BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MARGARET BRENNAN, Employee,	)	
v.	)	Hearing No. 1346556
CLAYMONT FIRE COMPANY, Employer.	)	

PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE/ APPEAL FROM A UTILIZATION REVIEW DECISION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board ("Board") on July 18, 2012 in the hearing room of the Board in New Castle County, Delaware.

PRESENT:

JOHN DANIELLO

OTTO MEDINILLA, SR.

Julie Pezzner, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Natalie Wolf, Attorney for the Employee
Susan List Hauske, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Ms. Margaret Brennan ("Claimant") sustained a compensable work injury to her neck and back on October 22, 2009 during the course and scope of her employment at Claymont Fire Company ("Employer"). Claimant's average weekly wage at the time of the work accident was $709.50 resulting in a compensation rate of $473.02. Claimant is currently collecting total disability benefits. On November 22, 2010, Claimant underwent surgery in the form of C5-6 anterior cervical discectomy and decompression, C5-6 anterior arthrodesis with ACF and C5-6 fusion with Synthes plate. In August 2011, Dr. Rastogi proposed lumbar surgery in the form of an anterior lumbar discectomy and fusion at L3-4 and L4-5 and posterior left L3-4 laminectomy, microdiscectomy and fusion. The matter was timely submitted to Utilization Review which found that the proposed lumbar surgery was not compliant with the Delaware Practice Guidelines ("Practice Guidelines").

On February 3, 2012, Claimant filed a Petition to Determine Additional Compensation Due in which she seeks an appeal of the Utilization Review decision. A hearing was held on Claimant's petition on July 18, 2012. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on her own behalf. She described her mechanism of injury. She stated that she initially treated conservatively for her neck and her back. She ultimately had neck surgery from which she experienced a huge improvement. She gained motion. Her headache and sharp achy stabbing pain resolved. She has not been able to return to work, however, because of her back.

Claimant testified that her low back is in constant pain. She experiences back spasms that cause her to drop to her knees. She stated that it feels like a hot poker stick is twisting in her

back. Her left leg goes numb and gives out on her causing her to fall. Claimant stated that around July 2011, Dr. Rastogi recommended she proceed with low back surgery. After having an EMG and two MRIs, Dr. Rastogi maintained his opinion that surgery is Claimant's best option.

Claimant testified that she declined Dr. Rastogi's recommendation to have a discogram. She explained that she had a bad reaction to the cervical injection and was fearful she would have a similar reaction to the dye used in the discogram. Her reaction included headaches, hives, itching, pain down her back, and difficulty breathing. Her allergic-type reaction caused her to contact Dr. Chiang. Dr. Chiang advised her to take Benadryl and to discontinue having the injections.

On cross examination, Claimant was read Dr. Chiang's medical note discussing Claimant's telephone call. According to the medical note, Claimant telephoned Dr. Chiang on the day after the cervical injection as opposed to on the day of the cervical injection. The medical note identified ample complaints but did not indicate any complaints about Claimant breaking out in hives or of having difficulty breathing. There also was no indication that Dr. Chiang advised Claimant to take Benadryl.

Claimant denied calling Dr. Chiang on the day after the cervical injection. Claimant elaborated. She stated that she called Dr. Chiang's office on the day of the cervical injection and left a message with the receptionist. Claimant stated that Dr. Chiang returned her call on the same day. Claimant reiterated that she did in fact complain of hives and of difficulty breathing.

Claimant confirmed that she has not returned to Dr. Rastogi since August 2011. Dr. Rastogi gave her the option of living with the pain or proceeding with surgery. Claimant expressed her desire to proceed with surgery. Claimant represented that she understands what is

involved in the proposed surgery. Dr. Rastogi wants to fuse the L3-5 levels and shave some of the hip bone that is causing numbness to the leg. She is hopeful the lumbar surgery will enable her to return to being an active family member and to return to work. She recognizes, however, that she will not be able to return to her former job as an Emergency Medical Technician.

Claimant testified that her pain increases with activities and it awakens her throughout the night. She purchased a new mattress with the hope of aiding her sleep but to no avail. Her left leg continues to bother her. She has pain and tingling that extends from her back down to the back of her knee. She is asymptomatic from the knee down. Claimant represented that most days she would rate her back pain with medication at a six to a seven on a ten-point pain scale. Without medication, she would rate her pain at a minimum of a ten on a ten-point pain scale. Her symptoms worsen with weather changes. Claimant listed her medications; her medications are prescribed by Dr. Bakst.

