United States Department of Labor
Employees' Compensation Appeals Board

V.V., Appellant	)	
and	)	**Docket No. 10-1454**
	)	**Issued: September 28, 2011**
DEPARTMENT OF DEFENSE, INSPECTOR GENERAL, Baltimore, MD, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 4, 2010 appellant, through counsel, filed a timely appeal from the January 28 and April 13, 2010 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying authorization for Botulinum Toxin (Botox) injections. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for Botox injections.

On appeal, appellant, through her attorney, contends that OWCP improperly referred the case to an impartial medical examiner; that OWCP's medical adviser's report was insufficient to create a conflict; that OWCP did not forward the report of appellant's physician, issued subsequent to OWCP medical adviser's opinion, to the medical adviser for comment or follow proper procedures in appointing the impartial specialist.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 10, 2003 appellant, then a 41-year-old federal agent, filed a traumatic injury claim alleging that during the course of performing mandatory self-defense training on February 6, 2003 she sustained a cervical sprain when placed in a choke hold. On March 25, 2003 OWCP accepted her claim for cervical strain. On December 1, 2004 it accepted that appellant sustained a recurrence of disability on October 19, 2004 and accepted a supraspinatus tendon tear, displacement of an intervertebral disc herniation at C6-7 and degeneration of a cervicothoracic intervertebral disc at C5. On March 11, 2005 appellant underwent a C5-6 and C6-7 anterior cervical discectomy and fusion with placement of allograft with an anterior plate. She underwent an approved right rotator cuff repair on June 2, 2005.

Appellant sustained an injury on October 26, 2004 when an elevator door closed on her upper body. The claim was approved for aggravation of cervical disc degeneration in case number xxxxxx010. The case was combined with the present case record.

In a May 2, 2007 report, Dr. S.R. Parthasarathy, appellant's Board-certified physiatrist,[2] diagnosed cervical postlaminectomy syndrome, cervical radiculopathy and rotator cuff syndrome. He recommended intramuscular stimulation (IMS). In a May 16, 2007 report, Dr. Parthasarathy noted that appellant continued to have mainly musculoligamentous pain and recommended a trial of IMS and possible Myobloc Botulinum Toxin Type B (Botox) depending upon her response. On August 31, 2007 he ordered a Myobloc injection. The request was denied and, in an October 4, 2007 letter, Dr. Parthasarathy indicated that Myobloc injectable solution had been FDA approved for treatment for a diagnosis of spasmodic torticollis also known as cervical dystonia. He considered treatment with Myobloc a medical necessity, noting that appellant was suffering from chronic neck pain with secondary right scapula, right shoulder, right arm and upper back pain which were the result of a work-related injury sustained on February 6, 2003 when she was injured during defensive tactics training. Dr. Parthasarathy opined that Myobloc would have an immediate impact on her quality of life which allowed her to perform daily living activities and return to work without the restrictions. He opined that Myobloc would have longer lasting effects than trigger point injections and were a better alternative than the long-term use of narcotic pain medication or muscle relaxants. Dr. Parthasarathy continued to see appellant and continued to recommend Myobloc injections. In a February 4, 2008 letter, he reiterated the need for the Myobloc and stated that appellant would like to proceed with Botox injections so that she could gain a better qualify of life. Dr. Parthasarathy opined that he believed this treatment was medically appropriate.

By letter dated January 13, 2008, OWCP asked OWCP's medical adviser to provide a well-reasoned opinion as to whether or not the proposed treatment was appropriate. In a response dated February 20, 2008, Dr. Arnold T. Berman, OWCP's Board-certified orthopedic surgeon, noted that he reviewed the record. He stated that the magnetic resonance imaging (MRI) scan performed on November 2, 2005 indicated no evidence of full thickness tear involving the rotator cuff but could have been a partial tear or tendinitis. Dr. Berman noted that postoperative MRI scan films of the cervical spine indicated a successful solid fusion at C6 and

[2] Dr. Parthasarathy is also Board-certified in pain medicine.

C6-7 without any additional abnormalities and without development of a small canal or other possible complications. He noted that a second opinion examination by Dr. Pabla on July 12, 2006 showed minimal objective findings and that the neurological examination was stable. Dr. Berman stated that based on his review, it was his recommendation that the Botox injections not be approved, but instead classic conservative treatment including home exercise, anti-inflammatory medications and cervical spine exercises should be the mainstay of her treatment. He further opined that Botox injections would not be helpful and have a high likelihood of increasing her symptoms.

