United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 13-452**
	)	**Issued: May 29, 2013**
U.S. POSTAL SERVICE, FOUR PEAKS POST OFFICE, Mesa, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2012 appellant filed a timely appeal from a June 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) that denied authorization for a walk-in tub and a November 14, 2012 decision, which denied his request for a review of the written record. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for authorization for purchase of a walk-in tub; and, (2) whether it properly denied his request for a review of the written record.

On appeal, appellant asserts that a walk-in tub is needed for his accepted reflex sympathetic dystrophy (RSD) condition. He also asserts that the questions provided by OWCP to the referral physician were inappropriate.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 16, 2002 appellant, then a 51-year-old mail handler, filed an occupational disease claim alleging that duties of his job caused degeneration in the bones of his feet. OWCP accepted aggravation of left foot hallux limitus, a bilateral hammertoe deformity and RSD of the left lower extremity. Dr. Donald Chudy, a podiatrist, performed surgical procedures on March 11 and April 14, 2003. Appellant returned to modified duty.

By decision dated January 24, 2006, appellant was granted a schedule award for 12 percent impairment of the right leg and 36 percent impairment on the left. On April 11, 2006 he filed a recurrence of disability claim, that was denied in a June 2, 2006 OWCP decision. Appellant retired on disability in 2006. He then taught school and tutored students. From July 3 to September 17, 2010, appellant was employed as a security guard at a casino. While employed at the casino, he sustained a left knee meniscus tear and underwent an arthroscopy. In November 2009, appellant began treatment with the Arizona Pain and Spine Institute. On January 9, 2011 he filed a recurrence of disability claim, stating that the recurrence occurred on May 26, 2009 due to worsening RSD symptoms.

On September 21, 2011 Linda M. Milam, a nurse practitioner at the Arizona Pain and Spine Institute, stated that appellant requested a walk-in tub because he experienced loss of balance due to numbness of the left foot. On October 19, 2011 she requested a walk-in tub for him because he had loss of balance due to RSD. Ms. Milam noted that appellant was managing his pain well with medication. In an authorization request dated January 30, 2012, Edna Sandoval of First Script requested a walk-in tub and home modification costing $19,662.50 for hydrotherapy to assist with appellant's RSD symptoms.

In an April 12, 2012 report, Dr. Ellen Pichey, Board-certified in family and preventive medicine and an OWCP medical adviser, recommended that appellant be referred for a second-opinion evaluation. She stated that in addition to the issue of home modification and a walk-in tub, the evaluation should include a review of his medication regimen to determine if it was effective or contributing to his balance difficulties. Dr. Pichey noted that a functional rehabilitation program might be useful.

In May 2012, OWCP referred appellant to Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 13, 2012 report, Dr. Lampert noted the history of injury, appellant's employment history and reviewed the medical records. He provided finding on physical examination, noting that skin temperature, skin color and observation for hair were equal bilaterally and there was no obvious sensitivity of the left leg greater than the right. Dr. Lampert diagnosed a preexisting low back condition not related to appellant's work; postoperative arthrodesis of the left big toe and hammer toe surgery, left foot. Based on examination, he advised that no obvious diagnosis of RSD was found. Dr. Lampert advised that the accepted aggravation of the left hallux limitus and bilateral hammer toe deformity conditions ended in 2005 when the conditions were reported as stationary and required no further medical treatment. He found that appellant did not require a walk-in tub to accommodate physical restrictions. Dr. Lampert stated that appellant's main limitation would be lack of flexibility to his foot following fusion surgery and that he was limited due to a back problem which was not employment related. He reiterated that the diagnosis of RSD was not confirmed on examination.

By decision dated June 29, 2012, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Lampert and denied authorization for a walk-in tub.

On September 26, 2012 appellant requested a review of the written record.

In a November 14, 2012 decision, an OWCP hearing representative denied his request for a review of the written record as untimely. He was advised that the issue in the case could equally be addressed by requesting reconsideration with OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of FECA 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.[2] While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[3]

Section 10.310(a) of the implementing regulations provide that an employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.[4] OWCP's procedures provide that nonmedical equipment such as waterbeds, saunas, weight-lifting sets, exercise bicycles, etc., may be authorized only if recommended by the attending physician and if OWCP finds that the item is likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.[5]

In interpreting section 8103(a) of FECA, 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. OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[6] In order to be reimbursed for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.[7] Proof of causal relationship must include supporting rationalized medical evidence.[8]

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[2] 5 U.S.C. § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

[3] *Kennett O. Collins, Jr*. 55 ECAB 648 (2004).