Claimant testified that it is her understanding that Employer terminated her job in either June or July of 2011. Claimant testified that she has carpal tunnel syndrome; consequently, she is not currently pursuing undergoing a functional capacity evaluation. Claimant acknowledged that for approximately eleven years preceding the work accident she had been treating for depression. During the eleven-year span, she encountered other stressors complicating her emotional status.

Dr. Pawan Rastogi who is board certified in neurology testified by deposition to a reasonable degree of medical probability on behalf of Claimant. He is a certified provider under the Delaware Workers' Compensation Practice Guidelines ("Practice Guidelines"). He first examined Claimant on October 12, 2010. He opined that his proposed lumbar spine surgery is reasonable, is necessary, and is causally related to the work accident.

Dr. Rastogi testified that Claimant's work accident involved feeling a pop in her neck while helping a patient. She developed significant pain that extended from her neck down into her left arm. She had complained of weakness and numbness particularly in the index finger as well as some low back pain and left leg pain.

Dr. Rastogi's treatment initially focused on Claimant's neck. He operated on her neck. Claimant continues to derive benefit. In February 2011, at Claimant's second post-operative visit with Dr. Rastogi, Claimant's main complaint pertained to her low back. At that visit, Claimant was having significant paraspinal back spasm with pain down the leg. Claimant's strength and reflexes were in tact. She had annular tears of the lumbar spine. Claimant commenced physical therapy with Dr. Bakst to treat her back.

When Dr. Rastogi saw Claimant in July 2011, Claimant's main complaint was of back spasms with pain radiating down the posterolateral aspect of the left leg. The examination findings were unchanged except Claimant had a positive straight left leg raising test in the seated position at forty-five degrees. Dr. Rastogi acknowledged that this visit was the only visit that he documented Claimant having a positive straight leg raising test. He was not concerned that he documented a positive straight leg raising test at only one visit because he was uncertain whether he conducted a straight leg raising test at other visits. He stated that surgery was necessary because Claimant had persistent mechanical back pain with an acute lumbar radiculopathy.

Dr. Rastogi testified that Claimant's MRI from July 26, 2011 revealed a left-sided foraminal disk herniation at L3-4 and an annular tear at L3-4. Dr. Rastogi characterized the findings as being essentially similar to the previous MRI findings. Dr. Rastogi informed Claimant: that Claimant's left leg symptoms appear to be more in the L5 distribution; that

Claimant has an annular tear at L4-5; and that Claimant has a foraminal disk herniation at L3-4. Dr. Rastogi added that the L5 nerve root is affected by L4-5.

Dr. Rastogi testified that normally he would recommend injections and then a discogram before recommending the surgical route. However, neither the injections nor the discogram were viable options because of Claimant's bad reaction to the cervical injections. He explained that a discogram involves using a dye that is similar to that used in the cervical injections. Dr. Rastogi acknowledged that a discogram would have been helpful to potentially identify the specific pain generator; he stated, however, that the risks of performing the discogram outweighed the benefit. Dr. Rastogi acknowledged not knowing what caused Claimant's bad reaction to the cervical injection.

Dr. Rastogi had Claimant undergo two EMGs in an attempt to isolate the area of pain but the findings were not helpful. The August 10, 2011 EMG was essentially negative. Dr. Rastogi stated when he saw Claimant in August, 2011 he again recommended to Claimant to undergo a two-level fusion and discectomy. He explained that Claimant's symptoms as she describes them could be from both the L3-4 and the L4-5 levels. He stated without being able to conduct additional testing, it is reasonable to base a surgical opinion on the MRI findings and on his clinical examination findings. The last time Dr. Rastogi saw Claimant was in August 2011.

Claimant had a third EMG in 2012 that according to Dr. Rastogi also was essentially negative. Dr. Rastogi testified that he was hoping that the EMG findings would help localize her area of pain but that did not happen. He added that a negative EMG does not necessarily mean that Claimant does not have radiculopathy.

Claimant saw Dr. Bakst on May 10, 2012 at which time Dr. Bakst documented that Claimant reported having weakness down her left leg and constant sharp and burning pain in her

low back. Dr. Rastogi acknowledged that he did not review Dr. Bakst's medical records to discover if Dr. Bakst ever noted a positive straight leg raising test. Dr. Rastogi remarked that he would not be surprised if Dr. Bakst did not find a positive straight leg raising test. Dr. Rastogi would continue to recommend surgery even if Dr. Bakst did not have a finding of a positive straight leg raising test. On cross examination, Dr. Rastogi testified that his one-time finding of the positive straight leg raising test and his finding of paraspinal spasm were sufficient to support his diagnosis of lumbar radiculopathy.