In a February 26, 2008 report, Dr. H. Edward Lane, III, a Board-certified orthopedic surgeon, noted that he believed the blocks suggested by Dr. Parthasarathy were reasonable to try to minimize the scar and discomfort in appellant's neck and shoulder region. He provided a prescription for a functional capacity evaluation.

By decision dated March 26, 2008, OWCP denied appellant's request for Botox as it found that this treatment would not cure but would most likely increase appellant's work-related symptoms.

Appellant requested a review of the written record. By decision dated August 18, 2008, the hearing representative vacated the March 26, 2008 decision. The case was remanded for referral to an impartial medical examiner based on a conflict between appellant's physician and OWCP's medical adviser.

In a May 21, 2008 report, Dr. Parthasarathy noted that Dr. Pabla's July 12, 2006 evaluation was almost two years old and was not undertaken specifically to evaluate her for her current medical state and pain management needs. He noted that a home exercise program and anti-inflammatory medications had been utilized but that appellant remained symptomatic. Furthermore, Dr. Parthasarathy noted that although a Myobloc injection is not expected to cure appellant's symptoms, it should provide pain management. He opined that the statement that Myobloc injection would most likely increase the work-related symptoms was grossly erroneous and lacked any scientific support. Dr. Parthasarathy contended that there was no rational medical basis to deny appellant's Botox injections to treat her painful cervical muscular spasms which have remained a chronic consequence of her prior or work-related injury and subsequent cervical and shoulder surgeries.

By letter dated January 7, 2009, OWCP referred appellant to Dr. David Dorin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 6, 2009 report, Dr. Dorin opined that appellant had healed from the initial injury to the neck and had no significant clinical abnormality on examination. He indicated that appellant's decompression of the cervical spine and fusion were unrelated to appellant's work-related injury. Dr. Dorin stated that, although he did not have the medical notes from the treating physician requesting the use of Botox, he believed that injecting Botox in the musculature structure of the shoulder or neck for treatment of pain was not indicated. He noted that in all cases that he enumerated where Botox has been used one was talking about very small muscles and not a large muscle as the one in the shoulder or neck, which, if used, would require large amounts of Botox and would be toxic and risk the life of the patient.

By decision dated March 4, 2009, OWCP denied use of Botulinum Toxin.

On March 24, 2009 appellant, through her attorney, requested review of the written record.

By letter dated March 25, 2009, OWCP asked Dr. Dorin to review OWCP's medical adviser's February 20, 2008 report and issue a supplemental opinion. In a March 31, 2009 addendum, Dr. Dorin stated that he reviewed Dr. Parthasarathy's reports. However, he found that based on his medical examination he did not see any evidence of abnormality in the muscular structures of the neck to suggest any chronic structural abnormality and that accordingly, review of the additional reports did not change his opinion.

By decision dated November 18, 2009, the hearing representative remanded the case as he found that Dr. Dorin did not have Dr. Parthasarathy's complete reports and accordingly his opinion was not based on a compete review of the evidence.

In a January 12, 2010 report, Dr. Dorin reviewed the additional evidence. He noted that appellant's initial injury to the neck healed a long time ago.

By decision dated January 28, 2010, OWCP denied appellant's request for Botox injections as the opinion of the impartial medical examiner established that these injections were not necessary as the work condition had resolved.

On February 2, 2010 appellant requested review of the written record.

By decision dated April 13, 2010, an OWCP hearing representative affirmed OWCP's decision.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, and reduce the degree or the period of disability or aid in lessening the amount of monthly compensation. In interpreting section 8103(a), 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.[3] OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.[4]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the

[3] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[4] *D.A.*, Docket No. 09-936 (issued January 13, 2010); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

effects of an employment-related injury or condition.[5] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[6]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[7] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, OWCP shall appoint a third physician to make an examination.[8] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

OWCP accepted appellant's claim for cervical strain, supraspinatus tendon tear, displacement of intervertebral disc herniation at C6-7 and degeneration of cervicothoracic intervertebral disc, C5. On March 11, 2005 appellant underwent a C5-6 and C6-7 anterior cervical discectomy and fusion with placement of allograft with anterior plate from C5-7.

Appellant's physician, Dr. Parthasarathy, recommended that appellant have Botolinum Toxin Type B injections to treat her cervical pain. He stated that these injections would increase appellant's quality of life, decrease her use of pain relievers and enable her to return to her regular duty status at work. Dr. Lane agreed and stated that the blocks suggested by Dr. Parthasarathy are reasonable to minimize the scar and discomfort in appellant's neck and shoulder region. OWCP medical adviser disagreed finding that appellant was stable and that Botox injections would not be helpful and have a high likelihood of increasing her symptoms. OWCP found that there was a conflict between these two opinions and referred appellant to Dr. Dorin for an impartial medical examination. Dr. Dorin did not believe that the use of Botox would be beneficial and, in fact, opined that the large amounts of Botox that would need to be used to treat appellant would be toxic and risk the life of appellant.