[4] 20 C.F.R. § 10.310(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(5) (October 1995).

[6] *R.L.*, Docket No. 08-855 (issued October 6, 2008).

[7] *See Debra S. King*, 44 ECAB 203 (1992).

[8] *M.B.*, 58 ECAB 588 (2007).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained aggravation of two left foot conditions and RSD. In 2011, appellant requested authorization to purchase a walk-in tub. OWCP denied the request, finding that the medical evidence did not establish that the purchase of the equipment was medically necessary for treatment of his accepted condition.

The Board finds that OWCP did not abuse its discretion in denying appellant's request to purchase the walk-in tub. The nurse practitioner, Ms. Milam, merely noted only that a walk-in tub was warranted because he had loss of balance due to numbness of the left foot. On October 19, 2011 she requested a walk-in tub because he had a loss of balance due to RSD. On January 30, 2012 Ms. Sandoval submitted an authorization form requesting a walk-in tub and home modification costing $19,662.50 for hydrotherapy to assist with RSD symptoms. Neither Ms. Milam nor Ms. Sandoval addressed how the walk-in tub was likely to cure, give relief, reduce the degree of period of disability or aid in lessening the amount of compensation.[9] As a nurse practitioner Ms. Milam is not a physician as defined under FECA. Her opinion is of no probative medical value.[10] It is not apparent from the record that Ms. Sandoval is a physician. The reports from Ms. Milam and Ms. Sandoval are insufficient to establish that a walk-in tub is medically necessary and reasonable.[11]

In May 2012, OWCP referred appellant to Dr. Lampert for a second opinion evaluation. In a June 13, 2012 report, Dr. Lampert provided physical examination findings, diagnosed preexisting low back problem; postoperative arthrodesis left big toe and hammer toe surgery, left foot; and no obvious diagnosis of RSD. He advised that accepted aggravation of the left hallux limitus and bilateral hammer toe deformity conditions ended in 2005 when the condition was reported as stationary and required no further medical treatment. Dr. Lampert found that appellant did not require a walk-in tub to accommodate physical restrictions.

OWCP did not abuse its discretion in denying appellant's request to authorize the purchase of a walk-in tub. The weight of the medical evidence submitted is the opinion of Dr. Lampert, who advised that appellant did not require a walk-in tub. The Board therefore finds that OWCP properly denied authorization for such purchase.[12]

As to appellant's assertion on appeal that OWCP asked Dr. Lampert inappropriate questions, section 8123(a) of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.[13] OWCP regulations, at section 10.320, provide that a claimant must submit to examination by a qualified physician as often and at such time and places as OWCP considers reasonably necessary.[14] The determination of the need for an examination, the type of

[9] *Supra* note 2.

[10] *Roy L. Humphrey*, 57 ECAB 238 (2005). *See* 5 U.S.C. § 8101(2).

[11] *Debra S. King, supra* note 7.

[12] *D.K.*, 59 ECAB 141 (2007).

[13] 5 U.S.C. § 8123(a); *see Scott R. Walsh*, 56 ECAB 353 (2005).

[14] *Dana D. Hudson*, 57 ECAB 298 (2006); 20 C.F.R. § 10.320.

examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.[15] Dr. Lampert was provided with an accurate statement of accepted facts regarding the accepted conditions. The Board has reviewed the questions prepared for Dr. Lampert and find that they were proper and not leading questions.

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.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[16] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[17] OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a request for a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[18]

ANALYSIS -- ISSUE 2

In its November 14, 2012 decision, OWCP denied appellant's request for a review of the written record on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a written record review as his request, dated September 26, 2012 was not made within 30 days of its June 29, 2012 decision. As appellant's request was dated September 26, 2012, more than 30 days after the date of the June 29, 2012 OWCP decision, the Board finds that OWCP properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.

OWCP also has the discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such as a matter of right. In the November 12, 2012 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown

[15] *Id*. The Board also notes that OWCP has not rendered a final decision regarding appellant's January 2011 recurrence claim.

[16] *Claudio Vazquez*, 52 ECAB 496 (2001).

[17] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[18] *Claudio Vazquez, supra* note 16.

through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[19] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a walk-in tub and denied his request for a review of the written record.[20]

ORDER

IT IS HEREBY ORDERED THAT the November 14 and June 29, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 29, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] *See Mary Poller*, 55 ECAB 483 (2004).

[20] The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *see P.W.*, Docket No. 12-1262 (issued December 5, 2012).