

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

A.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 16-1812
Issued: March 15, 2017**

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 September 12, 2016 appellant filed a timely appeal from an April 26, 2016 merit decision and an August 16, 2016 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.

ISSUES

The issues are: (1) whether OWCP abused its discretion in denying appellant's request for authorization of medical equipment; and (2) whether OWCP properly denied appellant's request for reconsideration of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 24, 1989 appellant, then a 32-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 1989 he injured his lower back as a result of

¹ 5 U.S.C. § 8101 *et seq.*

lifting sacks of mail. According to a statement of accepted facts (SOAF) dated December 19, 1991, his claim was initially accepted for back sprain. By decision dated October 27, 2004, OWCP accepted appellant's claim for a herniated nucleus pulposus (HNP) at L5-S1. A SOAF dated December 10, 2015 noted that his accepted conditions included lumbar sprain and displacement of the lumbar intervertebral disc. Appellant received compensation benefits for the period February 14, 2008 through April 30, 2010.

Appellant filed a claim (Form CA-7) on July 15, 2010 for compensation due to leave without pay commencing May 1, 2010. OWCP denied this claim on September 28, 2010.²

In a progress report dated May 8, 2014, Dr. Rommel G. Childress, a Board-certified orthopedic surgeon, noted that appellant was experiencing pain in the back and legs on a daily basis.

By letter dated June 23, 2014, appellant requested medical items and accommodations for his accepted condition including a stair lift, an adjustable bed with a mattress and box spring, a bathtub with jets to ease his back pain, and as well as repairs to a ramp OWCP built on his home.

On September 22, 2014 Dr. Childress recommended that appellant use a bathtub with jets and an adjustable bed. He explained that the bathtub and adjustable bed could relieve appellant's chronic pain. In a report dated October 10, 2014, Dr. Childress noted that appellant continued to have difficulty with his back and legs, and remarked that appellant had sought treatment at a pain clinic.

Dr. Childress reported on November 17, 2014 that appellant was ambulatory with a crutch, and he renewed appellant's Lortab prescription. By letter dated January 27, 2015, he reviewed a magnetic resonance imaging (MRI) scan of appellant's spine, noting that his continued difficulties were consistent with the testing.

By letter to OWCP dated May 26, 2015, Dr. Childress noted that he had treated appellant for acute and chronic lumbar sprain and a herniated disc at L5-S1. He requested and recommended that appellant have a gym membership at a center with a hot tub and whirlpool in order for appellant to undergo water therapy three to four times per week. Dr. Childress noted that this therapy would help appellant maintain reasonable strength and capability in his back.

On August 10, 2015 OWCP authorized a jet shower head to be used in a hot shower, an adjustable bed board placed between a mattress and a box spring with orthopedic pillows, and one year of hydrotherapy with aquatic exercises at the YMCA.

In a report dated August 28, 2015, Dr. Childress noted that, while OWCP had authorized a jet shower head, appellant already had one, and explained that the bathtub with jets was necessary because appellant had trouble standing in the shower for extended periods of time. He further noted that the adjustable bed board would be cumbersome for appellant given the nature

² The record does not reflect that appellant returned to work or received wage-loss compensation benefits after May 1, 2010. Appellant's claim remained open for medical treatment.

of his condition. Dr. Childress recommended a queen size bed with individually adjustable sides.

On September 24, 2015 OWCP authorized installation of a tub with a jet and one year of hydrotherapy with aquatic exercise at a different facility, the Kroc Center. On the same date it denied authorization for a double bed noting that appellant had not provided a note with medical rationale for the necessity of a double bed, but instead only addressed his desire to sleep with his spouse.

In a report dated November 9, 2015, Dr. Childress noted that appellant's condition required him to use a cane, crutches, or a wheelchair for activities of daily living. He noted that appellant had radicular pain that made both lower extremities numb at times, with pain going down his left lower extremity.

In January 25, 2016 letter, Dr. James T. Galyon, a Board-certified orthopedic surgeon noted his opinion that appellant refused to have a physical examination. Therefore, he was unable to qualify the completeness of his findings.

