United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 18-1478**
	)	**Issued: February 4, 2019**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Austin, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 14, 2018[1] appellant filed a timely appeal from a January 23, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Under the *Board's Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 23, 2018, the date of OWCP's last decision, was July 22, 2018, a Sunday; consequently, the period for filing the appeal ran to the next business day, Monday, July 23, 2018. *See* 20 C.F.R. § 501.3(f)(2). Since using July 23, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 14, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for authorization of the compounded drug Unique.

FACTUAL HISTORY

On July 30, 2003 appellant, then a 54-year-old tax examining technician, filed an occupational disease claim (Form CA-2) alleging tendinitis in both upper extremities as a result of typing on a computer and performing other repetitive work duties. She advised that she first became aware of her claimed condition on November 14, 2002 and realized that it was related to factors of her federal employment on December 1, 2002.[3] OWCP accepted that appellant sustained bilateral lateral epicondylitis and ulnar nerve lesion of her right upper extremity. On March 22, 2007 appellant underwent OWCP-approved right upper extremity surgery, including neurolysis of the right ulnar nerve in situ and Marcaine block for postoperative pain control.[4]

Appellant received treatment for her upper extremity problems from several attending physicians, and she consistently complained of pain, tingling sensation, and numbness in both upper extremities (right worse than left). In 2012, she began treating with Dr. Anthony M. Hicks, an occupational medicine physician, for management of her symptoms. In periodic progress reports, Dr. Hicks noted appellant's continuing complaints of pain, tingling sensation, and numbness in both upper extremities (right worse than left). He diagnosed several upper extremity conditions, including bilateral epicondylitis and chronic pain syndrome, and prescribed pain medications.

On January 4, 2017 Dr. Hicks noted that the physical examination he performed on that date showed that appellant had tenderness to palpation about the medial and lateral epicondyles of her elbows and equivocal Finkelstein's, Tinel's, and Phalen's tests bilaterally. He indicated that appellant's complaints of upper extremity symptoms were virtually the same as those reported in November 2002 and he prescribed several narcotic medications, Lidoderm patches, and nonsteroidal anti-inflammatory drugs, including Duexis.

In a January 9, 2017 authorization request form (Form CA-26), Dr. Hicks requested authorization from OWCP for appellant's use of Unique, a compounded drug which was topically administered.[5] He noted that other noncompounded medications had failed for treatment of appellant's primary diagnosis of lateral epicondylitis in both elbows. Dr. Hicks listed the components of Unique: gabapentin powder, amantadine hydrochloride (HCL) powder, ketoprofen

[3] Appellant did not stop work around the time she filed her claim. She later retired from the employing establishment, although the precise date of her retirement is unclear from the case record.

[4] By decision dated March 18, 2008, OWCP granted appellant a schedule award for 11 percent permanent impairment of her right upper extremity.

[5] In an August 31, 2016 letter, OWCP advised appellant that new authorization procedures for compounded drugs would be implemented effective October 2016. These new procedures required an attending physician to complete a Form CA-26 explaining the medical necessity for prescribing compounded drugs. *See* FECA Bulletin No. 17-01 (issued October 14, 2016).

powder, amitriptyline HCL powder, bupivacaine HCL powder, ethoxydiglycol liquid, stera base cream, and fluticasone propionate micronized powder. In the portion of the form entitled, "certification of medical necessity," he indicated that appellant developed a permanent, chronic pain syndrome and was being successfully treated with a multi-disciplinary drug regime which included compounded drugs.[6] Dr. Hicks noted that compounded topical/transdermal drugs were the safest drugs because little systemic absorption occurred with their usage and they caused fewer effects than oral drugs. He opined that the success of appellant's treatment was due, in large part, to the use of topical/transdermal drugs. Dr. Hicks advised that appellant reported experiencing, without exception, increased pain and decreased productive functioning when not using such drugs. He concluded, "Please facilitate the ongoing usage of medically-required compounded topical/transdermal medications that have been clinically demonstrated to provide significant pain relief and improved physical functioning for the sequelae of the OWCP-accepted adjudicated injuries."

On February 9, 2017 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon who served as an OWCP medical adviser. It requested that he review the medical evidence of record, including the January 9, 2016 Form CA-26 of Dr. Hicks, and provide an opinion regarding whether the compounded drug Unique was necessary to treat appellant's employment-related conditions.

