United States Department of Labor
Employees' Compensation Appeals Board

P.L., Appellant	)	
and	)	**Docket No. 18-0260**
	)	**Issued: April 14, 2020**
DEPARTMENT OF DEFENSE, DEFENSE SECURITY SERVICE, Mount Holly, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 17, 2017 appellant, through counsel, filed a timely appeal from an October 26, 2017 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.[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, appellant submitted additional evidence after the issuance of OWCP's October 26, 2017 decision and on appeal. However, the Boards *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 by denying authorization for therapy and surgical treatment for the accepted upper extremity conditions.

FACTUAL HISTORY

On June 17, 2002 appellant, a 49-year-old investigative technician, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome caused by repetitive work duties. On August 13, 2002 OWCP accepted bilateral carpal tunnel syndrome.[4] It later accepted a January 22, 2004 recurrence of total disability. OWCP paid appellant retroactive compensation on the supplemental rolls, and then paid appellant compensation on the periodic rolls as of October 31, 2004. Appellant has not returned to work and remains on the periodic compensation rolls.

Appellant underwent multiple hand surgeries on October 17, 2002, January 22, 2004, April 11, 2006, January 29, 2009, and October 21, 2010. OWCP also authorized multiple types of therapy beginning in September 2002.

On July 25, 2005 Dr. Scott M. Fried, an osteopath who practices orthopedic surgery, began treating appellant at which time he recommended a therapy program.

In December 2011 OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related condition. In a January 9, 2012 report, Dr. Heist noted that appellant was an insulin-dependent diabetic. He described physical examination findings and diagnosed status post multiple bilateral carpal tunnel release surgeries. Dr. Heist concluded that appellant had reached maximum medical improvement (MMI) and was unable to return to work because she was incapable of fine manipulation or firm grasping due to peripheral neuropathy, opining that diabetic peripheral neuropathy could be influencing her continued problems.[5]

In October 2015 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his November 13, 2015 report, Dr. Askin noted a history of diabetes, and that appellant had a kidney transplant in August 2014. Following examination, he opined that appellant's accepted bilateral carpal tunnel syndrome had resolved, as it had been treated in the standard fashion for such a condition. Dr. Askin advised that appellant did not need any further treatment for her accepted conditions and opined that there was nothing that was continually therapeutic with respect to the treatments provided by Dr. Fried. He determined that appellant had reached MMI and that surgical intervention was not recommended, noting that appellant has had more than sufficient surgery for the accepted conditions. Dr. Askin concluded that appellant could perform sedentary duty.

[4] Appellant has a separate claim, adjudicated by OWCP under File No. xxxxxx379 and accepted for de Quervain's tendinitis, left trigger finger, and left hand ganglion cyst.

[5] In a May 1, 2012 letter, relying on Dr. Heist's January 9, 2012 report, OWCP notified appellant that it proposed to terminate her wage-loss compensation and medical benefits because her accepted condition had ceased without residuals. The record does not contain a final termination decision.

In a December 7, 2015 addendum report, Dr. Askin reiterated his opinion that appellant's accepted bilateral carpal tunnel syndrome had fully resolved.

In a February 4, 2016 return to work report, Dr. Fried advised that appellant was capable of occasional bilateral lifting up to 10 pounds, shoulder lifting up to 10 pounds, overhead lifting up to 7 pounds, and bilateral carrying up to 10 pounds. In reports dated February 22, and June 2, 2016, Dr. Fried indicated that appellant had been under his professional care and continued to remain significantly symptomatic and limited, based on a January 19, 2016 functional capacity evaluation (FCE).[6] He opined that appellant's condition required further medical treatment, a home therapy program, continued lifestyle and behavior modifications, judicious use of splits, home modalities, medications, and home exercises and stretches. Dr. Fried advised that appellant was not capable of returning to work and, if her symptoms continued to worsen, surgery was an option. He continued to request authorization for therapy.

On an attending physician's report (Form CA-20) and work capacity evaluation (Form OWCP-5c) dated July 25, 2016, Dr. Fried listed a number of coded diagnoses. He attached a Physical Demand Definitions for the OWCP list. In a report that day, Dr. Fried asserted that appellant remained limited and was under his care for documented work-related injuries. He advised that she was totally disabled for work until further notice. Dr. Fried continued to submit reports in which he reiterated his medical opinions and continued to prescribe various modalities of therapy.

Neuromusculoskeletal ultrasounds of the right and left medial nerve and carpal tunnel and the right radial nerve and forearm extensor musculature and origin dated January 24, 2017 demonstrated trigger finger, tendinitis, flexor tenosynovitis, left shoulder capsulitis, median neuropathy, brachial plexopathy, cervical radiculopathy, and carpal tunnel median neuropathy.

In March 2017 OWCP referred appellant to Dr. Andrew Newman, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related condition and the need for further treatment. In a March 23, 2017 report, Dr. Newman noted his review of the statement of accepted facts (SOAF) and medical record. He described appellant's complaint of bilateral hand pain and reported her history of numerous surgeries and extensive treatment by Dr. Fried. Dr. Newman described upper extremity findings of some right wrist pain, no atrophy, negative Phalen's test, and good grip strength. He opined that appellant did not show any of the objective findings of carpal tunnel syndrome and advised that she was capable of working eight hours daily at a sedentary position with restrictions of pushing, pulling, and lifting no more than 10 pounds. In an attached Form OWCP-5c, Dr. Newman provided physical restrictions.

