

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

C.S., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, CENTER FOR DISEASE)
CONTROL, Atlanta, GA, Employer)

Docket No. 19-0516
Issued: August 15, 2019

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from a December 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the December 7, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP abused its discretion in denying authorization for a compound medication.

FACTUAL HISTORY

On August 6, 2009 appellant, then a 53-year-old technology development coordinator, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral arm epicondylitis due to factors of her federal employment. On April 30, 2010 OWCP accepted appellant's claim for bilateral lateral epicondylitis.

On December 21, 2010 appellant underwent authorized right lateral epicondylar release and right trigger thumb release.⁴ On October 25, 2011 she underwent authorized decompression of left lateral epicondylitis with partial ostectomy and decompression of the left ulnar nerve at the elbow. In addition, on August 29, 2013 appellant underwent authorized left lateral epicondyle debridement.

In three authorization request forms (Form CA-26) dated November 18 and December 2, 2016, and January 4, 2017, appellant's attending physician, Dr. Bronier L. Costas, a Board-certified orthopedic surgeon, requested authorization from OWCP for appellant's use of Gabapentin, a compound drug which was topically administered. He checked the box marked "yes" when asked whether the compounded drug was medically necessary for its intended use.

On January 25, 2017 OWCP referred appellant's case, along with a statement of accepted facts (SOAF) to Dr. William Tontz, Jr., a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). OWCP requested that the DMA address whether the requested compound medicine was medically necessary for treatment of appellant's accepted employment injury.

In a report dated February 8, 2017, Dr. Tontz determined that the proposed topical treatment was not medically necessary. He noted that topical analgesics, such as this Gabapentin compound, were largely experimental in use with few randomized controlled trials to determine efficacy or safety and thus there was little to no research to support the use of such agents.

In a development letter dated February 14, 2017, OWCP advised appellant that the medical evidence of record was insufficient to establish that Gabapentin was medically necessary to treat her accepted employment-related conditions. It afforded her 30 days to submit a narrative report from her attending physician explaining the medical necessity for this medication. Appellant did not submit the requested evidence.

By decision dated March 23, 2017, OWCP denied appellant's request for authorization of the compound drug Gabapentin finding that the evidence of record did not support that it was medically necessary to treat the effects of her accepted employment-related condition.

⁴ These procedures were performed under Master OWCP File No. xxxxxx582. OWCP File No. xxxxxx582 pertains to a July 14, 2019 traumatic injury claim (Form CA-1) which is accepted for right lateral epicondylitis.

On March 30, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received a letter dated March 6, 2017 from Dr. Costas who indicated that appellant had been on Dermatran, a different compound medicine to treat various tendinitis problems. Dr. Costas noted that she had been on this medicine for a long time and had very good success. He related that the newer Gabapentin compound was "slightly different" from the Dermatran medication, and appellant had noticed a significant difference in the effectiveness of the two different topical medications.

On August 16, 2017 Dr. Costas again requested authorization from OWCP for appellant's use of the Gabapentin compound.

On August 18, 2017 OWCP referred appellant's case record, along with the SOAF, to a new DMA, Dr. Todd Fellars, a Board-certified orthopedic surgeon, to determine whether the requested compound medication was medically necessary to treat appellant's accepted employment injury.

In a report dated August 30, 2017, the DMA determined that there was no medical evidence of record to support the use of topical compound medications as an analgesic and that any effect was likely due to a placebo response. He indicated that such medications had not been studied for safety or efficacy, and that there was no evidence that showed the use of Gabapentin objectively increased function, decreased pain, or decreased narcotic use.

In a development letter dated September 6, 2017, OWCP advised appellant that the medical evidence of record remained insufficient to establish that Gabapentin was medically necessary to treat her accepted employment-related conditions and it afforded her 30 days to submit a narrative report from her attending physician containing an adequate explanation for the necessity of this medication.

By decision dated October 12, 2017, OWCP again denied appellant's request for authorization of the compound drug Gabapentin finding that the evidence of record did not support that it was medically necessary to treat the effects of her accepted employment-related condition.

On October 16, 2017 a telephonic hearing was held regarding OWCP's March 23, 2017 decision.

Following the October 16, 2017 hearing, appellant submitted a letter dated October 2, 2017 from Dr. Costas who noted that Dermatran seemed to be helping appellant rather dramatically, along with some other measures. Dr. Costas indicated that events transpired where appellant was unable to obtain Dermatran any longer, was placed on a similar compound medication, and the new medication was not as effective as Dermatran.

On October 23, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review to review OWCP's October 12, 2017 decision.

By decision dated January 2, 2018, OWCP's hearing representative set aside OWCP's March 23, 2017 decision and remanded the case to OWCP finding an unresolved conflict in the medical opinion evidence. It also directed OWCP to amend the SOAF to include all pertinent facts

in this case and the master file, and to refer appellant, along with the updated SOAF and both files, to an independent medical examiner to determine whether Gabapentin was medically necessary for the accepted condition.

By decision dated January 19, 2018, OWCP's hearing representative remanded OWCP's October 12, 2017 decision finding that it should be vacated for the same reasons provided in the January 2, 2018 decision.

