

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

B.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
MATERIEL COMMAND, HILL AIR FORCE
BASE, UT, Employer**

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**Docket No. 15-1106
Issued: February 23, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 20, 2015 appellant filed a timely appeal from an April 7, 2015 merit 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

ISSUE

The issue is whether OWCP abused its discretion by denying appellant authorization for psychological testing and diagnostic evaluation.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the April 7, 2015 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that he sustained an employment-related head injury on January 24, 2013, but forgot to include it in his original claim form due to the nature of his injury. He contends that psychological testing and evaluation is necessary to determine the nature and extent of his condition.

FACTUAL HISTORY

OWCP accepted that appellant, a 39-year-old aircraft mechanic, sustained a right shoulder and acromioclavicular (AC) dislocation on January 24, 2013 as a result of slipping and falling on ice in the performance of duty. It authorized right shoulder surgery, which he underwent on March 1, 2013. Appellant was paid compensation benefits.

On May 21, 2013 appellant's treating physician, Dr. Michael Metcalf, a Board-certified orthopedic surgeon, found neurologic symptoms, substantial mood swings, depression, and agitation, and noted his concern that "perhaps during his fall [appellant] may have hit his head." He referred appellant to Dr. Antonietta Russo, a psychologist, for evaluation at a postconcussion clinic.

In a May 31, 2013 report, Dr. Russo indicated that appellant was seen for a "concussive injury that occurred secondary to slip and fall at work" on January 24, 2013. She noted that appellant suffered a "severe shoulder injury as well as back and mild concussive injury" and had "been struggling to manage affective and cognitive functioning with difficulties including pain, headaches, as well as noise and light sensitivities." On July 16, 2013 Dr. Russo conducted psychological testing and found significant psychological distress that was likely contributing to his current functioning. She discovered a pattern of neurological findings, including attention difficulties and significant mood dysfunction consistent with a mild head injury, complicated by psychological factors, as well as a history of previous mild head injuries. Dr. Russo diagnosed severe major depressive disorder, adjustment disorder with mixed anxiety and depressed mood, and concussion with no loss of consciousness.

On September 10, 2013 appellant requested authorization for psychological testing and diagnostic evaluation.

In a September 10, 2013 letter, OWCP notified appellant that the evidence in the record was insufficient to establish medical necessity and afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a December 17, 2013 report from Dr. Bryson Smith, a Board-certified neurosurgeon, who found that he had "functional limitations, clinical dysthymia, depression, anxiety, and passive coping skills with [his] chronic pain." Dr. Smith noted that untreated emotional issues could result in barriers to recovery and inadequate response to treatment. He found that appellant demonstrated "inadequate coping skills, and reliance on passive treatments such as opioids." Dr. Smith referred appellant to "pain psychology" to "help de-emphasize pain relief and emphasize mindfulness towards function and self-reliance for success."

OWCP referred appellant to Dr. Michael Callahan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related injuries. On July 2, 2014 Dr. Callahan reviewed a statement of accepted facts and appellant's medical records, and conducted a physical examination. He found that on January 24, 2013 appellant sustained a right grade 5 AC separation diagnosed by x-ray and subsequent surgical intervention confirming the posterior displacement of the AC joint and penetration of the trapezius muscle. Dr. Callahan opined that it was likely that the fall caused a recurrent injury to his lumbar spine based on his rapid onset of complaints of low back pain, left-sided radiculopathy, and right-sided hamstring pain with changes demonstrated by magnetic resonance imaging (MRI) scan. He found no evidence of any current neck condition other than trapezius pain due to the shoulder surgery. Dr. Callahan concluded that appellant had reached maximum medical improvement and was totally disabled for work. He recommended vocational rehabilitation and "further treatment includ[ing] cognitive behavioral therapy, which may extend for up to 20 visits with a psychotherapist familiar with cognitive behavioral therapy." Dr. Callahan advised that appellant should also continue with his pain management physicians, but strongly recommended weaning him from his narcotics. He indicated that "[t]hese treatments may extend for up to three to six months to complete his rehabilitation" and then appellant would be able to return to limited-duty work.

OWCP expanded appellant's claim to include displacement of lumbar intervertebral disc without myelopathy based on Dr. Callahan's July 2, 2014 second opinion report.

By decision dated April 7, 2015, OWCP denied authorization for psychological testing and diagnostic evaluation as these procedures were unrelated to appellant's accepted conditions. It further found that he did not initially claim a head injury on his CA-1 form and the medical evidence of record was insufficient to establish a head injury causally related to the January 24, 2013 employment incident.

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.³ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA.⁴

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

³ 5 U.S.C. § 8103.

⁴ See *J.B.*, Docket No. 11-1301 (issued March 22, 2012).

contrary to both logic and probable deductions from established facts.⁵ It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁶

ANALYSIS

The Board has duly considered the matter and finds that the case is not in posture for a decision and must be remanded to OWCP. In the case of *William A. Couch*,⁷ the Board held that when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by it before the final decision is issued. In this case, in a decision dated April 7, 2015, OWCP denied authorization for psychological testing and diagnostic evaluation.

On September 10, 2013 appellant requested authorization for psychological testing and diagnostic evaluation and OWCP referred appellant to Dr. Callahan for a second opinion evaluation to determine the nature and extent of his employment-related injuries. In his July 2, 2014 report, Dr. Callahan recommended vocational rehabilitation and “further treatment includ[ing] cognitive behavioral therapy, which may extend for up to 20 visits with a psychotherapist familiar with cognitive behavioral therapy.” This report was received by OWCP on July 10, 2014. In its April 7, 2015 decision, OWCP denied appellant’s request for psychological testing and diagnostic evaluation because the treatment was unrelated to his accepted conditions. It did not note receipt or consideration of the July 2, 2014 report from Dr. Callahan.

The Board finds that OWCP, in its April 7, 2015 decision, did not provide consideration to the July 2, 2014 report from Dr. Callahan and thus found that psychological testing and diagnostic evaluation was unrelated to his accepted conditions.⁸ For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the April 7, 2015 decision. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision on the claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁵ *Id.*

⁶ See *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁷ 41 ECAB 548 (1990).

⁸ See *Linda Johnson*, 45 ECAB 439, 440 (1994) (where the Board held that it is necessary that OWCP review all evidence submitted by a claimant and received by it prior to issuance of its final decision and noted that this principal applies with equal force when evidence is received by OWCP the same day a final decision is issued).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 23, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board