

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

R.R., Appellant	)	
	)	
and	)	<b>Docket No. 11-2124</b>
	)	<b>Issued: May 23, 2012</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>CORRECTIONAL INSTITUTION,</b>	)	
<b>La Tuna, TX, Employer</b>	)	
	)	

*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 September 21, 2011 appellant filed a timely appeal of the Office of Workers' Compensation Programs' July 12, 2011 merit decision denying his request for authorization of a health club membership and September 8, 2011 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP abused its discretion in denying appellant's request for authorization of a health club membership; and (2) whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

OWCP accepted that on September 7, 2000 appellant, then a 42-year-old brush maker supervisor, sustained lumbar and cervical subluxations, lumbar and cervical herniated discs and a neck sprain when he fell off a broken chair he was sitting on at work.

On February 24 and March 24, 2010 Dr. Alvaro A. Hernandez, an attending Board-certified orthopedic surgeon, prescribed a one-year YMCA membership. He reviewed the results of an electromyogram (EMG) and magnetic resonance imaging (MRI) scan. Dr. Hernandez advised that appellant had a closed lumbar vertebra, degeneration of the cervical intervertebral disc, derangement of the medial meniscus and lumbar intervertebral disc without myelopathy. He stated that the progressive degeneration in the back caused his continuing symptomatology. Dr. Hernandez noted that appellant's participation in an exercise program at the YMCA at that time helped to keep his weight off and his back strong and made him a more active person. He advised that it was medically necessary for appellant to continue the program since it had been very beneficial for him and would continue to benefit him in the future.

On June 9, 2011 Dr. Hernandez requested that OWCP authorize a one-year membership for the YMCA. In a certificate of medical necessity and prescription dated April 27, 2011, he recommended a one-year YMCA membership to treat appellant's brachia neuritis or radiculitis not otherwise specified, synovitis and tenosynovitis not otherwise specified and carpal tunnel syndrome. The membership would continue to help his range of motion and decrease his painful symptoms.

On June 28, 2011 Dr. Henry B. Mobley, a Board-certified internist and OWCP medical adviser, reviewed appellant's medical record. He noted that appellant's accepted conditions included lumbar and cervical closed dislocation, degeneration of cervical discs and degenerative disc disease. Dr. Mobley also noted that appellant had failed upper and lower back syndromes with chronic complaints of pain and weakness in the bilateral upper and lower extremities. He indicated that cervical surgery was recommended but never performed. Dr. Mobley stated that a February 10, 2010 EMG of the lower extremity showed bilateral peripheral neuropathies and lumbar radiculopathies. He stated that, while membership in an exercise club was not discouraged by OWCP, its regulations required that the least expensive method be used to obtain the goal. Dr. Mobley advised that most of the benefits from a health club membership could be attained by participation in a well-developed and organized home program that included conditioning and back exercises, in other words, walking for conditioning and proper calisthenics. As the benefits of a health club membership could be obtained by simpler and less costly means of treatment, he recommended against its authorization.

In a July 12, 2011 decision, OWCP denied appellant's request for a gym membership. It found that the weight of the medical evidence was represented by Dr. Mobley's opinion and did not establish that the recommended YMCA membership was medically necessary for his accepted conditions.

On August 17, 2011 appellant requested reconsideration.

In an April 27, 2011 progress note, Dr. Hernandez listed findings on physical examination and diagnosed cervical and lumbar syndrome. He recommended the renewal of appellant's YMCA membership. In a June 8, 2011 prescription, Dr. Hernandez again ordered a

YMCA membership to treat appellant's derangement of the medial meniscus. In an August 9, 2011 report, he stated that appellant had faithfully gone to the YMCA to perform exercises which helped to control his neck and back symptoms. The facilities at the YMCA allowed him to perform exercises with supervision. They also provided a pool and abundant exercise equipment which were not available to appellant at home and necessary to help him control his symptomatology.

Appellant submitted a duplicate copy of Dr. Hernandez's April 27, 2011 certificate of medical necessity. He also submitted an Internet document which addressed entitlement to compensation benefits for employment-related injuries or death for federal employees and their surviving dependents under Chapter 81 of FECA.

In a September 8, 2011 decision, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of his claim.

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

Section 8103 of FECA<sup>2</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 or the period of disability or aid in lessening the amount of the monthly compensation.<sup>3</sup>

In interpreting section 8103, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his or her 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 OWCP's authority is that of reasonableness.<sup>4</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 by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.<sup>5</sup> 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.<sup>6</sup>

Regarding membership in a health club or spa, OWCP's procedure manual provides that health club memberships may be authorized if needed to treat the effects of an injury, that such memberships may be approved only for periods of six months at a time and that the treating physician must describe the specific therapy and exercise routine needed, the anticipated

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<sup>2</sup> *Id.* at §§ 8101-8193, § 8103.

<sup>3</sup> *Id.* at § 8103(a).

<sup>4</sup> *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

<sup>5</sup> *See Debra S. King*, 44 ECAB 203 (1992).

<sup>6</sup> *Kennett O. Collins, Jr.*, 55 ECAB 648, 654 (2004).

duration of the recommended regimen, the specific equipment or facilities needed, the treatment goals, the actual or anticipated effectiveness of the regimen, the frequency of examinations to determine the ongoing need for the program and whether the exercise routine can be performed at home.<sup>7</sup>

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>8</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to a referee physician, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>9</sup>

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

The Board finds that the case is not in posture for decision due to a conflict in medical opinion between Dr. Hernandez, an attending physician, and Dr. Mobley, OWCP's medical adviser, as to whether the recommended YMCA membership is medically warranted for appellant's accepted conditions.

Dr. Hernandez recommended a one-year renewal of appellant's YMCA membership based on his diagnoses of a closed lumbar vertebra, degeneration of the cervical intervertebral disc, derangement of the medial meniscus, lumbar intervertebral disc without myelopathy, brachia neuritis or radiculitis not otherwise specified, synovitis and tenosynovitis not otherwise specified and carpal tunnel syndrome. He stated that the progressive degeneration in the back caused appellant's continuing symptomatology. Dr. Hernandez advised that it was medically necessary for him to continue his exercise program at the YMCA because it was very beneficial and would continue to benefit him in the future. He related that it helped to keep appellant's weight off and back strong, improve his range of motion and decrease his painful neck and back symptoms. Dr. Hernandez further related that appellant's participation in the exercise program made him a more active person.

Dr. Mobley reviewed Dr. Hernandez's findings and appellant's medical record. He cited a pertinent section of FECA and OWCP's procedures and advised that the benefits from a health club membership could be attained by participation in a well-developed and organized home program that included conditioning and back exercises such as, walking for conditioning and proper calisthenics. Dr. Mobley advised that, since the benefits of a health club membership could be obtained by simpler and less costly means of treatment, the request for authorization of the YMCA membership should be denied.

The Board finds that a conflict exists as to whether the recommended YMCA membership was medically necessary for appellant's September 7, 2000 accepted conditions. Accordingly, the Board will set aside the July 12 and September 8, 2011 decisions and remand the case to OWCP for referral of appellant, the medical record and a statement of accepted facts

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.15 (July 2000).

<sup>8</sup> 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>9</sup> *William C. Bush*, 40 ECAB 1064 (1989).

to an appropriate independent medical specialist to determine whether the recommended health club membership is medically necessary for the employment-related conditions. Following this and such other development as deemed necessary, OWCP should issue a *de novo* decision on appellant's claim.<sup>10</sup>

**CONCLUSION**

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion regarding the medical necessity of a health club membership.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8 and July 12, 2011 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: May 23, 2012  
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

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<sup>10</sup> The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.