

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

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**D.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Medford, OR, Employer**

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**Docket No. 11-715  
Issued: October 6, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 26, 2011 appellant filed a timely appeal from an August 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying authorization for medical treatment and a November 2, 2010 nonmerit decision denying his request for a review of the written record. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> 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 properly denied appellant's request for authorization for medical treatment; and (2) whether it properly denied his request for a review of the written record as untimely under 5 U.S.C. § 8124.

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

## **FACTUAL HISTORY**

This case has previously been before the Board. On February 11, 2009 the Board reversed an August 2, 2007 decision terminating appellant's compensation and an October 18, 2007 decision denying his request for a hearing.<sup>2</sup> It found that OWCP had issued a wage-earning capacity decision on May 1, 1992 reducing his compensation to zero based on its finding that his actual earnings as a general office clerk fairly and reasonably represented his wage-earning capacity. On May 12, 2006 appellant filed a claim for compensation. OWCP terminated his compensation based on the opinion of Dr. Timothy Borman, an osteopath who performed an impartial medical examination.<sup>3</sup> The Board determined that OWCP should have adjudicated the issue of whether appellant established that modification of the May 1, 1992 wage-earning capacity determination was warranted. The facts and circumstances surrounding the prior decision are hereby incorporated by reference.

By decision dated April 24, 2009, OWCP denied appellant's claim for compensation beginning May 1, 2006. It found that he had not established that his wage-earning capacity should be modified.

On June 25, 2010 Dr. Peter S. Kosek, an attending Board-certified anesthesiologist, requested authorization or reimbursement for implanting neuroelectrodes, analyzing a complex neurostim, implanting a spine infusion pump, implanting a spinal canal catheterization, injecting an epidural patch, fluoroguide for a spinal injection, analyzing spine infusion pump, and performing a spinal/brain pump refill and maintenance.

By letter dated June 25, 2010, OWCP informed Dr. Kosek that it was not able to authorize the requested medical treatment as the procedures did not appear to be due to appellant's work injury. It requested that he explain why he required the requested treatment and its relationship to the August 25, 1986 employment injury.

On July 30, 2010 Dr. Kosek related:

“[A]ll of the listed treatments were directed at the management of [appellant's] lumbar back strain. After inadequate analgesia with oral analgesics and physical therapy, and given an absence of curative surgical options, he underwent a trial of spinal stimulation. That did not result in significant analgesia, and a trial of spinal morphine did result in marked analgesia. A spinal pump was then implanted, and resulted in the need for an epidural blood patch. He continues now on spinal morphine therapy.”

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<sup>2</sup> Docket No. 08-697. OWCP accepted that on August 25, 1986 appellant, then a 36-year-old letter carrier, sustained acute chronic lumbar and thoracic strains and an episode of anxiety and depression in the performance of duty. He experienced intermittent periods of temporary and partial disability until April 13, 1992, when he resumed full-time employment. In a decision dated May 1, 1992, OWCP reduced appellant's compensation to zero after finding that his actual earnings as a general office clerk fairly and reasonably represented his wage-earning capacity.

<sup>3</sup> In a report dated April 2, 2007, Dr. Borman diagnosed multilevel degenerative disc disease unrelated to the accepted work injury with no evidence of radiculopathy.

On August 25, 2010 an OWCP medical adviser reviewed the evidence to determine whether OWCP should authorize the procedures requested by Dr. Kosek. He discussed the accepted condition of back strain and noted that appellant underwent “multiple imaging studies over a period of years following his injury with normal or near normal findings and he has been declined for surgery multiple times.”<sup>4</sup> The medical adviser noted that in 1987 a pain clinic found a minimal back impairment but “[m]ultiple psychopathology....” He further indicated that Dr. Borman, who conducted an impartial medical examination in 2007, found no residuals of his accepted condition. The medical adviser found that appellant did not benefit from a morphine pump implanted in 2007 or electrical spinal simulation. He recommended against authorization of the procedures as they were not indicated for diagnoses of thoracic or lumbar strain and agreed with Dr. Borman’s opinion that appellant’s current back condition was not work related. The medical adviser concluded, “The requested procedures are not indicated, in my opinion, regardless of claim status, due to the relative absence of physical pathology and the abundance of evidence of psychopathology.”

By decision dated August 30, 2010, OWCP denied authorization for the requested medical procedures. It based its denial on the finding by OWCP’s medical adviser that the procedures were not medically necessary to treat his employment injury. OWCP noted that Dr. Borman found that his degenerative disc disease was unrelated to his work injury and that his opinion was entitled to special weight as the impartial medical examiner. It indicated that Dr. Kosek had previously requested authorization for the procedures to treat appellant’s degenerative disc disease.

In a form dated September 27, 2010 and postmarked September 30, 2010, appellant requested a review of the written record. By decision dated November 2, 2010, OWCP denied his request for a review of the written record as it was untimely under section 8124.

On appeal appellant questions why OWCP refused to approve his treatment given that it had approved treatment for back procedures at the same levels in the past, including MRI scan studies and epidural steroid injections.

