

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

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| K.W., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0233 |
| |) | Issued: October 9, 2020 |
| U.S. POSTAL SERVICE, BROADWAY |) | |
| STATION POST OFFICE, Astoria, NY, |) | |
| Employer |) | |
| _____ |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 8, 2019 appellant filed a timely appeal from an August 6, 2019 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 6, 2019 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 has abused its discretion by denying appellant's request for authorization for physical therapy and/or acupuncture, as of February 2, 2019.

FACTUAL HISTORY

On March 26, 2012 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day when closing a shelf on a postal container (post-con) a metal case fell on top of her forehead while in the performance of duty. She stopped work on March 27, 2012.

OWCP accepted appellant's claim for contusion of the face, scalp, and neck, except eye(s), concussion, and post-concussion syndrome. It paid her wage-loss compensation on the supplemental rolls commencing May 11, 2012. On January 10, 2013 OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits because she refused to accept suitable work.³ Appellant returned to a sedentary position in late February 2013. She remained in receipt of medical benefits due to medical residuals from her accepted employment injuries. Appellant continued to be provided with physical therapy and acupuncture treatments.

In December 3 and 24, 2018 reports, Dr. Alexander Gimpelevich, an osteopath Board-certified in physiatry, noted appellant's history of a March 26, 2012 employment-related injury which caused cervical derangement. He also described the results of a March 11, 2018 magnetic resonance imaging (MRI) scan of her cervical spine. Dr. Gimpelevich indicated that appellant had past history of cancer, for which she underwent chemotherapy and was subsequently diagnosed with chemotherapy neuropathy. He noted that her complaints of general body aches from neck and upper back pain were improved with physical therapy and trigger point injections. Dr. Gimpelevich provided assessments of status post March 26, 2012 employment-related injury with cervical and intervertebral disc displacement, bilateral foraminal nerve, and degenerative disc disease at C1-2 and C2-3; myofascial pain syndrome; and history of tension headache, post-concussion syndrome, occipital neuralgia; and distal lower extremity neuropathy secondary to chemotherapy. He recommended that physical therapy continue three times a week. Dr. Gimpelevich also provided trigger point injections.

On February 18, 2019 OWCP received a request for physical therapy and/or acupuncture for a period beginning February 2, 2019. Dr. Gimpelevich indicated a cervical herniated nucleus pulposus diagnosis on his physical therapy order.

In a February 21, 2019 development letter, OWCP advised appellant that additional medical evidence was required from her treating physician before further physical therapy and/or acupuncture could be authorized. It noted that physical therapy and/or acupuncture had been furnished for an extended period of time, but had not resulted in the increased function or decrease

³ In its January 10, 2013 decision, OWCP indicated that the termination was effective January 10, 2012. Based on the evidence contained within the decision, the termination date appears to be a typographical error and should be January 10, 2013.

in the level of disability from the conditions accepted due to her March 26, 2012 employment injury. OWCP afforded appellant 30 days to provide the additional medical evidence.

OWCP received medical reports and authorization requests from Dr. Gimpelevich. In February 4, March 4, and April 1, 2019 reports, Dr. Gimpelevich continued to provide an assessment of “status post work-related injury” with cervical disc displacement, disc bulging, bilateral foraminal stenosis, and degenerative disease multilevel, myofascial pain syndrome and history of tension headache, post-concussion syndrome, and occipital neuralgia, not active. He additionally provided a differential diagnosis of ulnar nerve entrapment, peripheral neuropathy, and cervical radiculopathy.⁴ Dr. Gimpelevich noted that appellant was status post carpal tunnel release in 2010 and indicated that her peripheral neuropathy had been diagnosed by her hematologist as secondary to chemotherapy. He provided trigger point injections and continued to recommend physical therapy.

In a May 29, 2019 letter, OWCP advised appellant that it was unable to authorize the requested medical treatment and that she could request a final decision in the matter. It noted that the medical evidence indicated that the tension headache and post-concussion syndrome conditions were not currently active and that the other conditions had not been accepted by OWCP.

