File Number:
HR20-D-H

RECEIVED SEP 28 2019
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U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injurv:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a Review of the Written Record, the case file was transferred to the Branch of Hearings and Review.

The review was completed on As a result of such review, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
QUEENSBOROUGH BANK BUILDING
7393 HODGSON MEMORIAL DR-STE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, September 24, 2019

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of Claimant; Employed by the ; Claim number

Merit consideration of the case file was completed on Based on the review, the decision of the district office dated is affirmed for the reasons set forth below

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The issues for determination are whether the Office properly denied the request for claim expansion by decision dated

is employed as a with the She reported being struck from behind in her delivery vehicle on She stopped work on the date of injury, and receive Continuation of Pay as well as wage loss benefits. Treating physician MD opined on that mild degenerative changes were seen on an MRI study, with no significant stenosis. A lumbar strain was suffered. The claimant was to resume full duty work. The district office accepted that she suffered a lumbar sprain secondary to the accident. Ms. resumed her usual work on

Ms. sought care in an emergency room (ER) on for left leg pain. No additional care is documented until a MRI was administered. The study was not compared to the study.

On Dr. opined that the recent MRI revealed a disc herniation at L5-S1. The medical record was reviewed by the District Medical Advisor (DMA), who concurred with the diagnosis and recommended surgical intervention. On the Office expanded the case to accepted that lumbosacral radiculopathy at L5-S1 was suffered as a result of the accident.

On neurosurgeon , MD performed a left L5-S1 microdiscectomy. She returned to part-time limited duty work on She continued in that status, without increase in hours. On a third lumbar MRI study was performed. On the schedule was increased to 6 hours per day. Full-time modified work was achieved on . Ms. continued with Dr. on he recommended a lumbar fusion from L3 to S1. A fourth MRI study on revealed subtle progressive changes at L5-S1. By letter dated the Office expanded the claim allowances to include lumbar radiculopathy from L3 to S1.

The Office asked the DMA to review the request for additional fusion surgery. In a response of DMA , MD opined that the requested fusion was not related to the work accident of . He opined that the surgery had corrected the radiculopathy at L5-S1, and the post-operative scans did not reveal and stenosis or instability. As no stenosis or instability was in evidence, Dr. opined that the requested surgery was not medically necessary. He closed, noting that he did not think the current condition was related to the accident, and reiterating that no fusion was medically necessary.

On the Office denied the requested procedure. By decisions dated and the Office also denied claims for total disability for the period to finding the disability unrelated to the auto accident of

The Office twice sought clarification from Dr. on the active conditions and any relationship to the accident. He did not respond.

Dr. did respond to questions posed by attorney Paul Felser in his narrative o .
He indicated that the lumbar disc herniation, lumbar instability and iliotibial (IT) band syndrome were all related to the auto accident. He explained that scar tissue had formed over time, causing nerve pain and requiring a facetectomy which would create instability. The IT band syndrome was caused by stress on muscles from persistent lumbar degeneration and herniation. As the surgery would cause disease to the adjacent segment, so the request was expanded to include all levels from L3 to S1. The work related radiculopathy had caused leg pain, back pain, weakness and functional limitations. The patient could only perform sedentary work for 2 hours daily.

To address the new opinion supporting additional diagnoses, the Office arranged a second opinion exam with board certified orthopedic surgeon MD on Dr. reviewed the Statement of Accepted Facts and the medical records. He noted that history of injury and claim allowance as identified in the SOAF. He summarized the medical record in significant detail. His exam found independent ambulation, with function motion in the arms and neck. A lidocaine patch on the lumbar area was noted. Moderately decreased range of motion was recorded, with persistent paravertebral spasm. Straight leg raising was positive in supine and seated positions on the left, but negative on the contralateral side. Motor strength was symmetrical, and reflexes were intact. The left sensory exam was diminished in the foot. Dr. : opined that the active conditions were post-operative microdiscectomy L5-S1 left with progressive neuroforaminal stenosis, adjacent segment syndrome, and degenerative disc disease at L3-4 and L4-5. The above conditions were connected to the work injury, in spite of the operative attempt. The conditions remained active, and no evidence of malingering was found. He added that the underlying degenerative changes were permanently aggravated by the work factor. No improvement would come until the fusion surgery was performed. The opinion linking the additional diagnoses and surgery to the auto accident was not well reasoned. Dr. did not opine on the instability or IT band syndrome, nor was he directly asked about these diagnoses.

