

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

_____)
B.A., Appellant)

and)

U.S. POSTAL SERVICE, MANHASSET POST)
OFFICE, Manhasset, NY, Employer)
_____)

Docket No. 22-0041
Issued: July 1, 2022

Appearances:

Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 12, 2021 appellant, through counsel, filed a timely appeal from an April 15, 2021 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 to consider 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 an 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 issuance of the April 15, 2021 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 of left shoulder and left elbow surgery.

FACTUAL HISTORY

On March 16, 2016 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 10, 2016 she fell and injured her left knee, arm, elbow, wrist, and palm while in the performance of duty. She stopped work on the date of injury. In a March 10, 2016 narrative statement, appellant explained that, on that date, after placing mail in a basket at a house she turned around, descended the stairs, and tripped on the second or last step. As she tried to balance herself, she fell on her left side.

After development of the claim, OWCP, by decision dated May 6, 2016, notified appellant that it had accepted her claim for displaced fractures of scapula of left shoulder and head of left radius, and traumatic arthropathy of the left shoulder.

By decision dated May 17, 2016, OWCP denied the expansion of the acceptance of appellant's claim, finding that the medical evidence of record was to establish that the additional diagnosed conditions of left scaphotrapeziotrapezoid (STT) osteoarthritis, scaphoid fracture *versus* trapezium fracture, and possible wrist fracture were causally related to the accepted March 10, 2016 employment injury.

Appellant returned to full-time limited-duty work on October 8, 2016.

On June 29, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Edward Mills, a Board-certified orthopedic surgeon, for a second opinion evaluation to assess her accepted work-related conditions, the extent of disability, and need for further treatment.

In a July 18, 2017 report, Dr. Mills diagnosed left shoulder sprain and rotator cuff syndrome; and left elbow radial head fracture, coronoid process fracture healed with near anatomical alignment. He opined that appellant suffered disabling residuals of her accepted left shoulder condition and recommended surgery for improvement of her condition. Dr. Mills further opined that she was totally disabled from work due to her March 10, 2016 employment injury. He noted that appellant had left shoulder restrictions that would apply until six months post left shoulder surgery.

On January 18, 2018 OWCP authorized left shoulder arthroscopic surgery and left arthroscopic rotator cuff repair. The authorized procedures were to be performed during the period January 15 to April 15, 2018.

In a March 20, 2018 report, Dr. Gregory C. Mallo, an attending Board-certified orthopedic surgeon, noted appellant's history of injury on March 10, 2016. He diagnosed pain, incomplete rotator cuff tear or rupture that was not specified as traumatic, impingement syndrome, and other synovitis and tenosynovitis of the left shoulder. Dr. Mallo related that appellant had not made any meaningful improvement with conservative treatment. He explained to her that he planned to perform left shoulder arthroscopic rotator cuff repair *versus* debridement; distal clavicle excision; and subacromial decompression, and biceps tenotomy *versus* tenodesis.

In an April 11, 2018 general medical and surgical authorization request form, Dr. Mallo reiterated his prior diagnoses of incomplete rotator cuff tear or rupture, not specified as traumatic, impingement syndrome, and other synovitis and tenosynovitis of the left shoulder, and requested authorization to perform left shoulder arthroscopic surgery.

On April 23, 2018 OWCP authorized an extension of its prior approval of arthroscopic left rotator cuff repair and left shoulder arthroscopic surgery, and authorized left elbow arthroscopic surgery. The authorized procedures were to be performed during the period April 11 to July 11, 2018.

In reports dated May 1, 2018 through June 17, 2019, Dr. Mallo indicated that appellant wished to postpone her left shoulder surgery due to a family emergency. He noted that she later related that her left shoulder condition had improved because she was working in a supervisory position which placed less demand on her shoulder.

In a December 16, 2019 left shoulder magnetic resonance imaging (MRI) scan report, Dr. Joseph Hanono, a Board-certified diagnostic radiologist, provided impressions of no evidence of rotator cuff or labral tear; mild acromioclavicular (AC) joint arthrosis; and no acute osseous injury.

In a January 7, 2020 medical authorization record, arthroscopic left shoulder surgery and arthroscopic left rotator cuff and biceps tendon repairs were requested.

In a December 18, 2019 note, Dr. Mallo noted that appellant was recommended to undergo arthroscopic left shoulder subacromial decompression with distal clavicle excision, and possible rotator cuff repair and arthroscopic *versus* mini open biceps tenodesis.

OWCP by letter dated January 9, 2020, informed appellant that it was unable to authorize her request for left shoulder and biceps tendon surgery because the evidence of record was insufficient to establish that the proposed procedures resulted from her accepted employment conditions. It advised her of the medical evidence needed to authorize the request.

OWCP subsequently received additional narrative reports dated December 18, 2019 and January 15, 2020 and a December 18, 2019 duty status report (Form CA-17) from Dr. Mallo. Dr. Mallo provided assessments which included, *inter alia*, left AC joint osteoarthritis and left shoulder biceps tendinitis due to the March 10, 2016 employment injury. He maintained that the proposed biceps tendon tenodesis surgery was supported by his physical examination finding of tenderness over the long head of the biceps tendon that had temporarily improved with a localized injection of lidocaine and steroid. Dr. Mallo further maintained that the need for an arthroscopic distal clavicle excision was supported by evidence of AC joint arthrosis which was well documented on physical examination and MRI scan testing. He noted that appellant also received an injection to this area which provided significant relief. Dr. Mallo indicated that she had worsening left shoulder pain and function and was unable to work due to her pain and poor function. He reiterated that appellant was recommended to undergo left shoulder arthroscopic subacromial decompression with distal clavicle excision, and possible rotator cuff repair and arthroscopic *versus* mini open biceps tenodesis.