In a June 12, 2019 letter, appellant requested that OWCP issue a formal decision with respect to the denial of the requested medical treatment.

In June 10 and 25, 2019 reports, Dr. Gimpelevich continued to provide assessments of status post employment-related injury with cervical disc displacement and disc bulge, foraminal stenosis, degenerative disc disease multilevel, and myofascial pain syndrome. He also continued to provide trigger point injections and recommend physical therapy. In his June 25, 2019 report, Dr. Gimpelevich noted that he had ordered a new MRI scan of cervical spine, which appellant underwent on June 29, 2019.

The June 29, 2019 cervical spine MRI scan revealed spondylosis deformans and multilevel broad-based protruding discs from C3-4 through T2-3, which resulted in multilevel mild central canal stenosis and multilevel mild foraminal stenosis.

In a July 9, 2019 report, Dr. Victor Katz, a Board-certified orthopedic surgeon, noted the history of the March 26, 2012 employment injury as appellant lifting a heavy object and hit her head injuring her neck. He indicated that she continued to have neck pain which radiated to the upper extremities with associated weakness, numbness, and tingling. Dr. Katz noted that physical therapy, acupuncture, trigger point injections, and epidurals had provided temporary improvement of pain. He diagnosed cervical radiculopathy, cervical herniated discs at multiple levels, and cervical central canal stenosis after review of the June 29, 2019 cervical spine MRI scan. Dr. Katz recommended that appellant continue physical therapy. He further opined that she was totally disabled.

⁴ In his March 4, 2019 report, Dr. Gimpelevich indicated that appellant’s upper extremity numbness and tingling had resolved.

In his July 10, 2019 report, Dr. Gimpelevich opined that appellant's myofascial pain syndrome was related to her neck pain and neck injury. He continued to recommend physical therapy and provide trigger point injections.

In a July 10, 2019 letter, Dr. Gimpelevich provided definitions of cervical disc displacement and cervical bulge and explained that disc herniations and disc bulges refer pain from the neck into the upper back. The referred pain then produces muscle spasm in the trapezius muscle in the upper neck and upper back because of where the trapezius attaches to the cervical and thoracic spine. Dr. Gimpelevich indicated that appellant, like the overwhelming majority of patients with neck pain, disc herniations and cervical spinal stenosis had referred pain from the neck into the upper back and neck pain. He opined that physical therapy for any neck discomfort for the neck and upper back was reasonable and widely accepted in the medical community.

By decision dated August 6, 2019, OWCP denied authorization for physical therapy and/or acupuncture because the evidence of record did not support that it was medically necessary to address the effects of appellant's employment-related conditions.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which 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.⁵ 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.⁶ OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on OWCP's authority is that of reasonableness.⁷ 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.⁸

While OWCP is obligated to pay for treatment of employment-related conditions, a claimant 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 Causal relationship requires supporting

⁵ 5 U.S.C. § 8103.

⁶ *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *G.M.*, Docket No. 18-1710 (issued June 3, 2019); *Dale E. Jones*, 48 ECAB 648 (1997).

⁷ *J.E.*, Docket No. 18-0228 (issued August 8, 2019); *G.M.*, *id.*; *Daniel J. Perea*, 42 ECAB 214 (1990) (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).

⁸ *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁹ *R.M.*, *supra* note 6; *J.R.*, Docket No. 18-0603 (issued November 13, 2018).

rationalized medical evidence.¹⁰ Therefore, in order to prove that, a procedure is warranted, a claimant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.¹¹

OWCP procedures provide:

“For most orthopedic injuries, PT [physical therapy] services within the first 120 days after a traumatic injury are allowed without any prior authorization required, and it is also customary to automatically authorize PT postoperatively for orthopedic surgeries, usually for a period of 60 days postsurgery. If a request for therapy beyond these time frames is received, OWCP needs to review the file to determine whether further services should be authorized.”¹²

To determine whether a claimant requires physical therapy beyond the initial authorization period, OWCP reviews the record to determine whether the need for PT is due to the accepted work injury and whether the additional therapy is expected to yield functional improvement. Additionally, its procedures provide, “To authorize additional physical therapy for pain or to maintain function, OWCP should ensure that the pain is associated with measurable objective findings such as muscle spasm, atrophy and/or radiologic changes in joints, muscles, or bones, or that pain has placed measurable limitations upon the claimant’s physical activities.”¹³

ANALYSIS

The Board finds that OWCP has not abused its discretion in denying appellant’s request for authorization for physical therapy and/or acupuncture, as of February 2, 2019.