On attorney Paul Felser requested reconsideration of the surgery denial.

On Dr. saw Ms. ; he indicated that the active diagnosis was lumbar instability. His exam recorded normal coordination and sensation, with intact reflexes. The left hamstring showed mildly decreased strength, and an antalgic gait was present. The lumbosacral spine was not tender to palpation, with no swelling, edema or erythema, and no radicular symptoms on movement. Straight leg raising was negative bilaterally. An exam on was unchanged.

On the Office advised Dr. that several of the surgery procedures he requested were not consistent with the accepted conditions on record. It was also noted that two of the procedure codes fell outside the treatment suite for the accepted conditions. He was asked to explain how the conditions of disc herniation at L3-S1 were related to the auto accident.

Attorney Paul Felser wrote on that the report of Dr. appeared to support an additional claim allowance of permanent aggravation of lumbar degenerative disc disease, with approval of the requested surgery.

Or Dr. Esce reviewed the report of Dr. offering his concurrence.

On the medical record was again forwarded to the DMA for consideration of the consequential injuries of lumbar instability, IT band syndrome, and lumbar disc herniation at L3-S1. In a response dated DMA MD noted the history of injury from , with allowances of lumbar sprain and lumbar disc disorder with radiculopathy. Dr. noted that there is no evidence that a traumatic motor vehicle accident can cause multilevel spine degeneration; he found the pathology to be genetic. Addressing the requested surgery, Dr. found fusion to be a very aggressive approach given the relatively minor findings on the most recent MRI study. He found no surgery was warranted based on the study. He also found no evidence of any instability related to the accident, and no evidence that the degenerative condition was aggravated or accelerated by the accident. Dr. also found no evidence relating the IT band syndrome to the accident. Turning to the issue of causation, Dr. explained the American Medical Association's Bradford-Hill criteria used for determining causation. After application of the 9 criteria, he did not find it medically likely that the accident caused the spinal pathology, as it was mainly a genetic condition. He found that the surgery was unwarranted based on the medical evidence, and unrelated to employment in any case. He found no additional diagnoses were associated with the accident.

The district office denied the claim expansion by decision dated . The medical development which the Office undertook was summarized, as well as the fruits of that development. The Office afforded the weight of medical opinion to Dr. in denying a nexus between the instability, IT band syndrome and lumbar disc herniations. The claimant disagreed with that decision and on requested a telephonic hearing.

On Office denied modification of the decision. That decision cited the report of the DMA in rejecting the need for surgery, but did not address the new report in file from Dr.

On pain management physician MD saw the patient for complaints of worsening left radicular symptoms and neurologic deficits and severe low back pain. The left leg was reported as swollen and the lateral thigh was tender. Exam found no significant peripheral edema. Decreased light touch sensation over the left L4 to S1 dermatomes was found, with slightly decreased strength at the left extensor halluces longus and ankle dorsiflexor. The left lateral thigh was tender to palpation, but reflexes were intact and symmetrical. He recommended a repeat MRI.

On Dr. saw the patient, noting a recent MRI study.[1] Exam found mild distress, with tenderness to palpation of the back and antalgic gait and station. Straight leg raising was negative and muscle tone normal. The MRI was compared to and studies, showing significant degeneration and advancement and progression of the disk degeneration and bulges, particularly at L4-5 and L5-S1. Modic endplate changes and loss of disk height, with central canal stenosis at L3-4, L4-5 and L5-S1 were seen. Dr. was surprised at the level of progression, reinforcing his opinion that fusion was needed. No discussion of how any pathology was related to the auto accident was offered.

A hearing was scheduled for . Prior to the hearing attorney Felser asked that the appeal be converted to a review of the written record.

On the Branch of Hearings and Review sent letters to the claimant's employing agency requesting comments or documents believed to be relevant and material to Ms. claim for additional injury. Twenty days was afforded for a response. No responses have been received to date. No new argument or evidence has been received in the period afforded. The Branch now conducts the review of the record.

