

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

S.C., Appellant)

and)

DEPARTMENT OF TRANSPORTATION, U.S.)
COAST GUARD, U.S. COAST GUARD AIR)
STATION, Cape Cod, MA, Employer)

Docket No. 13-1729
Issued: December 12, 2013

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2013 appellant filed a timely appeal from a March 18, 2013 merit decision and a June 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a gym membership; and (2) whether OWCP properly denied his request for a review of the written record.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that appellant submitted evidence to OWCP subsequent to its March 18, 2013 decision on the merits of his request for gym membership and with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final merit decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

On appeal appellant asserts that he was unable to get the information requested by OWCP within the allowed 30 days.

FACTUAL HISTORY

On September 14, 1999 appellant, then a 62-year-old refrigeration/air conditioning mechanic, sustained an employment-related low back strain. He sustained an accepted recurrence of disability on September 30, 1999 and returned to four hours of daily modified duty on January 5, 2000. Appellant stopped work on February 27, 2000, did not return, and was placed on the periodic compensation rolls. On February 5, 2002 appellant underwent authorized decompressive laminectomy at L4-5.

Appellant came under the care of Dr. David P. Gannon, Board-certified in internal medicine and anesthesiology. On January 2, 2013 appellant's wife called OWCP requesting that a gym membership be authorized for appellant. In a letter dated January 28, 2013, OWCP informed appellant of the information needed to approve the gym membership. This included an opinion from his physician describing the nature of the recommended exercise program. In a treatment note dated February 19, 2013, Dr. Gannon noted appellant's complaint of lower back pain, provided examination findings and diagnosed lumbosacral spondylosis without myelopathy, postlaminectomy syndrome of the lumbar region and lumbago. On February 27, 2013 appellant submitted a signed statement requesting membership at Plymouth Athletic Club. He also submitted a brochure from Plymouth Fitness.

By decision dated March 18, 2013, OWCP denied authorization for the requested gym membership on the grounds that the record did not include medical evidence sufficient to establish that the requested treatment was necessary and appropriate and related to the accepted employment injury. Appeal rights were attached to the decision.

On an appeal request form dated May 24, 2013, appellant requested a review of the written record and submitted additional evidence. In a June 25, 2013 decision, OWCP denied his request for a review of the written record on the grounds that it was untimely filed. It noted that appellant's request was dated May 24, 2013, more than 30 days after issuance of the March 18, 2013 OWCP decision. OWCP also advised him that the issue in the case could equally be addressed by requesting reconsideration with OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of FECA 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.³ 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.⁴

³ 5 U.S.C. § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

⁴ *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

Section 10.310(a) of the implementing regulations provide that the employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.⁵ OWCP procedures provide that nonmedical equipment such as waterbeds, saunas, weight-lifting sets, exercise bicycles, etc., may be authorized only if recommended by the attending physician and if OWCP finds that the item is likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.⁶

In interpreting section 8103(a) of FECA, 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. OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.⁷ 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.⁸ Proof of causal relationship must include supporting rationalized medical evidence.⁹

Section 2.810.18 of OWCP procedures specifically addresses health club membership and indicates that such memberships may be authorized if rationalized medical evidence establishes that such membership would be therapeutic to treat the effects of an accepted injury. It provides the specific information needed from the compensationner and from his or her physician. The physician is to describe the specific therapy and exercise routine needed to address the effects of the employment injury, the anticipated or actual effects of the regimen, the treatment goals sought or attained, and whether the recommended exercise routine can be performed at home or in a public facility such as a community recreation center or pool.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that on September 14, 1999 appellant sustained a low back strain and authorized a lumbar laminectomy at L4-5 in 2002. On January 2, 2013 his wife requested authorization for a gym membership and on February 27, 2013 appellant submitted a signed request for membership at Plymouth Athletic Club. By decision dated March 18, 2013, OWCP denied the request finding that appellant had not submitted sufficient medical evidence to justify the membership.

⁵ 20 C.F.R. § 10.310(a).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3(d)(5) (October 1995).

⁷ *R.L.*, Docket No. 08-855 (issued October 6, 2008).

⁸ See *Debra S. King*, 44 ECAB 203 (1992).

⁹ *M.B.*, 58 ECAB 588 (2007).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 1.810.18 (September 2010).

The Board finds that OWCP did not abuse its discretion in denying appellant's request for gym membership. As noted above, a report from a physician including justification for a specific exercise program is mandatory before membership in a health club/gym can be authorized.¹¹ The record before the Board contains no such information. In a February 19, 2013 report, Dr. Gannon merely described appellant's complaints, physical examination findings and diagnoses. He did not address the need for an exercise program or gym membership.

In its March 18, 2013 decision, OWCP explained that the record did not include medical evidence sufficient to establish that the requested treatment was necessary and appropriate and related to the accepted employment injury. It therefore did not abuse its discretion in denying appellant's request to authorize gym membership at the Plymouth Athletic Club.

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.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹² The Board has held that 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 that OWCP must exercise this discretionary authority in deciding whether to grant a hearing or written record review.¹³ OWCP's procedures, which require it to exercise its discretion to grant or deny a request for a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹⁴

ANALYSIS -- ISSUE 2

In its June 25, 2013 decision, OWCP denied appellant's request for a review of the written record on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a written record review as his request, dated May 24, 2013, was not made within 30 days of its March 18, 2013 decision. As appellant's request was dated May 24, 2013, more than 30 days after the date of the March 18, 2013 OWCP decision, the Board finds that OWCP properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.

¹¹ *Id.*

¹² *Claudio Vazquez*, 52 ECAB 496 (2001).

¹³ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁴ *Claudio Vazquez*, *supra* note 12.

OWCP also has the discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such as a matter of right. In the June 25, 2013 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP'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.¹⁵ In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a review of the written record that could be found to be an abuse of discretion.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for a gym membership and in denying his request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the June 25 and March 18, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 12, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ See *Mary Poller*, 55 ECAB 483 (2004).