Under section 8103(a) of FECA, the Board has long recognized the discretion of the Director to furnish those supplies, appliances or services 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. The Board has noted that the language to section 8103(a) underscores the intent of Congress that discretion be delegated in determining whether to grant or reimburse an

[5] *See Dona M. Mahurin*, 54 ECAB 309 (2003); *see also Debra S. King*, 44 ECAB 203, 209 (1992).

[6] *See Debra S. King, supra* note 5; *Bertha L. Arnold*, 38 ECAB 282 (1986).

[7] 5 U.S.C. § 8123(a); *see S.R.*, Docket No. 09-2332 (issued August 16, 2010).

[8] 20 C.F.R. § 10.321.

[9] *V.G.* 59 ECAB 635 (2008).

employee for a prescribed service.[10] 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.[11] The claimant has the burden of submitting rationalized medical opinion evidence that addresses how the requested treatment is for the effects of an employment-related condition.[12]

To establish abuse of discretion it is not enough merely to show that the evidence could be construed to produce a contrary factual conclusion.[13]

The Board finds that the medical evidence submitted by appellant is not sufficient to establish that OWCP abused its discretion in denying treatment by Botox injections. The reports of Dr. Parthasarathy recommended treatment by Myobloc without adequate explanation for how such treatment was likely to cure, give relief or reduce the period of disability in this case. On June 27, 2007 Dr. Parthasarathy recommended a trial of Myobloc. On October 4, 2007 he noted that spasmodic torticollis/cervical dystonia was a condition not generally related to workers' compensation injuries and stated only that appellant's symptoms were consistent "to those suffering from cervical dystonia due to the severity of the injury she sustained during the defensive tactics training." Dr. Parthasarathy related generally, "I feel treatment with Myobloc may significantly reduce the spasmodic torticollis that has increased in severity." The Board finds Dr. Parthasarathy's opinion on causal relation to the accepted injury and conditions of this claim to be speculative and not well explained. He did not fully address accepted treatment methodologies for appellant's accepted conditions or why the conservative care as recommended by Dr. Berman or Dr. Dorin was inadequate in this case. Further, Dr. Parthasarathy noted only the anticipated effect of treatment without adequately addressing how Botox injections would relieve or reduce the period of disability in this case. He merely attached medical literature pertaining to the use of Myobloc in clinical trials in Europe. The Board finds that the opinion of Dr. Parthasarathy was not well rationalized. There was no conflict created under section 8123(a) due to the inadequacy of Dr. Parthasarathy's opinion on the medical necessity of the recommended Botox injections. For the same reasons, Dr. Lane's opinion is nationalized and insufficient to support the need for Botox injections to treat appellant's accepted employment injury. The Board notes that OWCP's medical adviser and Dr. Dorin did not believe that Botox injections would be helpful to appellant. OWCP's medical adviser reported that appellant had minimal objective findings and that her neurological examination was stable. He recommended continued conservative treatment and indicated that Botox injections would have a high likelihood of actually increasing her symptoms. Dr. Dorin, whose opinion is that of a second opinion physician, was even stronger in his opinion that Botox injections were contraindicated. Dr. Dorin stated that Botox was generally used on small muscles and not on large muscles such as the shoulder or neck and, if the Botox injections were applied, it would be toxic and risk the life of appellant. The Board finds that the weight of the medical opinion evidence is represented

[10] *Glen E. Shiner*, 53 ECAB 165 (2001). Abuse of discretion is generally shown through proof of manifest error clearly unreasonable exercise of judgment or actions taken that are contrary to both logic and probable deduction from established facts.

[11] *Michael W. Loveless*, 53 ECAB 784 (2002).

[12] *Stella M. Bohlig*, Docket No. 00-749 (issued February 8, 2002).

[13] *Wayne G. Rogers*, 54 ECAB 482 (2003); *Janie Kirby*, 47 ECAB 220 (1995).

by the opinions of OWCP's medical adviser and Dr. Dorin. Accordingly, OWCP did not abuse its discretion in denying appellant's request for Botox injections.

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.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for Botox injections.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 13 and January 28, 2010 are modified insofar as the Board finds that as the opinion of Dr. Parthasarathy was not sufficient to establish a conflict in medical opinion and thus there was no need for an impartial medical examination as his opinion was not rationalized. Accordingly, Dr. Dorin is as a second opinion physician. However, the Board affirms the decision as modified.

Issued: September 28, 2011
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