

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

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M.S., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Des Moines, IA, Employer )

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**Docket No. 09-654  
Issued: October 27, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 7, 2009 appellant filed an appeal of an October 16, 2008 merit decision of the Office of Workers' Compensation Programs denying authorization for spinal stimulator treatment and a December 17, 2008 nonmerit decision denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merit and the nonmerit issues in this case.

**ISSUES**

The issues are: (1) whether the Office abused its discretion by denying authorization for spinal stimulator treatment; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

**FACTUAL HISTORY**

On October 10, 1998 appellant, then a 46-year-old custodian, was injured when the dump cart he was using got caught under an object. The Office accepted his claim for right sacroiliac strain, L4-5 bilateral hemilaminectomy and microdiscectomy, which was performed on September 2, 1999, and L3-5 decompression laminectomy, foraminotomy and fusion surgery,

which was performed on July 15, 2002. Appellant returned to light-duty work for four hours per day on November 17, 2002 and eventually worked eight-hour days within his work restrictions on December 15, 2002.

On June 7, 2004 appellant began treatment with Dr. W. David Borchardt, an osteopath specializing in family medicine. In an August 27, 2008 report, Dr. Borchardt diagnosed lumbar radiculopathy. Given appellant's persistent bilateral lower extremity pain, he requested a fusion spinal cord stimulator.

The Office referred the record, together with a statement of accepted facts, to an Office medical adviser. In a September 13, 2008 report, the Office medical adviser stated that the progress notes of record did not reveal a thorough physical examination by Dr. Borchardt as to appellant's lumbar spine condition. He noted that prior physicians who had evaluated appellant had indicated that many aspects of his medical history may not be due to a lumbar spine condition. The Office medical adviser could not determine from Dr. Borchardt's reports whether appellant's drug regimen had been optimized and the medical documentation over the prior four years indicated that appellant had not undergone any pain management procedures, such as trigger point injections, caudal or epidural blocks or facets blocks which would be appropriate treatment prior to a trial spinal stimulator. He recommended that the spinal stimulator treatment not be authorized until more conservative treatment options were tried.

By decision dated October 16, 2008, the Office denied authorization for the spinal stimulator treatment. The weight of the medical evidence was accorded to the Office medical adviser's opinion.

On November 21, 2008 appellant requested review of the written record before the Office Branch of Hearings and Review. He advised that he had mailed the request to the Branch of Hearings and Review on October 28, 2008. On December 8, 2008 the Office received a duplicative copy of appellant's November 21, 2008 fax and an envelope addressed to the Branch of Hearings and Review postmarked November 21, 2008. It also received a July 21, 2008 report from Dr. Borchardt.

By decision dated December 17, 2008, the Office denied appellant's request for a review of the written record on the grounds it was untimely. It exercised its discretion and noted that his request could be addressed by reconsideration before the district Office and the submission of evidence not previously considered which established that a spinal stimulator would be appropriate treatment for his condition.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8103 of the Federal Employees' Compensation Act<sup>1</sup> 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 the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

lessening the amount of the monthly compensation.<sup>2</sup> In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. 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.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant had sustained right sacroiliac strain and authorized surgery for L4-5 bilateral hemilaminectomy and microdiscectomy and L3-5 decompression laminectomy, foraminotomy and fusion. Dr. Borchardt recommended a spinal stimulator in an August 27, 2008 medical report. The sole reason provided for such treatment was the persistence of bilateral lower extremity pain. Appellant's authorization request was reviewed by the Office medical adviser. On September 13, 2008 the medical adviser reviewed appellant's treatment history and recommended that the Office deny Dr. Borchardt's request. He stated that the medical notes from Dr. Borchardt did not report on a thorough medical evaluation or did not indicate that other treatment options, such as medical and pain management, had been attempted in treating appellant's pain. The Office medical adviser advised that other conservative treatment options were appropriate treatment and should be ruled out prior to proceeding to a trial spinal stimulator. The Office accordingly denied authorization for the spinal stimulator treatment requested by Dr. Borchardt.

As noted the only restriction on the Office's authority to authorize medical treatment is one of reasonableness. The Office medical adviser provided reasons to support his recommendation that a spinal stimulator not be authorized, noting that other more conservative treatment methods were not documented in the medical records. Moreover, the Board finds that the Office properly exercised its discretion in denying appellant's request for authorization for the spinal stimulator treatment requested by Dr. Borchardt.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides in pertinent part as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary....”<sup>4</sup>

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<sup>2</sup> *Id.* at § 8103.

<sup>3</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

The claimant can choose between two formats: an oral hearing or a review of the written record.<sup>5</sup> The requirements are the same for either choice.<sup>6</sup> The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking<sup>7</sup> and before the claimant has requested reconsideration.<sup>8</sup> However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

The Office denied appellant's request for spinal stimulator treatment on October 16, 2008. Appellant's request for a written review of the record before an Office hearing representative was faxed and postmarked on November 21, 2008. The date of filing of his hearing request is determined by the date of the postmark.<sup>10</sup> Appellant's November 21, 2008 hearing request was made more than 30 days after the date of the Office's October 16, 2008 decision. Therefore, he was not entitled to a hearing as a matter of right.

The Office has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its December 17, 2008 decision, it properly exercised its discretion. The Office considered the issue involved and had denied appellant's request for a review of the written record on the basis that his claim on the issue of whether the spinal stimulator would be the appropriate treatment for his condition could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on the Office's authority is reasonableness. 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 deduction from established facts.<sup>11</sup> In the present case, the Office did not abuse its discretion in denying a discretionary hearing.

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<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

<sup>7</sup> 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>8</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> See *N.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1432, issued May 5, 2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking). See *supra* note 7.

<sup>11</sup> *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

**CONCLUSION**

The Board finds that the Office did not abuse its discretion by denying appellant's request for authorization to undergo spinal stimulator treatment. The Board further finds that the Office properly found that appellant had filed an untimely request for a review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated December 17 and October 16, 2008 are affirmed.

Issued: October 27, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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