Causal relationship is a medical issue,[2] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established factors of employment. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established factors of employment.[3]

When causal relationship is not obvious or when there may have been an intervening non-occupational cause, it is essential that the physician give his or her medical reasons for relating the condition to the history obtained. A rationalized opinion is also necessary, and should be requested, when disability appears to last beyond the time frame anticipated for an injury of the type accepted.[4] In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is

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[1] The date of the MRI is unknown; the interpretation is not a part of the record.
[2] Mary J. Briggs, 37 ECAB 578 (1986).
[3] Victor J. Woodhams, 41 ECAB 345 (1989).
[4] Federal Employees' Compensation Act Procedure Manual Section 2-810-5c2

determined by the reliability of the medical report obtained; its probative value; its convincing quality; the care of analysis manifested; and the medical rationale expressed in support of the doctor's opinion.[5]

When the medical report is *prima facie* sufficient but the opinion provided is un-rationalized or speculative, the Office may find that causal relationship cannot be properly determined on the basis of the medical evidence of record. When this happens, the Office must obtain additional medical evidence.[6]

In summarizing the issues, Dr. had opined that adjacent lumbar disc segments had been impacted by the work injury and resulting surgery. He opined that disc pathology from L3 to S1 was related to the auto accident. He also diagnosed IT band syndrome and lumbar instability, relating these diagnoses to the work accident indirectly. While not well reasoned, the opinion was prima fascie evidence of additional injury.

The Office arranged a second opinion exam with an orthopedic surgeon. That exam supported a relationship between the work accident and the claimed additional disc pathology as well as the need for surgery. The provider was not asked to address the remaining diagnoses of IT band syndrome or instability.

Upon review of the second opinion report, Dr. offered his concurrence. The Office was at that time in possession of a request for surgery, as well as a second opinion report supporting the request. The Office referred Dr. letter to Dr. , with additional medical records, for an opinion on the additional claimed diagnoses of IT band syndrome, and unspecified disc herniation, and lumbar instability. Dr. rejected any relationship between any of the diagnoses and the accident. He did not opine on whether the diagnoses of IT band syndrome or instability were present, but did opine, "the vast majority of her spinal pathology is genetic in nature not related to her work injury." He found no evidence that an accident could cause multi-level disc degeneration. Dr. did not opine on whether the accident contributed to the progression of the disc pathology.

The Office cited the opinion of Dr. in assigning his opinion greater weight than the treating physician, denying the unspecified disc herniation as well as the instability and IT band syndrome.

I find that the denial of the disc herniation, instability and IT band syndrome must be vacated, and additional development undertaken.

While the DMA may create a conflict in medical opinion, the DMA may not resolve it. Furthermore, the DMA's reasoned medical opinion will not usually constitute the weight of the medical evidence in an accepted disability case, even if the DMA is a Board-certified specialist in the appropriate field of medicine and the AP is not a specialist and offers no rationale, because the DMA has not examined the claimant and the AP has a critical function in determining extent and duration of injury-related disability.

[5] John A. Ceresoli, Sr., 40 ECAB ___ (1988) [88-1565 issued November 28, 1988].
[6] FECA Procedure Manual 2-805-5.

Washington DC, September 24, 2019

The DMA may provide an opinion which is not strong enough to constitute a conflict with the opinion of the treating physician but which is nevertheless of sufficient value to warrant additional action. For instance, where an AP states that a claimant is still disabled from a work-related back strain six months post-injury, the DMA may state that a two-month recovery period should have been sufficient. In this instance, referral for a second opinion examination would be appropriate.

The Office received an opinion from Dr. , supporting additional disc pathology and the need for surgery. He found that the "factors of employment" accelerated and permanently aggravated the pre-existing degenerative condition, but offered no reasoning or discussion of the temporal relationship between the accident and the progression. The Office should have sought clarification from Dr. on how he established that the accident of contributed to the degenerative process. The Office should also have taken the opportunity to explore the additional diagnoses at that time. Dr. report cannot serve as the basis for the denial of the consequential conditions in light of the evidence in file. I also note that a new MRI study of the back is available. The Office should arrange for an addendum report from Dr. to address the additional diagnoses of disc degeneration at L3-4 and L4-5, as well as the lumbar instability and IT band syndrome. Any additional development warranted by the response should be accomplished, and a de novo decision issued as appropriate.

Accordingly, I find that the Office's decision of is set aside, and the case returned to the district office for further development as indicated above.
Issued:

Washington, D.C.

Electronically Signed

David Cattani
Hearing Representative
for
Director, Office of Workers' Compensation Programs