In a February 21, 2020 medical authorization record, a drainage and injection of appellant's left joint/bursa was requested. On the same date, OWCP notified appellant that it was unable to authorize her request because the evidence of record was insufficient to establish that the proposed

procedure resulted from her accepted employment conditions. It advised her of the medical evidence needed to authorize the request.

OWCP subsequently received reports dated February 12 and March 18, 2020 from Dr. Mallo who reiterated his prior assessments of osteoarthritis of the left AC joint, biceps tendinitis, acute pain, and incomplete rotator cuff tear or rupture, not specified as traumatic, of the left shoulder. Dr. Mallo again recommended left shoulder and biceps tendon surgery. He, in a general medical and surgical authorization request form dated March 3, 2020, diagnosed left shoulder pain, and requested authorization for medical treatment.

Reports dated October 23, 2019 and March 18, 2020 signed by Daniel Fain, a physician assistant, provided assessments of acute pain and bursitis of the left shoulder, and osteoarthritis of the left AC joint.

By decision dated June 2, 2020, OWCP denied appellant's request for authorization for left shoulder arthroscopic surgery, left rotator cuff tear and left biceps tendon repairs, and drainage and injection of the left joint/bursa. It found that the medical evidence of record did not establish that the requested procedures were "medically necessary to address the effects of appellant's work-related injury or conditions."

OWCP received additional reports dated March 18 and August 7, 2020 from Mr. Fain who noted that appellant was performing light-duty work and she continued to help her husband. He also noted her desire to undergo surgery to treat her diagnosed left shoulder and biceps conditions.

On January 15, 2021 appellant, through counsel, requested reconsideration of the June 2, 2020 decision and submitted additional medical evidence from Dr. Mallo. In a June 25, 2020 letter, Dr. Mallo diagnosed left shoulder bursitis. Dr. Mallo advised that appellant's condition remained guarded. He concluded that she sustained a work-related left shoulder injury on March 10, 2016.

OWCP subsequently received additional reports dated January 8 and February 26, 2021 from Dr. Mallo. Dr. Mallo continued to provide assessments of acute pain, biceps tendinitis, and incomplete rotator cuff tear or rupture, not specified as traumatic, of left shoulder, and osteoarthritis of left AC joint. He noted that appellant was previously indicated for arthroscopic left shoulder surgery.

By decision dated April 15, 2021, OWCP denied modification of the June 2, 2020 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA⁴ 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 by 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 the monthly compensation.⁵ While OWCP is obligated to pay for treatment of employment-related conditions, the employee

⁴ *Supra* note 2 at § 8103(a).

⁵ *Id.*; see *D.S.*, Docket No. 18-0353 (issued May 18, 2020); *L.D.*, 59 ECAB 648 (2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁶

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.⁷

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.⁸ 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.⁹

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.¹⁰

ANALYSIS

The Board finds that OWCP has abused its discretion by denying appellant's request for authorization of left shoulder and left elbow surgery.

In reports dated May 1, 2018 through February 26, 2021, Dr. Mallo diagnosed left AC joint osteoarthritis, biceps tendinitis, acute pain, incomplete rotator cuff tear or rupture, not specified as traumatic, and bursitis of the left shoulder. He opined that the diagnosed conditions were causally related to the accepted March 10, 2016 employment injury. Dr. Mallo advised that left shoulder and left elbow arthroscopic surgery, left rotator cuff tear and left biceps tendon repairs, and drainage and injection of the left joint/bursa were necessary to treat the diagnosed conditions and requested authorization to perform these procedures. He explained that the requested procedures were supported by his physical examination findings and MRI scan results. Dr. Mallo noted that appellant was previously indicated for arthroscopic left shoulder subacromial decompression with distal clavicle excision, rotator cuff repair, and arthroscopic versus mini open biceps tenodesis, but she postponed the surgical procedures to care for her ill husband.

⁶ *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

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

⁸ *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that an 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).

⁹ *D.S.*, *supra* note 5.

¹⁰ *Id.*; *P.L.*, Docket No. 18-0260 (issued April 14, 2020); *L.W.*, 59 ECAB 471 (2008).

The only limitation on OWCP's approving or disapproving service under FECA is one of reasonableness.¹¹ In the instant case, OWCP had already authorized appellant's left shoulder and elbow surgeries, on two separate occasions but which had been postponed due to a family emergency. The left shoulder arthroscopy and arthroscopic left rotator cuff repair were authorized based on the July 18, 2017 second opinion report of Dr. Mills. On April 23, 2008 OWCP reissued authorization of these procedures and authorized left elbow arthroscopy. As such, OWCP has already determined that appellant had met her burden of proof that the treatment was for her continuing employment-related conditions.

The Board finds that these prior authorizations for surgery, taken together with Dr. Mallo's reports, which articulated a rationalized opinion that appellant's current conditions and requested surgeries were causally related to the employment injury, and the lack of any rationalized medical opinion finding the surgeries were no longer reasonable, are sufficient to demonstrate that OWCP abused its discretion in denying authorization for the left shoulder and elbow surgeries.¹²

CONCLUSION

The Board finds that OWCP has abused its discretion by denying appellant's request for authorization of left shoulder and left elbow surgery.

¹¹ *Supra* note 8.

¹² *H.L.*, Docket No. 16-0920 (issued January 9, 2017); *D.K.*, Docket No. 13-230 (issued June 17, 2013).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 1, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board