In a supplement medical report from the second opinion examiner, dated March 10, 2016, Dr. Galyon replied to OWCP's query as to whether appellant's request for an adjustable mattress and chairlift were medically necessary. He opined that appellant did not need an adjustable mattress, jetted bathtub,³ or chairlift, and noted that a shower chair would be a reasonable accommodation for appellant's condition. Dr. Galyon opined, "I do not believe that the other equipment that I have just referred as being unnecessary, would in any way improve [appellant's] condition."

By decision dated April 26, 2016, OWCP approved only hydrotherapy at the Kroc Center and a shower chair. It denied authorization for an adjustable mattress, widening of the home doorway, installation of a heavy chairlift, a jetted bathtub, modification of appellant's existing bathroom, and repair of a cracked ramp. OWCP noted that the medical evidence supported authorization of hydrotherapy, but that there was no medical evidence supporting the remainder of her requests for authorization. Regarding the cracked ramp, it noted that the crack was minor, and that a recommendation was made to monitor the ramp and reassess in 12 to 24 months.

On August 3, 2016 appellant requested reconsideration of OWCP's April 26, 2016 decision. With his request, he submitted letters and reports from Dr. Childress dated from May 8, 2014 through March 4, 2016, which were previously of record. Appellant also submitted two reports from Dr. Childress not previously of record, dated May 9 and July 28, 2016. In the May 9, 2016 report, Dr. Childress noted that appellant had visited for a follow-up on his condition, and recommended the use of a cane for activities outside the home. In the July 28, 2016 report, he noted that appellant experienced increased pain and difficulty and that he had requested a lumbar facet block to manage his pain.

³ The jetted bathtub had previously been authorized on September 24, 2015.

By decision dated August 16, 2016, OWCP denied appellant's request for reconsideration, noting that he had failed to submit relevant and pertinent new evidence in support of his claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician who OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.⁴ 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.⁵

In interpreting section 8103, 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.⁶ 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.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 -- ISSUE 1

The Board finds that OWCP did not abuse its discretion in denying appellant's request to widen the home doorway, installation of a heavy chairlift, modification of appellant's existing bathroom, repair of a cracked ramp, an adjustable bed, and a jetted bathtub.

OWCP accepted appellant's claim for an HNP at L5-S1, lumbar sprain, and displacement of the lumbar intervertebral disc. Appellant submitted a report from Dr. Childress dated May 26, 2015, which recommended hydrotherapy to treat appellant's accepted conditions. By letter dated June 23, 2014, he requested medical items and accommodations for his accepted condition including a stair lift, an adjustable bed with a mattress and box spring, a bathtub with jets to ease his back pain, and repairs to a ramp OWCP built on his home. On September 22, 2014

⁴ 5 U.S.C. § 8103(a).

⁵ See *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁶ *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

⁷ See *Debra S. King*, 44 ECAB 203 (1992).

⁸ *Kennett O. Collins, Jr.*, 55 ECAB 648, 654 (2004).

Dr. Childress recommended that appellant use a bathtub with jets and an adjustable bed. He explained that the bathtub and adjustable bed could relieve appellant's chronic pain. On August 10, 2015 OWCP authorized a jet shower head to be used in a hot shower, an adjustable bed board placed between a mattress and a box spring with orthopedic pillows, and one year of hydrotherapy with aquatic exercises at the YMCA. In a report dated August 28, 2015, Dr. Childress noted that, while OWCP had authorized a jet shower head, appellant already had one, and explained that the bathtub with jets was necessary because he had trouble standing in the shower for extended periods of time. He further noted that the adjustable bed board would be cumbersome for appellant given the nature of his condition, and recommended a queen size bed with individually adjustable sides. On September 24, 2015 OWCP then authorized a tub with a jet.

In a report from a second opinion examiner, Dr. Galyon, dated March 10, 2016, responding to OWCP's query as to whether appellant's request for an adjustable mattress and chairlift were medically necessary, he opined that appellant did not need an adjustable mattress, jetted bathtub, or chairlift, and noted that a shower chair would be a reasonable accommodation for appellant's condition.

By decision dated April 26, 2016, OWCP approved hydrotherapy at the Kroc Center and a shower chair. It denied authorization for an adjustable mattress, widening of the home doorway, installation of a heavy chairlift and a jetted bathtub, modification of appellant's existing bathroom, and repair of a cracked ramp.