In a February 18, 2017 report, Dr. Katz advised that he had reviewed the medical evidence of record and had determined that he was unable to recommend authorization of Unique for appellant. He indicated that prescribing compounding pharmaceuticals on a custom basis was expensive and presented risks to patients with respect to purity, side effects, and adverse reactions resulting from mixing multiple drugs. Dr. Katz noted that, while each of the substances might have efficacy in managing pain, it was his opinion that the use of such polypharmacy presented risks. He asserted that Dr. Hicks failed to present a well-reasoned opinion in support of appellant's use of Unique.

In a March 8, 2017 informational letter, OWCP advised appellant that the medical evidence of record was insufficient to establish that Unique was 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. In response, appellant submitted a March 27, 2017 report of Dr. Hicks containing the same language supporting the use of Unique as his previous January 9, 2017 Form CA-26.[7]

On April 14, 2017 OWCP again referred appellant's case to Dr. Katz for review in his role as OWCP medical adviser. On April 18, 2017 Dr. Katz advised that he had reviewed Dr. Hicks' March 27, 2017 report. He provided essentially the same discussion as contained in his

[6] Dr. Hicks noted that this treatment regimen included oral over-the-counter drugs, topical/transdermal over-the-counter drugs, topical/transdermal compounded drugs, prescribed nonsteroidal anti-inflammatory drugs, prescribed pain relievers, trigger point injections, epidural steroid injections, and other invasive interventions.

[7] Appellant continued to submit periodic progress reports of Dr. Hicks. In these reports dated between March and May 2017, Dr. Hicks detailed the treatment of appellant's upper extremity condition, noting that there was no change in her upper extremity symptoms.

February 18, 2017 report and he advised that his opinion against appellant's use of polypharmacy "in a manner unapproved by the FDA [Food and Drug Administration]" remained unchanged from his prior report.

By decision dated June 8, 2017, OWCP denied appellant's request for authorization of the compounded drug Unique. It found that Dr. Hicks failed to adequately explain why Unique was necessary to treat appellant's employment-related medical conditions.

On June 19, 2017 appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.

OWCP referred appellant for a second opinion examination to Dr. Salvador P. Baylan, a Board-certified physical medicine and rehabilitation physician. It requested that Dr. Baylan provide an opinion regarding whether the compounded drug Unique was necessary to treat appellant's accepted upper extremity conditions.

In an August 21, 2017 report, Dr. Baylan discussed appellant's factual and medical history, including the nature of her accepted employment conditions.[8] He detailed the findings of the physical examination he conducted on that date, noting that appellant exhibited tenderness to palpation of both medial/lateral epicondyles, and 4/5 strength in the prime elbow movers bilaterally. Appellant was neurovascularly intact in both elbows/forearms, although a positive Tinel's sign was present at the right cubital tunnel. Dr. Baylan noted that gabapentin, a component of Unique, was used for the treatment of seizures and post herpetic neuralgia and; therefore, its use for other pain was "off-label." He indicated that gabapentin was designed for gastrointestinal absorption with a short shelf life and advised that its application as a topical agent was useless. Dr. Baylan discussed other components of Unique, noting that amantadine HCL was indicated as a prophylaxis for influenza A virus and Parkinsonism, and that any other use of the drug was off-label. He noted that amantadine HCL was not indicated for appellant due to its questionable therapeutic effectiveness for pain.

Dr. Baylan further explained that ketoprofen was a nonsteroidal agent for inflammation and noted that, although there were studies documenting transdermal absorption, the pharmacokinetic effect of topical ketoprofen was unclear. He further noted that amitriptyline was indicated for depression and chronic neuropathic pain, bupivacaine was an anesthetic used for chronic pain, ethoxydiglycol was a solvent, stera base was a delivery vehicle, and fluticasone was a steroid. Dr. Baylan opined that Unique was not really indicated for appellant's chronic neuropathic pain. He advised that appellant had reported that she gets by with "neuropathic supplement" and Duexis, and he opined that she required no further medical treatment. Dr. Baylan concluded that Unique had questionable therapeutic value with respect to appellant's chronic medical condition.

