015 report from Dr. Gregory Oetting, a Board-certified neurosurgeon, who indicated that appellant had continuing lumbar pain. He reported that the recent lumbar spine MRI scan demonstrated some mild degenerative facet joint change at the junctional level L2-3. Dr. Oetting noted some mild-to-moderate central stenosis and recess stenosis. He diagnosed multiple previous lumbar operations, currently instrumented from L3 to the sacrum, with mild-to-moderate junctional changes at this time. Dr. Oetting opined that appellant had ongoing pain management issues and he did not recommend surgery at that time.

He indicated that the plan was to see appellant in six months, and if symptoms become more prominent and studies showed more significant junctional changes, then consideration for surgery would be warranted.

Appellant was referred by OWCP to Dr. John Bieltz, an osteopath, for a second opinion regarding the proposed lumbar surgery. In a report dated July 28, 2015, Dr. Bieltz provided a history and results on examination. After reviewing the diagnostic studies, discussion with the patient, and going over his results he opined, "I do not feel that surgical intervention will significantly benefit the patient." Dr. Bieltz noted that appellant had four major surgeries and he was unsure that a fifth surgery would in any way significantly improve his overall function. He indicated that it was likely the L2 level would become more involved due to the fusion above it, and it was likely appellant would need some additional treatment in the future.

Appellant submitted a report dated August 13, 2015 from Dr. Parfenchuck. Dr. Parfenchuck reported that appellant had instability at L2-3 based on x-rays. He indicated that appellant did not have severe spinal stenosis, but it appeared that he had translation abnormality which could be contributing to his symptoms, and appellant did have some posterior thickened ligament as well. Dr. Parfenchuck noted the risks of surgery, but indicated that appellant "would like to pursue consideration for operative intervention with PLIF reconstruction L2-3 due to the fact that he has had progressive symptoms and failed conservative care for an exhaustive period of time."

By decision dated September 24, 2015, OWCP denied authorization for further lumbar surgery. It found the weight of the evidence did not establish the surgery was warranted.

On February 22, 2016 appellant requested reconsideration. He submitted a January 21, 2016 report from Dr. Parfenchuck, who provided a history and results on examination. Dr. Parfenchuck again indicated that appellant would like to pursue surgery in view of progressive symptoms and failure of conservative care.

In a report dated March 3, 2016, Dr. Oetting indicated that appellant had a lumbar myelogram on February 25, 2016. He indicated that there were no changes and that appellant continued to report low back pain radiating into the legs. Dr. Oetting reported that myelogram and computerized tomography scan demonstrated severe spinal stenosis at L2-3 above his previous fusion from L3 to the sacrum, with a left side facet cyst and/or disc rupture contributing to the stenosis. The diagnoses provided under "past medical history" included depression, hypertension, prostate disorder, and thyroid disease. Dr. Oetting listed appellant's medications. He noted that the planned surgery was for exploration of fusion, hardware removal, L2 laminectomy, bilateral L2-3 osteotomies, L2-3 posterior lumbar interbody fusion with reinstrumentation, and fusion from L2 the sacrum. Dr. Oetting wrote:

> "Considering the recent data about sagittal balance. His surgical procedures were done prior to that information being known. I would like to try to get him some better lumbar lordosis and hopefully with the osteotomies. We get him a little bit of the lordosis back in the spine. I [ha]ve explained 90 [percent] chance that surgery will help him. It certainly w[ill] n[o]t make him perfect, and pain-free, but will hopefully improve him 60 [to] 70 [percent]."

OWCP referred the case to another medical adviser, Dr. William Tontz, an orthopedic surgeon. In a May 17, 2016 report, Dr. Tontz noted that indications for a low back spinal fusion include neural arch defect, segmental instability with movement of more than 4.5 millimeters (mm), revision surgery where functional gains are anticipated, infection, tumor, deformity, and after a third disc herniation. He also found there was a lack of support for fusion for mechanical low back pain for subjects with failure to participate effectively in active rehabilitation, total disability over six months, active psychiatric diagnosis, and narcotic dependence.[3] Dr. Tontz opined, "there is lack of medical necessity for lumbar fusion as there is no evidence of segmental instability greater than 4.5 mm, severe stenosis at L2-3, or psychiatric clearance from the exam[ination] note of [March 11, 2016] to warrant fusion. Therefore, the requested lumbar fusion is not medically necessary."

By decision dated May 25, 2016, OWCP reviewed the merits and denied modification. It found the weight of the medical evidence did not establish the proposed surgery was medically necessary.