The Board finds that OWCP did not abuse its discretion in this case as there is no medical of record supporting authorization for widening of the home doorway, installation of a heavy chairlift, modification of appellant's existing bathroom, repair of a cracked ramp, an adjustable bed, and a jetted tub.

The Board notes that Dr. Childress did not specifically recommend authorization for widening of the home doorway, installation of a heavy chairlift, modification of appellant's existing bathroom, or repair of a cracked ramp. There was no evidence presented with appellant's request for these items as to why these items were necessary due to his accepted injury. As previously noted, while OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁹

While Dr. Childress did recommend a bathtub with jets to relieve chronic pain due to appellant's trouble standing in a tub, OWCP authorized a jet shower head and shower chair for appellant, hydrotherapy and aquatic exercises at the YMCA, and a tub with a jet. He offered no medical explanation as to why appellant would require the tub with multiple jets to relieve pain, given these other authorizations for hydro/aquatic therapy. Dr. Childress did not provide the necessary medical explanation as to how the jetted tub would cure, reduce the period of

⁹ *Id.*

disability, or aid in lessening the amount of monthly compensation.¹⁰ The Board also notes that Dr. Galyon's March 10, 2016 report suggested that jetted bathtub was not medically necessary.

Regarding appellant's request for an adjustable bed, Dr. Childress related on September 22, 2014 that an adjustable bed would relieve appellant's chronic pain. OWCP thereafter authorized an adjustable bed board. In an August 28, 2015 report, Dr. Childress opined that the adjustable bed board would be cumbersome for appellant. However, Dr. Galyon opined in his March 10, 2016 report that he did not believe that the adjustable bed would in any way improve appellant's condition. Again, there is no rationalized medical evidence of record establishing that an adjustable bed, instead of an adjustable bed board, was medically necessary and would reduce the period of disability, or aid in lessening the amount of monthly compensation.

OWCP has administrative discretion in choosing the means to achieve the goal of recovery from a work-related injury and the only limitation on OWCP's authority is that of reasonableness.¹¹

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 established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹²

The Board finds that OWCP did not abuse its discretion by denying authorization of the requested items.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹³ Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

¹⁰ See *E.J.*, Docket No. 10-0743 (issued November 2, 2010).

¹¹ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts).

¹² See *Minnie B. Lewis*, 53 ECAB 606 (2002).

¹³ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

¹⁴ *Id.* at § 10.608(b); see *K.H.*, 59 ECAB 495, 499 (2008).

ANALYSIS -- ISSUE 2

The issue presented on appeal of the August 16, 2016 decision is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of his claim. In his August 3, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether OWCP abused its discretion in denial of authorization for an adjustable mattress, widening of the home doorway, and installation of a heavy chairlift, a jetted bathtub, modification of appellant's existing bathroom, and repair of a cracked ramp. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any relevant and pertinent new evidence with his request for reconsideration.

The evidence submitted in support of reconsideration included a narrative statement from appellant, which is not medical evidence and therefore is irrelevant to the issue of whether OWCP abused its discretion.¹⁵ Appellant also submitted various reports from Dr. Childress, of which only two had not previously been record: the reports of May 9 and July 28, 2016. In the May 9, 2016 report, Dr. Childress noted that appellant had visited for a follow up on his condition, and recommended the use of a cane for activities outside the home. In the July 28, 2016 report, he noted that appellant experienced increased pain and difficulty and that he had put in a request for a lumbar facet block to manage appellant's pain.¹⁶

As neither the May 9, 2016 report nor the July 28, 2016 report discussed the authorization of requested items, they are irrelevant to the underlying issue on reconsideration, and therefore insufficient to warrant reconsideration of appellant's claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for widening of the home doorway, installation of a heavy chairlift, modification of appellant's existing bathroom, repair of a cracked ramp, a jetted bathtub, and adjustable mattress. The Board further finds that OWCP properly denied appellant's request for reconsideration of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ See *C.L.*, Docket No. 14-1585 (issued December 16, 2014).

¹⁶ *Johnnie B. Causey*, 57 ECAB 359, 364 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 16 and April 26, 2016 are hereby affirmed.

Issued: March 15, 2017
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