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

Section 8103 of FECA<sup>5</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 OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.<sup>6</sup>

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<sup>4</sup> A November 5, 2001 magnetic resonance imaging (MRI) scan study found minor degenerative disc desiccation at L2-3 and L3-4 and mild facet arthritis at L5-S1. A March 11, 2005 lumbar MRI scan study showed partially desiccated intervertebral discs at L2-3 and L3-4, right foraminal annular bulging at L4-5 and minor joint arthropathy. An October 3, 2005 MRI scan study showed degenerative changes at multiple levels with disc desiccation and mild bulging. A February 20, 2007 MRI scan study revealed mild degenerative changes of the lumbar and thoracic spine unchanged since October 2005 and a small disc protrusion at T12-L1. On December 14, 2009 an MRI scan study showed degenerative lumbar changes without progression and with improvement of the T12-L1 disc protrusion.

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

<sup>6</sup> *Id.* at § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority being that of reasonableness.<sup>7</sup> 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>8</sup> In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.<sup>9</sup>

Proof of causal relationship must include supporting rationalized medical evidence. In order for a surgery to be authorized, appellant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.<sup>10</sup>

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

OWCP accepted that appellant sustained acute chronic lumbar and thoracic strains and an episode of anxiety and depression due to an August 25, 1986 employment injury. On June 25, 2010 Dr. Kosek requested authorization or reimbursement for implanting neuroelectrodes, analyzing a complex neurostim, implanting a spine infusion pump, implanting a spinal canal catheterization, injecting an epidural patch, fluoroguide for a spinal injection, analyzing spine infusion pump, and performing a spinal/brain pump refill and maintenance.

Appellant has the burden to establish that the requested procedures were for treatment of a condition causally related to the employment injury and medically necessary for his accepted lumbar or thoracic strain.<sup>11</sup> Dr. Kosek generally opined that the medical treatments were due to his lumbar sprain. He asserted that oral analgesics, physical therapy and spinal stimulation had been ineffective but that a spinal pump and spinal morphine provided relief. Dr. Kosek, however, did not adequately explain why appellant's lumbar sprain required such significant and invasive pain management. Medical conclusions unsupported by rationale are of diminished probative value.<sup>12</sup>

OWCP has broad discretion in approving services under FECA. The only limitation on its authority in approving or disproving services under FECA is that of reasonableness.<sup>13</sup> In order to ascertain whether the requested treatment was medically necessary and employment

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<sup>7</sup> *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

<sup>8</sup> *Claudia L. Yantis*, 48 ECAB 495 (1997).

<sup>9</sup> *Cathy B. Millin*, 51 ECAB 331 (2000).

<sup>10</sup> *Id.*

<sup>11</sup> *See Cathy B. Millin*, *supra* note 9.

<sup>12</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>13</sup> *See D.C.*, 58 ECAB 620 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

related, OWCP consulted with its medical adviser, who opined that the procedures were not required for either a lumbar or thoracic strain. The medical adviser further found that appellant had minimal objective findings on diagnostic studies and did not benefit from a 2007 morphine pump or electrical spinal stimulation. He agreed with Dr. Borman's opinion that appellant had no further work-related back condition. Regardless of the cause of the back condition, however, the medical adviser recommended against the procedures "due to the relative absence of physical pathology and the abundance of evidence of psychopathology." After considering the medical evidence, OWCP denied authorization for the requested medical treatment. The Board finds that OWCP's refusal to authorize the procedures was reasonable and did not constitute an abuse of discretion.<sup>14</sup>

On appeal appellant questions why OWCP denied authorization for the medical treatment when it had previously authorized treatment to his back. Regardless of whether it authorized similar procedures in the past, however, OWCP retains the discretion to authorize medical services, appliances and supplies pursuant to section 8103.<sup>15</sup>

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 and 20 C.F.R. §§ 10.605 through 10.607.

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

Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "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>16</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>17</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."<sup>18</sup>

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district [OWCP] may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as

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<sup>14</sup> See *D.K.*, 59 ECAB 141 (2007).

<sup>15</sup> See *Joseph P. Hofmann*, *supra* note 7.

<sup>16</sup> 5 U.S.C. § 8124(b)(1).

<sup>17</sup> *Leona B. Jacobs*, 55 ECAB 753 (2004).

<sup>18</sup> 20 C.F.R. § 10.615.

determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.”<sup>19</sup>

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 FECA must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.<sup>20</sup> OWCP's procedures, which require it to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of FECA and Board precedent.<sup>21</sup>

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

OWCP issued a decision on August 30, 2010 denying appellant's request for authorization of various medical procedures. Appellant sought a review of the written record in a form dated September 27, 2010 and postmarked September 30, 2010. By decision dated November 2, 2010, OWCP denied his request as untimely by decision. As appellant's request for a review of the written record was postmarked September 30, 2010, more than 30 days after OWCP issued its August 30, 2010 decision, he was not entitled to a hearing, in the form of a review of the written record, as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.<sup>22</sup> It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to OWCP in a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An 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>23</sup> In this case, the evidence of record does not establish that OWCP committed any action in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. For these reasons, OWCP properly denied his request for a review of the written record as untimely under section 8124 of FECA.

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<sup>19</sup> *Id.* at § 10.616(a).

<sup>20</sup> *See André Thyratron*, 54 ECAB 257 (2002).

<sup>21</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>22</sup> *Afegalai L. Boone*, 53 ECAB 533 (2002).

<sup>23</sup> *See André Thyratron*, *supra* note 20.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for authorization for medical treatment and properly denied his request for a review of the written record as untimely under section 8124.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 2 and August 30, 2010 are affirmed.

Issued: October 6, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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