An oral hearing was held before an OWCP hearing representative on November 13, 2017, during which appellant testified that Dr. Hicks prescribed medications/creams that reduced pain for a few years, but that these medications/creams later "stopped working." She noted Dr. Hicks

[8] Dr. Baylan noted that appellant reported that the only medications she currently used were "neuropathic supplement" and Duexis.

then prescribed "neopathic [sic] supplement capsules," which relieved her pain more than anything else. Appellant described the limitations caused by the pain from her accepted upper extremity conditions, including limited ability to grip with her hands.[9]

By decision dated January 23, 2018, OWCP's hearing representative affirmed OWCP's June 8, 2017 decision. She found that the well-reasoned opinion of Dr. Baylan showed that Unique was not necessary to treat appellant's accepted upper extremity conditions and that appellant failed to meet her burden of proof to submit evidence sufficient to support authorization for this medication.

LEGAL PRECEDENT

Section 8103(a) of FECA states 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 to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[10]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[11] The only limitation on OWCP's authority is that of reasonableness.[12] 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.[13] It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[14]

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[15] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[16]

[9] Appellant submitted reports, dated between July and October 2017, in which Dr. Hicks noted that there was no change in appellant's upper extremity symptoms.

[10] 5 U.S.C. § 8103.

[11] *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

[12] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[13] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[14] *Id.*

[15] *J.R.*, Docket No. 17-1523 (issued April 3, 2018); *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[16] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for authorization of the compounded drug Unique.

The Board finds that the August 21, 2017 report of Dr. Baylan, an OWCP referral physician, contains a probative medical opinion that Unique was not appropriate for treating appellant's employment-related conditions. Dr. Baylan provided a detailed discussion of the constituent components of Unique in which he described the specific medical conditions these components were intended to treat. He explained that several of these components would not be appropriate for treating the pain symptoms of appellant's accepted employment-related conditions. In addition, Dr. Baylan advised that the effectiveness of topical application of some of these components was limited or nonexistent. For example, he indicated that gabapentin was for the treatment of seizures and postherpetic neuralgia and; therefore, its use for other pain was off-label.[17] Dr. Baylan noted that amantadine HCL was indicated as a prophylaxis for influenza A virus and Parkinsonism, and that any other use of the drug was off-label. He opined that amantadine HCL was not indicated for appellant due to questionable therapeutic effectiveness for pain. Dr. Baylan also noted that, although ketoprofen was a nonsteroidal agent for inflammation, the effectiveness of topical application of the drug was unclear. He concluded that Unique had questionable therapeutic value with respect to appellant's chronic medical condition and its associated neuropathic pain.

In support of her claim, appellant submitted January 9 and March 27, 2017 reports in which Dr. Hicks recommended use of the compounded drug Unique. The Board finds that these reports are of limited probative value regarding appellant's request for authorization of Unique because Dr. Hicks failed to provide a rationalized medical opinion explaining how the drug was necessary to treat her employment-related medical conditions. Dr. Hicks did not describe the accepted employment-related conditions (bilateral lateral epicondylitis and ulnar nerve lesion of the right upper extremity) in any detail, or explain why the recommended compounded drug would effectively treat these employment-related conditions. He concluded that Unique was the safest drug that appellant could use for treatment of her medical problems, but he did not provide any explanation for this conclusion. As noted above, proof of causal relationship that medical expenditures are incurred for treatment of the effects of an employment-related injury or condition must include supporting rationalized medical evidence.[18]

As noted above, OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief and the only limitation on OWCP's authority is that of reasonableness.[19] In denying appellant authorization for the compounded drug Unique, the Board finds that OWCP has not abused its discretion given that it has not committed manifest error,

[17] Dr. Baylan also indicated that gabapentin was designed for gastrointestinal absorption with a short shelf life and that its application as a topical agent was useless.

[18] *See supra* notes 14 and 15.

[19] *See supra* notes 10 and 11.

engaged in a clearly unreasonable exercise of judgment, or taken actions contrary to both logic and probable deductions from established facts.[20]

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 properly denied appellant's request for authorization of the compounded drug Unique.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[20] *See supra* note 12. During the November 13, 2017 hearing and on appeal, appellant suggested that OWCP should pay for a medication which is taken orally in capsule form. It does not appear that appellant was referring to the medication which is the subject of the present appeal because Unique is used topically, rather than orally.