

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

J.G., Appellant)	
)	
and)	Docket No. 15-1784
)	Issued: October 2, 2015
DEPARTMENT OF VETERANS AFFAIRS,)	
AMERICAN LAKE VETERANS)	
ADMINISTRATION MEDICAL CENTER,)	
Tacoma, WA, Employer)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2015 appellant filed a timely appeal from June 5 and July 28, 2015 merit decisions 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 501.3,² the Board has jurisdiction over the merits of the claim.³

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its jurisdiction is limited to the evidence of record that was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

³ The instant claim was adjudicated by OWCP under file number xxxxxx947. OWCP also accepted that on August 17, 2000 appellant sustained a right medial meniscus tear, adjudicated under file number xxxxxx057, and on August 12, 2002 sustained a left ankle strain, adjudicated under file number xxxxxx965. Appellant has a second appeal before the Board regarding file number xxxxxx947 that will be adjudicated separately under Docket No. 15-1448.

ISSUE

The issue is whether OWCP abused its discretion by denying appellant authorization for physical therapy for the period April 23 to June 23, 2015.

On appeal appellant asserts that the medical evidence of record supports the need for physical therapy. He also requests a “final medical examination.”

FACTUAL HISTORY

On August 28, 2007 appellant, then a 53-year-old engineering equipment operator, filed an occupational disease claim alleging that he injured his right great toe which became infected and required amputation. OWCP accepted an employment-related aggravation of right great toe osteomyelitis. Appellant underwent a partial right great toe amputation on September 14, 2007, returned to modified duty in October 2007, and returned to full duty several weeks later.

In July 2010 appellant informed OWCP that his right toe condition had worsened and he was being treated by the Department of Veterans Affairs (VA). Appellant’s supervisor stated that from November 2007 appellant performed his duties with increasing discomfort.

In August 2010 OWCP referred appellant to Dr. David S. Whitney, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 2, 2010 report, Dr. Whitney noted a history that in 1975, while appellant was working in private employment, he crushed his right foot between rollers and developed some sympathetic nerve pain and had surgery to relieve the pain. In 1992 appellant went to work for the employing establishment, and in 2006, when stepping out of a backhoe, felt something pop in his right great toe. He described symptoms of stabbing pain in the right foot, mainly around the area of the amputation, right ankle pain with weight bearing, and right hip pain. Dr. Whitney noted his review of the medical record and provided physical examination findings. He stated that because appellant had surgical amputation of the entire right great toe and distal first metatarsal, he had medial migration of the second and third toes of the right foot, and also rotation and contractures of the toes with blister and/or soft callus formation of the second right toe. Sensation was globally diminished from the ankle downward in the right foot. Dr. Whitney advised that appellant probably dislocated the dorsal metatarsophalangeal joint of the right great toe in April 2006, and with an unreduced deformity, the base of the right great toe became infected, and this led to the amputation. He opined that appellant’s right hip strain was secondary to abnormal gait following the work injury, and that appellant’s ongoing nerve pain and weight-bearing pain were secondary to the work injury. Dr. Whitney noted that appellant might require additional right foot surgery but could work full time, with no prolonged walking or repetitive climbing. In an attached work capacity evaluation, he provided physical limitations.

On October 1, 2010 OWCP accepted right great toe osteomyelitis, right hip sprain, and closed dislocation of right great toe metatarsophalangeal joint.

Appellant filed a schedule award claim on February 14, 2011. He retired on disability effective April 8, 2011. By letter dated September 26, 2011, OWCP informed appellant that maximum medical improvement had not been reached because based on Dr. Whitney’s evaluation additional medical treatment was recommended.

In a November 29, 2011 report, Dr. Amy Duckworth, a podiatrist, noted appellant's complaint of right foot problems including increased deformity and inability to wear anything except a slipper. She indicated that surgical options were discussed and requested authorization for right tendoAchilles lengthening (TAL) and amputation of all digits.

OWCP authorized the requested surgery on March 7, 2012. On July 13, 2012 Dr. Duckworth amputated digits two through five of the right foot and performed a TAL procedure of the right foot.⁴

In an April 22, 2015 report, Dr. Marciano B. Capati, Board-certified in family medicine, noted that appellant was there for ongoing care. He described the history of injury, appellant's past medical and surgical history, and his complaints of right foot and hip pain. On physical examination of the lower extremities, Dr. Capati noted amputation of all toes on the right, a normal gait, normal strength, and tenderness to examination of the right calf and hip. He diagnosed hypertension, and calf, hip, and foot pain. Dr. Capati advised that he would treat appellant conservatively with physical therapy and medication. A right hip x-ray on April 22, 2015 showed no acute fracture or dislocation, and a small area that could reflect previous trauma. Dr. Capati referred appellant for physical therapy that day, noting diagnoses of pain in right calf and pain in limb.

Appellant was evaluated for physical therapy on April 23, 2015. The physical therapy provider requested authorization for eight weeks of physical therapy, to run from April 23 to June 23, 2015.

On April 28, 2015 Dr. Capati reported that appellant had continued hip and lower extremity pain. He recommended treatment with medication, physical therapy, and massage therapy.

By letter dated April 29, 2015, OWCP advised appellant that physical/occupational therapy for the period April 23 to June 23, 2015 could not be authorized because the record did not contain medical evidence that explained the need for the treatment requested due to the accepted conditions. Appellant began physical therapy that day.