Dr. Rastogi acknowledged that Dr. Ali Kalamchi, Employer's medical expert, disagreed with the reasonableness and necessity of Dr. Rastogi's proposed surgery. Dr. Rastogi testified that contrary to Dr. Kalamchi, Dr. Rastogi considers Claimant to have left lumbar radiculopathy with mechanical back pain as opposed to nonspecific. Dr. Rastogi acknowledged that his examination findings were otherwise very similar to Dr. Kalamchi's examination findings – the bulk of the findings were of spasm with restricted range of motion. Neurologically, Claimant's strength and sensation were in tact. She did not have atrophy or weakness. The main differences in findings were that Dr. Rastogi documented a positive straight leg raising test and significant paraspinal spasm. Furthermore, Dr. Rastogi did not find that Claimant demonstrated positive Waddell signs. Dr. Rastogi acknowledged that Claimant may have emotional and psychosomatic issues. Dr. Rastogi did not believe that such issues would prevent Claimant from being a surgical candidate. Dr. Rastogi remarked that Claimant's cervical spine surgery was successful.

Dr. Rastogi added that he has seen Claimant multiple times and she has consistently and clearly exhibited significant pain levels. He noted a number of times during his evaluations that Claimant was in a fair bit of pain when she essentially bent forward. Dr. Rastogi does not consider Claimant to have minimal symptomatology. Dr. Rastogi testified that other than

continuing to treat with Dr. Bakst and living with her condition, Claimant's only other option is surgical.

Dr. Ali Kalamchi who is board certified in orthopedic surgery testified by deposition to a reasonable degree of medical probability on behalf of Employer. He is a certified health care provider under the Practice Guidelines. Dr. Kalamchi described the mechanism of injury and subsequent medical treatment. He examined Claimant on four occasions: on February 22, 2010; on June 2, 2011; on October 10, 2011; and on May 31, 2012. He reviewed the medical records of Delaware Back Rehabilitation, of Dr. Bakst, and of Dr. Rastogi. Dr. Kalamchi opined that the proposed surgery is not reasonable or necessary.

When Dr. Kalamchi saw Claimant on October 10, 2011, Claimant complained that her back symptoms were worsening. She was having residual symptoms with her left arm but her physicians wanted to address her lumbar spine condition before addressing the left arm. Dr. Rastogi had already recommended surgery. Dr. Kalamchi noted that Claimant did not appear to understand the complexity of the proposed surgery. Claimant expressed that she was willing to merely follow whatever recommendations Dr. Rastogi made.

Dr. Kalamchi recognized that the proposed surgery was denied under Utilization Review. He testified that the Utilization Review decision directed that more should be done to localize the area of pain and questioned the need for surgery. Dr. Kalamchi agreed with the Utilization Review decision. Dr. Kalamchi testified that he does not believe the proposed surgery is reasonable or necessary for the following reasons: 1) the proposed surgery is complex and risky; 2) Claimant is not a good surgical candidate; 3) Claimant did not have the objective findings to support having the proposed surgery; and 4) the specific area causing Claimant's subjective complaints had not been localized.

Dr. Kalamchi described what is involved in the proposed surgery and represented it is associated with ample high risks. Dr. Kalamchi expressed concern about Claimant not appearing to understand the complexity of the surgery or the involved risks. Dr. Kalamchi represented that Claimant is not a good surgical candidate particularly because she has psychosomatic and emotional issues that should be addressed before having surgery. He stated that Claimant is emotionally distraught and often was tearful during his examinations of her. She appeared moody; Claimant attributed her mood swings to the weather and sometimes to the medications.

Claimant demonstrated positive Waddell signs and presented at times with nonorganic-type of complaints that did not correlate with the clinical findings or with the MRI studies. As an example, Dr. Kalamchi testified that when he was examining Claimant's lumbar spine, Claimant was in a position in which her shoulder and hips were fixed. He asked Claimant to rotate in a manner that isolated Claimant's hips and kept the lumbar spine still. Claimant broke into tears because of the pain in her back yet nothing was touching her back. At different points in the examination, Claimant gasped and nearly screamed.

Dr. Kalamchi testified that Claimant's objective findings were minimal. Unlike Dr. Rastogi, Dr. Kalamchi did not find a clinical corresponding spasm in the lumbar spine. Furthermore, the straight leg raising tests that Dr. Kalamchi conducted did not produce reliable results. Dr. Kalamchi testified that at his two most recent examinations, Claimant had a positive straight leg raising test while in the supine position. At the October 2011 examination, Claimant's straight leg raising test was positive at sixty degrees on the left side. The right side was normal. At the May 2012 examination, Claimant's straight leg raising test was positive at seventy degrees. The right side was normal. However, when Claimant performed the straight

leg raising tests in the seated position and while distracted, the findings at both examinations were negative bilaterally.

