United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 16-1407**
	)	**Issued: November 14, 2016**
DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL, Denver, CO, Employer	)	

Appearances:
James E. Nesland, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 27, 2016 appellant, through counsel, filed a timely appeal from a February 2, 2016 merit decision and a May 17, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] The record also contains a June 10, 2016 OWCP hearing representative decision with respect to a permanent impairment. Appellant did not request review of this decision on appeal.

[3] 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUES

The issues are: (1) whether OWCP properly denied authorization for a gym membership; and (2) whether OWCP properly determined appellant's application for reconsideration was insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 17, 1986 appellant, then a 40-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on October 10, 1986 when he lifted some equipment off a truck in the performance of duty. His claim was accepted for the conditions of: lumbar sprain; thoracic or lumbosacral neuritis or radiculitis; left intervertebral disc disorder with myelopathy; and a consequential depressive disorder. As to appellant's work history, the record indicates that appellant stopped working initially on October 14, 1986, returned to work on October 20, 1986, then stopped working again on April 29, 1988. OWCP paid wage-loss compensation through April 9, 1993, when OWCP terminated compensation.[5] Appellant pursued appeal rights regarding termination of benefits, and he filed an appeal with the Board. By order dated March 11, 1997, the Board remanded the case for proper assemblage of the case record and an appropriate decision to protect appellant's appeal rights.[6]

By decision dated November 12, 1997, OWCP found appellant's employment-related conditions had resolved. In a decision dated March 1, 1999, an OWCP hearing representative found OWCP had properly terminated wage-loss compensation. With respect to continuing medical benefits for a back condition radiating into the left leg, the hearing representative found OWCP did not meet its burden of proof to terminate medical benefits. The hearing representative found appellant was entitled to continuing medical benefits for the back and leg condition, including a health club membership.[7]

OWCP issued a July 6, 1999 schedule award for one percent left leg permanent impairment. In a decision dated January 22, 2008, it issued a schedule award for an additional 12 percent permanent impairment of the left leg.

On November 30, 2015 appellant submitted an authorization request for a health club membership from December 1, 2015 to December 1, 2016. By letter dated December 10, 2015, OWCP requested that appellant submit additional information regarding the authorization

[4] On appeal, appellant submitted additional evidence. The Board can only review evidence that was before OWCP at the time of the final decisions on appeal. 20 C.F.R. § 501.2(c)(1).

[5] The record indicates that OWCP paid compensation for loss of premium pay through July 10, 1993.

[6] Docket No. 95-2604 (issued March 11, 1997).

[7] Although a health club membership had been approved in 1999, FECA procedures require review and authorization for health club or spa membership and usually only for a period of six months at a time. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.18(c) (September 2010).

request. It requested information from the gym manager, as well as medical evidence with respect to the nature of the exercise program.

Appellant submitted a letter dated December 30, 2015 indicating that he continued to use the health club that had previously been authorized for his exercise program. He submitted a undated statement from an assistant manager at the health club regarding fees and facilities provided.

In addition, appellant submitted a November 19, 2015 report from Dr. Paul Gause, a Board-certified orthopedic surgeon, who provided a history that appellant had a long history of back problems. Dr. Gause noted that appellant sustained a 1986 injury while attempting to lift a heavy object. He provided results on examination and reported that appellant continued with persistent lumbar pain and left leg radiculopathy. Dr. Gause wrote that he recommended appellant maintain membership at his local gym.

By decision dated February 2, 2016, OWCP denied authorization for gym membership. It found the medical evidence was insufficient to establish a gym membership was medically necessary to treat a work-related condition.[8] It was noted that the medical evidence of record did not describe the nature of the recommended exercise program, or the equipment needed.

On April 28, 2016 appellant requested reconsideration. In an April 14, 2016 letter, he indicated that the health club membership had been authorized since 2009, and included core strengthening equipment, a pool, and whirlpool. Appellant submitted a March 9, 2016 report from Dr. Amber Hennenhoefer, a Board-certified physiatrist. Dr. Hennenhoefer noted that appellant complained of lumbar and leg pain, and he had continued to perform his home exercise program at the gym, including weight lifting and riding a bike. She reported that appellant had a "low back injury he sustained while lifting in 1984" with subsequent diagnoses that included degenerative disc disease, myelopathy, and left lumbar neuritis. Dr. Hennenhoefer provided results on examination and wrote that appellant would benefit from performing his home exercise program at the gym. She indicated that continuing the exercise program helped appellant to control symptoms, reduce medication use, and improve functioning. In addition, Dr. Hennenhoefer provided a note dated March 9, 2016 asserting that appellant needed to have a gym membership to continue his exercise program to maintain strengthening, stretching, and current functioning.

