

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

_____)	
L.B., Appellant)	
)	
and)	Docket No. 19-0432
)	Issued: July 23, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Plano, 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 December 18, 2018 appellant filed a timely appeal from a November 2, 2018 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 a stair climber/stair lift and a walk-in tub.

¹ 5 U.S.C. § 8101 et seq.

² The Board notes that, following the November 2, 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.*

FACTUAL HISTORY

On December 1, 2010 appellant, then a 56-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral pain and stiffness in both knees as a result of repetitive job duties. She noted that she first became aware of her claimed condition on April 4, 2010 and related it to her federal employment on October 29, 2010. On the reverse side of the claim form the employing establishment noted that appellant stopped work on November 22, 2010.

On January 12, 2011 OWCP accepted appellant's claim for bilateral unspecified derangement of her knees and left knee medial meniscus tear. Appellant underwent left total knee replacement surgery on January 9, 2012 and total right knee replacement surgery on October 8, 2012. She returned to full-time limited-duty work on July 14, 2014.

By decision dated January 26, 2016, OWCP granted appellant a schedule award for 23 percent permanent impairment of the left lower extremity and 25 percent permanent impairment of the right lower extremity.

In a report dated February 24, 2017, Dr. Christopher R. Mann, an osteopath, noted appellant's history of injury and treatment, and requested medical authorization for a stair climber/stair lift and a walk-in tub/safety rails. He indicated that her home was situated such that her bedroom was upstairs, and she had no option of living on the ground floor so as to avoid ascending and descending stairs. Dr. Mann opined that the single-leg lift on multiple stairs, multiple times per day was highly suspect for causing persistent stress on the knee as it tended to put harsh medial pressure on the knee and possibly induce the varus angle into the knee. He requested that the stair climber/stair lift be installed, and indicated that it would significantly reduce the risk of falling on the stairs, and reduce any mechanical abnormal stress on the knees when going up and down to and from her bedroom. In addition, Dr. Mann requested that a "step-in tub" or safety rails be installed to facilitate bathing safely.

On July 28, 2017 OWCP asked its district medical adviser (DMA) for an opinion regarding the medical necessity of the requested durable medical equipment (DME) including the stair climber/stair lift and walk-in tub. With its request, it listed a statement of accepted facts and two questions.

In a September 27, 2017 report, Dr. William Tontz, Jr., a Board-certified orthopedic surgeon, serving as the DMA, noted appellant's history of injury and accepted medical conditions. He answered "yes" to the question of request for whether the stair/climber lift and walk-in tub was causally related to the accepted medical conditions; however, he responded "no" with regard to whether the stair/climber lift and walk-in tub was medically necessary.

On November 1, 2017 appellant filed a notice of recurrence (Form CA-2a) indicating that she stopped work on September 14, 2017 due to a worsening of her accepted conditions. On November 7, 2017 OWCP accepted appellant's recurrence claim, effective September 14, 2017.

OWCP found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Mann, and its DMA, Dr. Tontz, regarding the medical necessity of the requested

stair/climber lift and walk-in tub. On December 13, 2017 it referred appellant to Dr. Adam Carter, Board-certified in physical medicine and rehabilitation, for a referee examination to resolve the conflict.

In a report dated January 2, 2018, Dr. Carter determined that the DME request was causally related to appellant's accepted employment-related injuries. With regard to whether the equipment was medically necessary, he noted that appellant owned a walk-in shower with a shower bench and a hand-held shower head, and that she ascended and descended her stairs at home with bilateral canes at a modified independent level. Dr. Carter related that, given appellant's high level of independent function, he believed it was most reasonable that appellant be authorized bathing rails for safety. He indicated that appellant did not require a walk-in tub. Dr. Carter also noted that he believed the stair climber/stair lift would debilitate her further. He determined that, based on her physical examination and medical history, appellant was sufficiently independent and did not need the walk-in tub and stair climber/stair lift.

On February 21, 2018 OWCP requested that Dr. Carter address whether appellant required another total left knee arthroscopy due to the accepted injury.

By decision dated February 22, 2018, OWCP denied appellant's requested authorization for a walk-in tub and stair climber/stair lift, finding that the evidence of record did not support that it was medically necessary to address the effects of her employment-related condition.

In a supplemental report dated February 26, 2018, Dr. Carter opined that appellant did require another total left knee arthroscopy as she had aseptic loosening of the left knee prosthesis. He also noted that appellant's initial total left knee arthroscopy was necessitated by her employment injury that the joint had worn out over time, and needed to be replaced. Dr. Carter concluded that appellant's proposed total left knee arthroscopy was medically necessary and causally related to her accepted employment injury.

In a report dated April 12, 2018, Dr. Mann reiterated his request for authorization of a stair climber/stair lift and walk-in tub. He indicated that, in light of appellant's need for a second total knee replacement of both knees, it furthered her need to have the equipment installed in her home. Dr. Mann pointed to multiple medical literature references in arguing that appellant would be at a huge risk for further injury should OWCP deny the equipment. He noted that exerting any type of force on her knees postsurgery was not recommended, and should be avoided as there was a legitimate risk the stress on the prosthesis could have caused it to become aseptically loosened. Dr. Mann reiterated that it was highly likely that the stress placed on her surgically-repaired knees from ascending and descending stairs caused her need for a subsequent surgery. He indicated that current biomechanical literature supported his view that appellant's regular exposure to excessive contact and shear forces directly contributed to the simultaneous aseptic loosening of both prosthesis over time.