Also at both examinations, Claimant had a normal range of ankle reflex bilaterally. She had no numbness distal to the knee and there was no clinical weakness distally. Claimant's lumbar range of motion was restricted although Claimant controlled when she stopped movement. In other words, Claimant actively controlled her movements and her stopping points. Dr. Kalamchi characterized his October 2011 and the May 2012 examinations of Claimant as being normal excluding Claimant's psychosomatic and emotional issues. Claimant did not demonstrate weakness, atrophy, foot drop or any other objective evidence to indicate a need for surgery.

Dr. Kalamchi represented that the diagnostic tests revealed minor findings and minimal changes. He stated that Claimant had three MRIs of the lumbar spine dating back to January 2010 that revealed minimal changes. Claimant has bulges at L3 and L4-5 with some facet hypertrophy – such changes Dr. Kalamchi characterized as common. Claimant's first two EMG studies were essentially negative. The third EMG revealed a minimal positive finding but at a level different than the levels identified by the MRIs and different than the levels involved in the proposed surgery.[1]

Dr. Kalamchi opined that particularly in this situation, a discogram should be performed to localize the area causing the pain. With no localization of the pain site, there is no confirmation of the pain source. Dr. Kalamchi recommended that the discogram be delayed until

[1] The January 5, 2010 EMG was completely normal for the lower extremities. A repeat EMG study was done on August 10, 2011 that also was normal for the lower extremities. The January 18, 2012 EMG revealed a decreased recruitment pattern found in the study suggestive of the presence of a left L5 radiculopathy although no acute or chronic denervation was noted at the L5 root or other nerve root involvement. Dr. Kalamchi characterized such findings as mild in nature. The findings would need to be clinically correlated. It was noted during this EMG that the study was technically difficult to conduct due to Claimant's significant pain inhibition.

Claimant addresses her emotional and psychosomatic issues. Dr. Kalamchi testified that Dr. Rastogi's surgical opinion is unreasonably based on a one-time positive straight leg raising test, on spasms, on subjective complaints, and on only minor changes on the MRI.

Dr. Kalamchi recognized that Claimant had an automobile accident in August 2011 that aggravated her symptoms. However, such accident occurred after Dr. Rastogi recommended surgery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Utilization Review Appeal

Dr. Rastogi's proposed surgery was denied under the Utilization Review process. Claimant has appealed the denial of coverage. When a party appeals a Utilization Review determination, the appeal is heard by the Board *de novo*. 19 *Del. C.* §2322F(j). However, when the Board is confronted with the issue of medical treatment, a different standard applies than the applicable standard under Utilization Review.

Workers' Compensation Regulation 5.4 provides, in relevant part that, "the designated utilization review company will review treatment to determine if it is in compliance with the practice guidelines developed by the Health Care Advisory Panel and adopted and implemented by the Department of Labor." The focus of a Utilization Review determination is on whether or not a specific treatment falls within the applicable Practice Guidelines. If the treatment by a certified health care provider falls within the applicable Practice Guidelines, the treatment is "presumed, in the absence of contrary evidence, to be reasonable and necessary." 19 *Del. C.* § 2322C(6). *See also, Meier v. Tunnell Companies*, Del. IAB, Hearing No. 1326876, at 4 (Nov. 25, 2009) (ORDER).

The adoption of the Health Care Guidelines does not change the issues the Board must determine regarding the compensability of medical treatment. *Meier v. Tunnell Companies*, Del. IAB, Hearing No. 1326876, at 4. When the issue of the compensability of medical treatment is brought before the Board, the Board must determine whether or not such medical treatment is reasonable, necessary and causally related to the work accident. *See Turnbull v. Perdue Farms,* Del. Super., C.A. No. 98A-02-001, Lee, J., 1998 WL 281201 at * 2 (May 18, 1998) (employer is obligated to pay for necessary and reasonable medical expenses related to work injury), *aff'd*, Del. Supr., 723 A.2d 398 (1998). The Board does not review the evidence to determine if such medical treatment falls within the Practice Guidelines. The Board will consider the evidence *de novo* to determine the reasonableness and the necessity of the medical treatment and if such treatment is causally related to the work accident. If under Utilization Review, the treatment is determined not to be within the Practice Guidelines as in this case, then on *de novo* appeal to the Board, "[t]he burden of proof is [] on the claimant to provide appropriate evidence to show that, in the claimant's particular case, such treatment was reasonable." *Meier v. Tunnell Companies*, Del. IAB, Hearing No. 1326876, at 6 (Nov. 25, 2009) (ORDER).

