

An attending orthopedic surgeon, Dr. William Winternitz, Jr., indicated in an August 8, 2001 report that appellant should continue weekly massages. In a November 19, 2002 letter, the Office noted that appellant had been receiving massage therapy for over six years and asked Dr. Winternitz to discuss the benefits to appellant. By report dated December 11, 2002, Dr. Winternitz stated that appellant had received significant benefit from massage therapy. He stated that massage therapy reduced pain and increased range of motion in the spine and the benefit, while temporary, was also cumulative.

The Office referred appellant for a second opinion examination by Dr. Jerrold Sherman, an orthopedic surgeon. In a report dated April 20, 2003, Dr. Sherman reviewed the medical history and provided results on examination, diagnosing osteoarthritis and osteoporosis of the lumbar spine with radicular pain. In a report dated December 30, 2003, he stated: "I do not believe [appellant] will benefit from further physical therapy, massage, acupuncture or aroma therapy, none of which have been demonstrated to have curative benefits for osteoporosis with degenerative disc disease."

Appellant was referred to Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, selected as a referee physician to resolve the conflict in the medical evidence. In a report dated January 20, 2005, Dr. Auerbach reviewed appellant's history and results on examination. He diagnosed chronic back strain and diffuse degenerative disc disease. Dr. Auerbach stated:

"Orthopedically, [appellant] does not need massage therapy. Although, massage therapy may feel good and temporarily alleviate part of the claimant's pain, it will not cure or relieve the effects of her problem. According to the Occupational Medical Practice Guidelines, Second Edition, of the American College of Occupational Environmental Medicine, physical modalities such as massage have no proven efficacy in treating acute low back symptoms. Insufficient scientific testing exists to determine the effectiveness of these therapies. They may have some value in the short term, at home local application of heat or cold are as effective as those performed by therapists. However, daily back exercises, which [appellant] can do at home, have shown to be of great benefit and is the better course of treatment."

By letter dated February 10, 2006, the Office notified appellant that it proposed to terminate authorization for massage therapy treatment. By decision dated March 21, 2006, it terminated authorization for massage therapy.

Appellant requested reconsideration and submitted additional medical evidence from Dr. Thomas Pattison, a physiatrist.¹ In a report dated December 16, 2006, Dr. Pattison stated that he had received materials from appellant, including a magazine article on massage therapy, but a more scientific and medical basis was needed to justify the treatment.

¹ Prior to requesting reconsideration, appellant submitted a request for a hearing before an Office hearing representative, which was denied as untimely by decision dated January 26, 2007. She also requested an appeal to the Board, which was dismissed by order dated April 26, 2007 as appellant withdrew her appeal. Docket No. 07-857 (issued April 26, 2007).

In a decision dated June 14, 2007, the Office reviewed the case on its merits and denied modification of the March 21, 2006 decision.

Appellant requested reconsideration and submitted a December 6, 2007 report from Dr. Marko Bodor, a physiatrist, who provided results on examination and stated: "I can attest to the fact that [appellant] benefits from weekly massage therapy for her myofascial pain, and given that these problems will not get better over time, she will likely continue to benefit from them in the future." Dr. Bodor also stated that, as appellant did not require invasive or interventional medical treatments, it would not be unreasonable for her to continue to have some insurance coverage in this regard. In a report dated June 20, 2007, Dr. Pattison stated that appellant found the massage therapy helpful with her calf pain and reported clear-cut benefits from this therapy.

By decision dated March 20, 2008, the Office reviewed the case on its merits and denied modification.

Appellant again requested reconsideration of her claim. She resubmitted the December 6, 2007 report from Dr. Bodor and an x-ray report from 2004 diagnosing degenerative disc disease.

In a decision dated May 28, 2008, the Office found the application for reconsideration was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act 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 lessening the amount of the monthly compensation.² In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.³ It has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

² 5 U.S.C. § 8103(a).

³ *R.L.*, 60 ECAB ___ (Docket No. 08-855, issued October 6, 2008); *Janice Kirby*, 47 ECAB 220 (1995).

⁴ *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that 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 deductions from established facts).

⁵ *Furman G. Peake*, 41 ECAB 361 (1990).

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

Appellant received massage therapy as part of the authorized medical benefits for her accepted lumbar strain and aggravation of lumbar degenerative disc disease. There was a disagreement between an attending physician, Dr. Winternitz and a second opinion physician, Dr. Sherman, regarding the benefit of continuing massage therapy treatment. The Act provides that, if there is a disagreement between an attending physician and an Office physician, a third physician shall make an examination.⁷ The Office referred appellant to Dr. Auerbach for a referee examination.

Dr. Auerbach provided a complete report that reviewed appellant's history and the medical evidence, providing a rationalized opinion that appellant did not need massage therapy. He noted that such therapy had no proven efficacy in treating acute low back symptoms and that other treatments, such as back exercises, provided a better treatment. The Board finds that Dr. Auerbach provided a rationalized medical opinion based on a complete background. As noted above, a rationalized opinion from a referee physician is entitled to special weight and it represents the weight of the evidence in this case. The Office met its burden of proof to terminate authorization for massage therapy.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁸ Following the termination decision, appellant submitted a June 20, 2007 report from Dr. Pattison, who indicated that appellant found massage therapy to be helpful and wanted to continue. Dr. Bodor stated in a December 6, 2007 report that appellant benefited from massage therapy for myofascial pain.

The Office has, as noted above, broad discretion in determining the benefits authorized under 5 U.S.C. § 8103(a). Drs. Pattison and Bodor provide general statements that appellant felt she benefited from the massage therapy. However, they did not provide a complete medical history or discuss other appropriate treatments. The physicians did not provide any explanation as to how massage therapy would cure or reduce the period of disability associated with appellant's accepted conditions. The Board finds that the Office did not abuse discretion in denying massage therapy after March 20, 2006.

⁶ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁷ 5 U.S.C. § 8123(a). The Office's regulations state that this is called a referee examination. 20 C.F.R. § 10.321 (2008).

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁹ the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."¹⁰ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹¹

ANALYSIS -- ISSUE 2

On reconsideration appellant did not attempt to show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. In addition, she did not submit any new and relevant medical evidence on the issue of continuing medical benefits for massage therapy. The December 6, 2007 report had been considered by the Office in its March 20, 2008 merit decision.

The Board accordingly finds appellant did not meet any of the requirements on 20 C.F.R. § 10.606(b)(2) in her application for reconsideration. Pursuant to 20 C.F.R. § 10.608, the Office properly declined to reopen the case for review of the merits of the claim.

CONCLUSION

The Office met its burden of proof to terminate authorization for massage therapy. On reconsideration, appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2).

⁹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 28 and March 20, 2008 are affirmed.

Issued: March 25, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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