On May 7, 2018 appellant underwent a revision of left total knee arthroplasty.

On September 5, 2018 appellant requested reconsideration of the February 22, 2018 decision regarding her request for medical equipment.

By decision dated November 2, 2018, OWCP denied modification of its February 22, 2018 decision, finding that the weight of medical evidence rested with the referee physician, Dr. Carter.

LEGAL PRECEDENT

Section 8103 of FECA³ 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 monthly compensation.⁴ 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.⁵

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.⁶ 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.⁷ 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.⁸

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.⁹

Section 8123(a) of FECA which 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 (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁰ This is called a referee examination and OWCP will

³ *Supra* note 1.

⁴ 5 U.S.C. § 8103; *G.A.*, Docket No. 18-0872 (issued October 5, 2018); *see Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *G.A., id.*; *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

⁶ *M.B.*, Docket No. 17-1679 (issued February 8, 2018); *see D.K.*, 59 ECAB 141 (2007).

⁷ *See A.W.*, Docket No. 16-1812 (issued March 15, 2017).

⁸ *M.G.*, Docket No. 18-0099 (issued April 26, 2018); *see Debra S. King*, 44 ECAB 203 (1992).

⁹ *M.G., id.*; *see Minnie B. Lewis*, 53 ECAB 606 (2002).

¹⁰ 5 U.S.C. § 8123(a); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹ When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.¹²

ANALYSIS

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

OWCP accepted that appellant sustained an employment-related bilateral unspecified derangement of her knees, left knee medial meniscus tear, and bilateral localized primary lower leg osteoarthritis. On January 9, 2012 appellant underwent left total knee replacement surgery. On October 8, 2012 she underwent right total knee replacement surgery.

In his report dated February 24, 2017, Dr. Mann requested medical authorization for a stair climber/stair lift and a walk-in tub/safety rails. He requested that the stair climber/stair lift be installed, as it would significantly reduce the risk that she would fall on the stairs, and reduce mechanical abnormal stress on the knees when ascending and descending stairs from her bedroom. In addition, Dr. Mann requested that a “step-in tub” or safety rails be installed to facilitate bathing safely.

On July 28, 2017 OWCP asked its DMA for an opinion regarding the medical necessity of the requested DME including the stair climber/stair lift and walk-in tub. In his September 27, 2017 report, Dr. Tontz indicated that the requested authorization for medical equipment was causally related to the accepted conditions; however, he also determined that the equipment was not medically necessary as appellant did not need such equipment to function at her normal level.

OWCP determined that there was a conflict of medical opinions between Drs. Mann and Tontz and on December 13, 2017 it properly referred appellant to Dr. Carter for a referee examination to resolve the conflict.

In his January 2, 2018 report, Dr. Carter determined that the DME request was causally related to appellant’s accepted employment-related injury. However, he concluded that, because appellant owned a walk-in shower with a shower bench and a hand-held shower head, and because she was able to ascend and descend her stairs at home with bilateral canes at a modified independent level, the requested DME was not medically necessary.¹³ Dr. Carter indicated that neither a walk-in tub nor a stair climber/stair lift were medically necessary.

The Board finds that Dr. Carter sufficiently explained that appellant did not medically need a walk-in bath as her home was equipped with a walk-in shower. OWCP properly denied

¹¹ 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006); *C.L.*, *id.*

¹² See *C.L.*, *supra* note 10; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ Dr. Carter also related that, given appellant’s “high level of independent function,” he believed it was most reasonable for the bathing rails for safety. OWCP did not thereafter deny authorization for bathing rails.

authorization of the walk-in bath tub based upon this rationalized opinion of the impartial medical examiner which is afforded the special weight.¹⁴

With regard to the request for stair climber/stair lift OWCP subsequently requested that Dr. Carter address whether appellant required a second total left knee total arthroscopy causally related to the accepted employment injury. However, prior to receipt of Dr. Carter's supplemental report, OWCP denied appellant's request for the stair climber/stair lift on February 22, 2018. Dr. Carter opined in his February 26, 2018 report that appellant did require a second total left knee arthroscopy causally related to her accepted employment injury as her first prosthesis had worn out. Appellant underwent the authorized left-knee revision on May 7, 2018. On September 5, 2018 she requested reconsideration of the denial of her request for medical equipment. OWCP did not thereafter ask Dr. Carter to clarify whether the requested stair climber/stair lift was medically necessary following appellant's May 7, 2018 revision of left total knee arthroplasty.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁵ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁶

On remand OWCP shall request that Dr. Carter clarify his opinion regarding appellant's request for authorization of the stair climber/stair lift in light of his opinion that appellant required a second authorized total left knee arthroscopy. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁴ *Supra* note 13.

¹⁵ *T.R.*, Docket No. 17-1961 (issued December 20, 2018); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁶ *Id.*; *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2018 decision of the Office of Worker's Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: July 23, 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