On February 7, 2018 OWCP referred appellant along with the updated SOAF and medical record to Dr. David S. Ryan, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated March 22, 2018, Dr. Ryan opined that the requested compound medication was not medically necessary. However, he indicated that the compound medication was successful at treating her pain and noted that he did not know of any alternatives for appellant to use. Dr. Ryan related that the compound medication was safe and effective, and noted that appellant had tried numerous oral medications and other topical anti-inflammatory creams, none of which worked effectively. However, he indicated that he was unsure of whether the Gabapentin compound was FDA approved.

By decision dated April 19, 2018, OWCP denied appellant's request for authorization of Gabapentin finding that the evidence of record did not support that it was medically necessary to treat the effects of her accepted employment-related condition.⁵

On April 30, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review to review OWCP's April 19, 2018 decision. The hearing was held on October 2, 2018. After the hearing, appellant submitted new evidence for consideration.

In a letter dated May 11, 2017, received by OWCP on October 9, 2018, Dr. Costas indicated that the previous anti-inflammatory topical medicine worked well. He noted that the prescription for that medication had run out, and it was elected to be replaced by a pre-manufactured formula, but that formula did not work for her. Dr. Costas indicated that he did not see the difference in allowing one brand of topical medicine as opposed to another.

In a letter dated October 2, 2017, received by OWCP on October 9, 2018, Dr. Costas reiterated that his request to return back to the original topical compound, Dermatran, had been denied, and that he feared that he was unable to control appellant's pain.

By decision dated December 7, 2018, OWCP's hearing representative affirmed OWCP's April 19, 2018 decision finding that the evidence of record did not establish that it was an abuse of discretion for OWCP to deny authorization for Gabapentin.

LEGAL PRECEDENT

Section 8103(a) of FECA provides in pertinent part: 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 the Secretary of Labor considers likely

⁵ In a separate decision of even date, OWCP denied appellant's request for authorization of Gabapentin. The same rationale was used in denying the request.

to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.⁶ In general, drugs and medications which are necessary to treat an injury or occupational disease may be purchased at OWCP's expense on the recommendation of the attending physician. These include prescription as well as nonprescription medications.⁷

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.⁸ The only limitation on OWCP's authority is that of reasonableness.⁹ 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.¹⁰

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹¹ The implementing regulations provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the IME. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system. OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁴

⁶ 5 U.S.C. § 8103(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies, Prescription and Non-Prescription Drugs*, Chapter 3.400.3(a) (October 1995).

⁸ *G.B.*, Docket No. 18-1478 (issued February 4, 2019); *see M.B.*, Docket No. 17-1389 (issued April 6, 2018); *see also Vicky C. Randall*, 51 ECAB 357 (2000).

⁹ *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *see Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

¹⁰ *R.C.*, *id.*; *Rosa Lee Jones*, 36 ECAB 679 (1985).

¹¹ 5 U.S.C. § 8123(a).

¹² 20 C.F.R. § 10.321.

¹³ *See J.T.*, Docket No. 18-0503 (issued October 16, 2018); *R.C.*, 58 ECAB 238 (2006).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

ANALYSIS

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

Appellant's treating physician, Dr. Costas, requested authorization for the compound medication, Gabapentin. In multiple reports, he explained that appellant had tried and failed to obtain relief from over the counter or other prescribed medications for her accepted employment-related condition of bilateral lateral epicondylitis. Dr. Costas further explained that appellant had tried Gabapentin and that it was much more effective than the similar topical medications. Dr. Tontz and Dr. Fellers, acting as OWCP DMAs, opined that the proposed topical treatment was not medically necessary and use of this compound was largely experimental.

By decisions dated January 2 and 19, 2018, an OWCP hearing representative determined that a conflict existed in the medical opinion evidence between Dr. Costas, and OWCP's DMAs.¹⁵ She remanded the case to OWCP for referral of appellant for an impartial medical specialist to resolve the conflict of medical evidence.

On remand, OWCP referred appellant to a second opinion physician, Dr. Ryan, rather than to an impartial medical specialist. However, as previously noted, the selection process differs for referrals to a second opinion physician, and an impartial medical specialist. The Board has explained that a physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between OWCP and a particular physician.¹⁶ OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.¹⁷

The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.¹⁸ OWCP did not follow its procedures in selecting Dr. Ryan as a second opinion physician and thus the record contains an unresolved conflict in medical opinion regarding the extent of whether the requested compound medication should be authorized for treatment of appellant's accepted employment-related condition.

Therefore, the Board will remand the case to OWCP for further medical development. On remand, OWCP, as previously directed by the hearings examiner, should select an impartial medical examiner in accordance with its procedures to determine whether Gabapentin should be authorized. After such further development as deemed necessary, it shall issue a *de novo* decision.

¹⁵ *Supra* note 12.

¹⁶ *L.S.*, Docket No. 16-1789 (issued September 1, 2017); *see Raymond J. Brown*, 52 ECAB 192 (2001).

¹⁷ *L.S.*, *id.*; *see also M.A.*, Docket No. 07-1344 (issued February 19, 2008).

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(e)(2) (May 2013).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 15, 2019
Washington, DC

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

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

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