On June 13, 2016 appellant again requested reconsideration. He asserted OWCP did not consider all the evidence and he was still having trouble walking. Appellant submitted a May 23, 2016 report from Dr. Todd Cable, Board-certified in pain medicine, opining appellant needed to continue to take Movantik, for opioid induced constipation. He also submitted a July 12, 2016 report from a nurse practitioner.

By decision dated July 21, 2016, OWCP denied merit review of the claim. It found the evidence submitted was not relevant to the medical issue presented.

LEGAL PRECEDENT -- ISSUE 1

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 the amount of monthly compensation.[4] In interpreting 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.[5]

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.[6] In order to be entitled to

[3] Dr. Tontz did not provide additional detail as to an active psychiatric diagnosis or narcotic dependence.

[4] 5 U.S.C. § 8103(a).

[5] *Dale E. Jones,* 48 ECAB 648, 649 (1997).

[6] *J.T.,* Docket No. 16-0731 (issued May 11, 2017); *Claudia L. Yantis,* 48 ECAB 495 (1997).

reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[7]

ANALYSIS -- ISSUE 1

OWCP has accepted that appellant sustained displacement of lumbar intervertebral disc (L5-S1) without myelopathy, degeneration of lumbar/lumbosacral intervertebral disc, closed dislocation of lumbar vertebrae, and other psychogenic pain, as a result of an April 22, 2002 employment incident. The issue in the present case is whether OWCP properly denied authorization for the proposed lumbar surgery.

Appellant has submitted evidence from treating physicians Dr. Parfenchuck and Dr. Oetting supporting the need for lumbar surgery. Dr. Parfenchuck indicated in his March 19 and August 13, 2015 reports, as well as a February 22, 2016 report, that appellant would benefit from the proposed surgery. He does not, however, provide a detailed medical explanation of the need for surgery. While Dr. Oetting provided a March 3, 2016 report, noting recent data about sagittal balance that was unknown at the time of previous surgeries, he does not clearly explain why he felt this supported the need for surgery. Appellant must submit evidence that shows that the requested medical procedure is both due to a condition causally related to an employment injury and that it is medically warranted.[8] Neither Dr. Parfenchuck nor Dr. Oetting substantiated that the requested procedure was medically warranted.

The second opinion physician, Dr. Bieltz indicated in his July 28, 2015 report that he did not feel surgery was warranted at that time, although he did indicate that future surgery was likely. The most recent report from an OWCP medical adviser was the May 17, 2016 report from Dr. Tontz. He referred to the lack of evidence of segmental instability or severe stenosis, and the lack of psychiatric clearance, opining that lumbar fusion surgery was not medically necessary.[9]

As noted above, an abuse of discretion is established only for clearly unreasonable exercise of judgments. OWCP has probative medical evidence from a second opinion physician and an OWCP medical adviser indicating that surgery was not warranted at this time. The Board accordingly finds the denial of authorization of lumbar surgery does not constitute an abuse of discretion in this case.[10]

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[7] *Cathy B. Mullin,* 51 ECAB 331 (2000).

[8] *See L.C.,* Docket No. 16-1797 (issued March 10, 2017).

[9] *Id.*

[10] *See S.M.,* Docket No. 15-1511 (issued January 11, 2016).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[11] OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."[12] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.[13]

ANALYSIS -- ISSUE 2

In the present case, appellant submitted a June 10, 2016 letter on reconsideration, writing that he felt OWCP had not properly considered the evidence. He indicated he was having trouble walking and did not understand how OWCP came to its decision. Appellant did not show OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered. As discussed above, the issue was a medical issue with respect to the need for surgery and OWCP has discretion with respect to authorizing medical treatment.

Appellant did not submit relevant and pertinent evidence not previously considered by OWCP. As to the new report he submitted, Dr. Cable did not discuss surgery in his May 23, 2016 report. Further, the report from a nurse practitioner is not relevant medical evidence as a nurse practitioner is not considered a physician under FECA.[14]

The Board accordingly finds OWCP properly denied merit review in this case. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered by OWCP. Since appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2), he was not entitled to a review of the merits of the claim.

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[11] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[14] *See R.H.,* Docket No. 16-1055 (issued May 22, 2017); *see David P. Sawchuk,* 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law). *See also L.D.*, Docket No. 17-0435 (issued April 5, 2017) (nurse practitioners are not considered physicians as defined under FECA).

CONCLUSION

The Board finds OWCP did not abuse its discretion in denying authorization for lumbar surgery. The Board further finds that OWCP properly denied appellant's reconsideration request without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 21 and May 25, 2016 are affirmed.

Issued: July 13, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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