OWCP accepted appellant’s March 26, 2012 traumatic injury claim for contusion of the face, scalp, and neck except eye(s), concussion, and post-concussion syndrome. Appellant has been treated conservatively with physical therapy and/or acupuncture for several years.

In 2019 appellant’s treating physician, Dr. Gimpelevich, sought continuing authorization for physical therapy and/or acupuncture, seven years after the March 26, 2012 employment-related injury. He indicated in his reports that her tension headaches and post-concussion syndrome were no longer active. Dr. Gimpelevich opined, however, that appellant’s neck pain, disc herniations, and cervical spinal stenosis were causally related to the March 26, 2012 employment injury. In a July 10, 2019 letter, he advised that physical therapy for any neck discomfort for the neck and upper back was reasonable and widely accepted in the medical community. Dr. Gimpelevich also explained how referred pain from the neck resulted in upper back and neck pain.

¹⁰ *K.W.*, Docket No. 18-1523 (issued May 22, 2019).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Physical Therapy*, Chapter 2.810.19 (September 2010).

¹³ *Id.*

OWCP accepted only the conditions of concussion; contusion of the face, scalp, and neck, except eyes; and post-concussion syndrome due to the accepted March 26, 2012 employment incident. While Dr. Gimpelevich generally opined in his reports that appellant's cervical spine and back spine conditions were employment related, he failed to provide a rationalized opinion which explained how the accepted employment injury caused or exacerbated her cervical disc displacement and disc bulge, foraminal stenosis, degenerative disc disease, cervical radiculopathy, myofascial pain syndrome, and neck and back pain. A medical opinion must explain how, physiologically, the movements involved in the employment injury caused or contributed to the diagnosed conditions.¹⁴ Thus, Dr. Gimpelevich's reports are insufficient to establish causal relationship. Furthermore, other than generally opining that, physical therapy for any neck discomfort was reasonable and widely accepted in the medical community, he did not explain how physical therapy and/or acupuncture would cure, provide relief, or reduce appellant's disability as a result of her accepted conditions.¹⁵

Dr. Katz diagnosed cervical radiculopathy, cervical herniated discs at multiple levels, and cervical central canal stenosis, all of which are conditions OWCP had not accepted. While he provided a history of the employment injury, he failed to address causation, and thus, his report is of no probative value to support the necessity of physical therapy and/or acupuncture as a result of appellant's accepted conditions.¹⁶

The record also contains a June 29, 2019 cervical spine MRI scan. The Board has explained that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether the employment injury caused any of the diagnosed conditions.¹⁷

There is no other rationalized medical evidence supporting physical therapy and/or acupuncture as necessary to address the effects of appellant's employment-related conditions. The only restriction on OWCP's authority to authorize medical treatment is one of reasonableness. The medical evidence of record does not substantiate that previous therapy has been curative or provided relief of appellant's accepted conditions. The Board thus finds that OWCP did not abuse its discretion in denying her request for authorization of physical therapy and/or acupuncture as of February 2, 2019.

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.

¹⁴ *B.B.*, Docket No. 19-1541 (issued March 2, 2020); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁵ *See C.W.*, Docket No. 17-1636 (issued April 25, 2018).

¹⁶ *C.S.*, Docket No. 18-1633 (issued December 30, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

CONCLUSION

OWCP has not abused its discretion in denying appellant's request for authorization for physical therapy and/or acupuncture, after February 2, 2019.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2020
Washington, DC

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

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

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