On April 30, 2015 Dr. Steven Teeny, a Board-certified orthopedic surgeon, noted seeing appellant for right hip pain. He described physical examination findings including a normal gait and intact sensation to the lower extremities. Dr. Teeny diagnosed right lumbago. He advised that appellant's hip pain probably originated in the lumbar spine. A May 6, 2015 lumbosacral spine x-ray demonstrated surgical changes at the L4 level with degenerative changes from L3 to S1.

On May 8, 2015 Dr. Capati recommended massage therapy to relieve right hip pain. The physical therapy provider requested authorization for eight weeks of physical therapy, to run from May 7 to July 7, 2015. Appellant continued physical therapy sessions.

⁴ In November 2013, appellant changed his address to a post office box in Winchester, Oregon. This was acknowledged by OWCP on December 6, 2013.

On June 1, 2015 OWCP authorized 32 units of massage therapy, for the period May 7 to July 5, 2015.⁵

In a decision dated June 5, 2015, OWCP denied authorization for physical/occupational therapy for the period April 23 to June 23, 2015 because the evidence did not support that the requested therapy was medically necessary.

On June 23, 2015 appellant requested reconsideration. In reports dated May 6 and June 15, 2015, Dr. Capati described appellant's complaint of increasing right hip and knee pain. He advised that appellant's foot pain caused him to walk awkwardly, leading him to develop pain in the right knee and hip, and to eventually develop low back pain. In correspondence dated June 16, 2015, Sherri Lucke, a licensed massage practitioner, and Alicia Gilfoy, a physical therapist, maintained that appellant needed the requested therapy for his right hip and ankle pain and also requested a prosthetic device. Additional therapy was recommended.

On June 23, 2015 OWCP denied appellant's request.

In a merit decision dated July 28, 2015, OWCP denied modification of the June 5, 2015 decision because the medical evidence, from a physician, did not support that the requested therapy for the period April 23 to June 23, 2015 was medically necessary to address the effects of appellant's accepted conditions.

LEGAL PRECEDENT

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.⁶

In interpreting this section of FECA, 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. 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

⁵ Appellant filed a schedule award claim on May 25, 2014. On September 3, 2014 OWCP denied his schedule award claim. It noted that the record did not contain a medical report sufficiently describing appellant's current condition. In correspondence postmarked October 1, 2014, appellant requested a hearing. By decision dated June 3, 2015, OWCP found that he had abandoned his request for a hearing regarding the September 13, 2014 decision. Appellant filed an appeal with the Board from the June 3, 2015 decision, adjudicated separately by the Board under Docket No. 15-1448. *Supra* note 3.

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

established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁷

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.⁸

ANALYSIS

The accepted conditions in the master file in this case, file number xxxxxx947, are right great toe osteomyelitis, right hip sprain, and closed dislocation of right great toe metatarsophalangeal joint. Under subsidiary file number xxxxxx057, a right medial meniscus tear is accepted, and under subsidiary file number xxxxxx965, a left ankle strain is accepted. In decisions dated June 5 and July 28, 2015, OWCP denied appellant's request for authorization of physical/occupational therapy for the period April 23 to June 23, 2015 because the evidence did not support that the requested therapy was medically necessary to address the effects of his accepted conditions.

In April 2015, Dr. Capati, an attending family physician, recommended that appellant have physical therapy. On April 22, 2015 the physical therapy provider requested authorization for eight weeks of therapy, to begin on April 23, 2015, the date appellant was evaluated by physical therapists. By letter dated April 29, 2015, OWCP denied authorization and informed appellant that the medical evidence did not explain the need for treatment due to the accepted conditions.

Lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA⁹ and the opinions of Ms. Lucke, a massage practitioner, and Ms. Gilfoy, a physical therapist, are of no probative medical value as to the need for therapy in this case.

The only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. In a treatment note dated April 22, 2015, Dr. Capati diagnosed calf, hip, and foot pain and advised that he would treat appellant conservatively with physical therapy and medication. He referred appellant for physical therapy that day, indicating that it was for right calf and limb pain, neither of which are accepted conditions.

On May 8, 2015 Dr. Capati recommended massage therapy to relieve hip pain as right hip sprain is an accepted condition. This was authorized by OWCP on June 1, 2015. On June 15, 2015 Dr. Capati described appellant's complaint of increasing right hip and knee pain. He advised that appellant's foot pain caused him to walk awkwardly, leading him to develop pain in the right knee and hip, and eventually low back pain. Dr. Capati, however, did not adequately explain the need for treatment to provide relief of the accepted conditions. Thus,

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁸ *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

⁹ *David P. Sawchuk*, 57 ECAB 316 (2006).

OWCP did not abuse its discretion when it denied appellant's request for physical therapy for the period April 23 to June 23, 2015.¹⁰

As to appellant's request that OWCP perform a "final examination," the determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP.¹¹

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 did not abuse its discretion when it denied appellant's request for physical therapy for the period April 23 to June 23, 2015.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 28 and June 5, 2015 are affirmed.

Issued: October 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁰ See *D.K.*, 59 ECAB 141 (2007).

¹¹ *J.T.*, 59 ECAB 293 (2008).