In an addendum report dated April 18, 2017, Dr. Newman opined that there was no need for any additional therapy at all, including further treatment by Dr. Fried.

By decision dated May 16, 2017, OWCP relied on Dr. Newman's March 23 and April 18, 2017 reports and denied appellant's request for authorization for various modalities of therapy and surgical treatment for her bilateral wrists and upper extremity conditions.

[6] A January 19, 2016 FCE demonstrated that appellant could perform the light physical demand of work with occasional lifting below waist height to 10 pounds.

On May 23, 2017 appellant, through counsel, requested an oral hearing before OWCP's Branch of Hearings and Review.

On August 7, 2017 appellant submitted additional evidence including an FCE and an attending physician's report, both dated August 2, 2017. Each was signed by Dr. Fried, enumerated diagnoses, and listed dates of treatment. Appellant also submitted a May 6, 2004 operative report and copies of Dr. Fried's reports dated February 4, 2016 through January 24, 2017, an occupational therapy report, and the January 19, 2016 FCE all previously of record.

In a March 20, 2017 report, Dr. Fried reiterated his medical opinions and attached his prior reports dated February 4, 2016 through March 20, 2017.

A videoconference hearing was held before an OWCP hearing representative on August 17, 2017. Appellant testified regarding her hand surgeries. The hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted a lengthy August 25, 2017 report in which Dr. Fried described appellant's treatment from 2005 to present. In an August 29, 2017 report, he reiterated his opinion that appellant remained severely symptomatic and limited. Dr. Fried continued to request additional therapy and functional capacity testing.

By decision dated October 26, 2017, OWCP's hearing representative affirmed the May 16, 2017 OWCP decision denying appellant's request for authorization, finding that the evidence of record was insufficient to support the need for further treatment.

LEGAL PRECEDENT

Section 8103 of FECA[7] 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.[8] 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]

Section 10.310(a) of OWCP's implementing regulations provide that an 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.[10]

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. OWCP has the general objective of ensuring that an employee recovers

[7] *Supra* note 2.

[8] 5 U.S.C. § 8103; *see D.S.*, Docket No. 18-0353 (issued May 18, 2020); *Thomas W. Stevens*, 50 ECAB 288 (1999).

[9] *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

[10] 20 C.F.R. § 10.310(a); *see D.W.*, Docket No. 19-0402 (issued November 13, 2019).

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.[11]

Abuse of discretion is 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]

ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying authorization for therapy and surgical treatment for the accepted upper extremity conditions.

In this case, OWCP accepted bilateral carpal tunnel syndrome due to factors of her federal employment. OWCP properly referred appellant to Dr. Heist, Dr. Askin, and Dr. Newman for second opinion evaluations, and each physician concluded that her accepted bilateral carpal tunnel syndrome condition had resolved. The Board finds that OWCP properly relied on Dr. Newman's March 23 and April 18, 2017 reports as the basis for denying authorization for Dr. Fried's requests for additional therapy and surgical treatment for appellant's bilateral wrists and upper extremities.

As noted, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.[13] The opinion of Dr. Newman constituted sufficient medical rationale to support OWCP's October 26, 2017 decision to deny authorization. Dr. Newman provided a comprehensive evaluation, based on a thorough review of the medical evidence, and opined that the requested therapy and surgical procedures were not appropriate or necessary for appellant's accepted condition. The Board finds that his reports are sufficiently probative, rationalized, and based upon a proper factual background. Therefore, OWCP did not abuse its discretion by relying on Dr. Newman's opinion to deny approval for the continued therapy and surgical treatment of appellant's accepted bilateral carpal tunnel syndrome condition.

While Dr. Fried continued to recommend further therapy and indicated that therapy could be a future option, the Board finds that he did not provide a sufficient explanation as to how and why the continued physical therapy and surgical treatment would cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation.[14] He did not relate any specific objective findings which noted that appellant's accepted conditions had improved or would improve in the future due to continued therapy.[15] The evidence of record does not substantiate that previous therapy, which began in 2002, has been curative or provided relief

[11] *D.S., supra* note 8.

[12] *Id.*; *L.W.*, 59 ECAB 471 (2008).

[13] *See supra* note 10; *see also A.W.*, Docket No. 14-0708 (issued January 2, 2015) (the Board found that OWCP did not abuse its discretion by relying on the opinion of its second opinion examiner as the weight of evidence to deny approval for elective spinal surgery).

[14] *See L.S.* Docket No. 18-1746 (issued April 9, 2019).

[15] *Id*.

of appellant's accepted conditions. The Board thus finds that appellant OWCP did not abuse its discretion in denying appellant's request for authorization.

On appeal counsel asserts that continued therapy and surgical treatment were required and necessary to treat appellant's medical conditions. However, as explained above, the medical evidence submitted provided insufficient explanation for the necessity of continued therapy and additional surgical intervention. The Board thus finds that it was not unreasonable for OWCP to deny authorization for the requested treatment.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying authorization for therapy and surgical treatment for the accepted upper extremity conditions.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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