Based on the totality of the evidence, the Board finds that Claimant did not present sufficient evidence to support the reasonableness and necessity of the proposed surgery at this time. The Board accepts the opinions and supporting reasons of Dr. Kalamchi over the opinions of Dr. Rastogi. Dr. Rastogi is proposing a complex two-level surgery based primarily on what the Board considers to be minimal objective findings, to be exaggerated subjective complaints, and to be questionable findings incorporating subjective components. Furthermore, the area of pain has not been localized.

The Board accepts Dr. Kalamchi's testimony that the MRI findings are minimal. Dr. Kalamchi testified that he did not detect a clinical spasm in that lumbar spine that correlated with the MRI findings. Claimant's first two EMGs were essentially normal.[2] Dr. Rastogi testified that Claimant had a positive straight leg raising test in the seated position on only one occasion. He did not indicate that Claimant had a positive straight leg raising test in the supine position. Dr. Rastogi could not identify another examination by him or any other medical provider where there was a similar finding.

Dr. Rastogi last saw Claimant in August 2011. Dr. Kalamchi examined Claimant on two occasions after Dr. Rastogi last saw Claimant – on October 10, 2011 and on May 31, 2012. The Board notes that Dr. Kalamchi's most recent examination was less than two months prior to the hearing. Dr. Rastogi last saw Claimant nearly one year prior to the hearing. Dr. Kalamchi performed the straight leg raising test during his examinations of Claimant. At Dr. Kalamchi's two most recent examinations of Claimant, Claimant tested positively during the straight leg raising test when not distracted and tested negatively when distracted. Claimant has been continuing to treat with Dr. Bakst. There was no evidence that Dr. Bakst detected a positive straight leg raising test.

Both Dr. Kalamchi and Dr. Rastogi indicated that Claimant's range of motion of the lumbar spine was restricted. However, range of motion has a subjective component - Claimant actively moves and controls at what point she stops. The Board accepts Dr. Kalamchi's assessment that Claimant demonstrated positive Waddell signs and presented at times with nonorganic types of complaints that did not correlate with the clinical findings or with the MRI

[2] Claimant's third EMG was positive for suggesting the presence of left L5 radiculopathy although there was no acute or chronic denervation noted at the L5 root or other nerve root involvement. Dr. Kalamchi characterized such finding as mild in nature and would need to be clinically correlated.

Dr. Rastogi recommended surgery prior to this EMG. Dr. Rastogi characterized the third EMG as essentially normal. He did not represent that his recommendation for surgery was based on the finding in the third EMG.

studies. It was noted during the third EMG that the EMG study was difficult to conduct because of Claimant's significant pain inhibition. The Board notes that Claimant rated her pain level without medication *at a minimum* of a ten on a ten-point pain scale. Such rating demonstrates magnified complaints.

It is undisputed that Claimant has psychosomatic and emotional issues. Typically injections and possibly a subsequent discogram are performed to localize pain before proceeding to surgery. The Board acknowledges that Claimant contends that she had an allergic-type reaction to the cervical injections although it also notes that Dr. Chiang's medical notes did not support such contention. The Board accepts Dr. Kalamchi's opinion that if Claimant can better manage her psychosomatic and emotional issues, there might be an additional opportunity to localize her origin of pain. Dr. Rastogi was not convincing that it is both levels causing Claimant's symptoms. Dr. Rastogi testified that: "She [Claimant] has a left-sided disc herniation at L3-4. She also had an annular tear at L4-5. Her symptoms, as she describes them, *could be* from both those levels, in which case treatment, therefore should be for both levels." (Rastogi Dep., 07/10/2012, p. 16, lines 18-22)(Emphasis added.) Dr. Rastogi was not convincing that he understands if Claimant's pain is coming from one or both levels, if from either level at all. In light of Claimant's emotional instability, the decision to proceed with surgery based on a questionable positive straight leg raising test, on minimal findings, and on magnified subjective complaints provides more reason to pursue some means to localize Claimant's pain prior to surgery. The Board denies Claimant's petition.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition for Additional Compensation Due is DENIED in its entirety.

IT IS SO ORDERED THIS 12th DAY OF SEPTEMBER, 2012.

INDUSTRIAL ACCIDENT BOARD

JOHN DANIELLO

OTTO MEDINILLA, SR.

I, Julie Pezzner, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

OWC Staff

Mail Date: 9-14-12