The record indicates that on March 21, 2016 appellant submitted a handwritten response to the form "physician's recommendations for treatment-related health club program for job-related exercise or therapy." The signature is illegible.[9] The response indicated that the exercises to be performed included exercises for core and pelvic stability, as well as low back strengthening.

In a report dated April 13, 2016, Dr. Hennenhoefer noted that health club membership had been denied. She provided results on examination and opined that appellant needed to have

[8] *Id*.

[9] The address provided is the medical practice associated with Dr. Hennenhoefer.

access to a gym facility with a pool, as swimming laps was the best exercise for the back condition and a whirlpool provided a benefit with muscle spasms.

By decision dated May 17, 2016, OWCP denied appellant's reconsideration request. It found the reports from Dr. Hennenhoefer were irrelevant or immaterial. According to it, Dr. Hennenhoefer did not provide the actual exercise program and provided no rationale regarding the need for pool or whirlpool.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8103 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. 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.[10]

Section 10.310(a) of the implementing regulations provides 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.[11] 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.[12]

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 its authority is that of reasonableness.[13] 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.[14]

OWCP procedures specifically address health club membership and indicate 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 compensationer and from his or her physician. The

[10] *Kenneth O. Collins, Jr.*, 55 ECAB 648 (2004).

[11] 20 C.F.R. § 10.310(a).

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

[13] *R.L.*, Docket No. 08-0855 (issued October 6, 2008).

[14] *Debra S. King*, 44 ECAB 203 (1992).

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.[15]

ANALYSIS -- ISSUE 1

In the present case, appellant requested continued authorization for health club membership. The only medical evidence that was before OWCP at the time of the February 2, 2016 decision was the November 19, 2015 report from Dr. Gause. This report does not address the medical issues noted above with respect to health club membership. Dr. Gause writes only that he recommended appellant maintain his gym membership. He does not describe the exercise routine needed to treat an employment injury, the treatment goals, or the necessity of using equipment or facilities that could not be performed at home.

Although the record indicated that OWCP had authorized gym membership in the past, the Board notes that prior authorization for medical services does not establish that such services are medically necessary under 5 U.S.C. § 8103. The medical evidence did not establish that a health club membership was necessary treatment for an employment-related condition. The Board finds that OWCP did not abuse its discretion in denying authorization in the February 2, 2016 decision.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[16] OWCP'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 new evidence not previously considered by OWCP."[17] 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.[18]

ANALYSIS -- ISSUE 2

In the present case, appellant submitted additional evidence on reconsideration, including reports dated March 9 and April 13, 2016 from Dr. Hennenhoefer. These reports represent new

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.18 (September 2010).

[16] 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").

[17] 20 C.F.R. § 10.606(b)(3).

[18] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

evidence that were not previously considered. Dr. Hennenhoefer had not submitted reports with respect to health club membership prior to the February 2, 2016 OWCP decision.

OWCP finds the evidence to be irrelevant to the issue, but in their review of the evidence, it discusses the probative value of the evidence submitted. The issue on reconsideration, with respect to whether a claimant is entitled to a merit review, is not whether the evidence is of sufficient probative value to establish the claim or benefit sought. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof.[19] Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.[20]

In this case the new evidence from Dr. Hennenhoefer was clearly relevant and pertinent to the issue presented. Dr. Hennenhoefer opined in the March 9, 2016 report that gym membership was recommended to maintain strengthening, stretching, and current functioning. In the April 13, 2016 report, she specifically discussed benefits to appellant from a facility that included a pool and whirlpool.

The Board finds that appellant submitted "relevant and pertinent new evidence not previously considered by OWCP." Pursuant to 20 C.F.R. § 10.606(b)(3), appellant was entitled to a merit review of his claim. The case will accordingly be remanded to OWCP. Following such development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP properly denied authorization for gym membership in its February 2, 2016 decision. The Board further finds that appellant submitted pertinent new and relevant evidence on reconsideration and was entitled to a merit review.

[19] *J.L.*, Docket No. 11-0771 (issued November 17, 2011).

[20] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2016 is affirmed. The decision dated May 17, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 14, 2016
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board