United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 22-0164**
	)	**Issued: November 28, 2022**
DEPARTMENT OF THE ARMY, TAMPA MILITARY ENTRANCE PROCESSING STATION, Tampa, FL, 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
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 15, 2021 appellant filed a timely appeal from a July 15, 2021 merit decision and November 5, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 November 5, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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*.

ISSUES

The issues are: (1) whether OWCP properly treated appellant's request for TENS unit leads as a recurrence of the need for medical treatment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 10, 2004 appellant, then a 52-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 2004 she sustained a back injury when squatting during a heel-to-toe walking demonstration while in the performance of duty. OWCP accepted the claim for lumbago. Appellant stopped work on October 28, 2004 and returned to limited-duty work on November 2, 2004 and retired in 2007.

On June 8, 2020 Dr. Adam Brunson, a Board-certified family practitioner, diagnosed low back pain and submitted a recertification of medical necessity for electrical stimulating supplies.

On July 15, 2020 the employing establishment later challenged the claim asserting that while appellant sustained a work-related injury there was no current medical evidence in the claim file supporting continuing treatment for the accepted work-related injury.

In a letter dated August 7, 2020, OWCP closed the case due to no recent medical activity in the file. It noted that the claim was accepted for lower back pain due to a traumatic work incident on October 27, 2004. OWCP advised that the most recent medical evidence in the file pertaining to the accepted condition was March 18, 2005.

In a March 7, 2021 report, Dr. Brunson noted treating appellant for low back pain due to a work-related injury that occurred on October 27, 2004. He advised that during the course of appellant's treatment for her work-related injury she was prescribed a home TENS unit, which she used on a daily basis since 2004 and continued to receive supplies related to its use for her workers' compensation claim. Dr. Brunson noted that appellant was not a candidate for further surgery or rehabilitation, she no longer responded to spine injections, and was allergic or intolerant to numerous medications, which limited her treatment options. He advised that the TENS unit was the only pain management modality that afforded her pain relief. Dr. Brunson opined that the TENS unit and associated leads were reasonable and medically necessary treatment for appellant's work-related injury.

On April 13, 2021 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability. She did not report a date of recurrence but noted the recurrence occurred due to demonstrating the "duck walk" and weightlifting required in her job. After the original injury appellant returned to a limited-duty position and retired in 2007. She reported receiving physical therapy and a lifetime award of TENS unit supplies.

In a development letter dated April 19, 2021, OWCP informed appellant of the deficiencies in her recurrence claim and advised her of the type of evidence necessary to establish her claim. It requested that appellant provide a rationalized medical report explaining the basis of her claimed

recurrence. OWCP also provided appellant a questionnaire for completion and afforded her 30 days to provide the requested evidence.

OWCP received a copy of Dr. Brunson's recertification of medical necessity form dated June 8, 2020, previously of record.

On July 5, 2021 appellant responded to the development letter and indicated that the original work-related injury occurred in 2004 and she subsequently retired in 2007. She reported continuous pain since her original injury and her continued treatment with a TENS unit. Appellant believed her disability was due to the accepted work-related injury noting a daily work requirement of demonstrating the "duck walk," falling on her knees as a demonstration, and lifting up to 70 pounds of weight. She performed light-duty work from 2004 through her retirement in 2007. Appellant indicated that she was authorized a TENS unit and associated leads to manage her pain and requested her case be reopened so that this treatment modality would continue.

By decision dated July 15, 2021, OWCP denied appellant's claim for a recurrence. It found that the medical evidence was insufficient to establish that she had recurrent disability from work due to her accepted October 27, 2004 employment injury.

On October 24, 2021 appellant requested reconsideration and asserted that she sought continuing treatment for her ongoing work-related injury. Her treatment included the continued use of a TENS unit and associated leads. Appellant indicated that the supplies of the TENS unit leads remained unabated until 2020 when the employing establishment challenged her claim. After her case was closed on August 7, 2020, in January 2021 she contacted OWCP and was instructed to provide updated treatment notes and a Form CA-2a. Appellant provided a recertification of necessity and an updated narrative report from Dr. Brunson in support of her claim.

By decision dated November 5, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA[3] 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

[3] *Supra* note 1

[4] *Id*. at § 8103; *see O.M.*, Docket No. 20-0640 (issued April 19, 2021); *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *G.A.*, Docket No. 18-0872 (issued October 5, 2018); *see 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.[5]

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.[6]

In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority is that of reasonableness.[7] 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.[8] 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.[9]

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.[10]

ANALYSIS -- ISSUE 1

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

The Board notes that, in a March 7, 2021 report, Dr. Brunson, discussed appellant's factual and medical history. After examining appellant, Dr. Brunson advised that during the course of appellant's treatment for her work-related injury she was prescribed a home TENS unit and associated leads , which she used on a daily basis since 2004 and continued to receive supplies related to its use through her workers' compensation claim. He explained that appellant was not a candidate for further surgery or rehabilitation, she no longer responded to spine injections, and was allergic or intolerant to numerous medications, which limited her treatment options. Dr. Brunson advised that the TENS unit and associated leads were the only pain management

[5] *See D.K.*, Docket No. 20-0002 (issued August 25, 2020); *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 203, 209 (1992).

[6] 20 C.F.R. § 10.310(a); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3.d(5) (October 1995); *id*. at Chapter 2.810.17.h (June 2014); *J.M.*, Docket No. 20-0457 (issued July 16, 2020); *D.W.*, Docket No. 19-0402 (issued November 13, 2019).

[7] *D.K.*, *supra* note 5; *M.B.*, Docket No. 17-1679 (issued February 8, 2018); *see D.K.*, 59 ECAB 141 (2007).

[8] *See D.K.*, *supra* note 5; *A.W.*, Docket No. 16-1812 (issued March 15, 2017).

[9] *M.G.*, Docket No. 18-0099 (issued April 26, 2018); *see Debra S. King*, *supra* note 5.

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

modality that afforded her pain relief. He opined that the TENS unit and leads were a reasonable and medically necessary treatment for appellant's work-related injury.

OWCP has the discretion to authorize medical services, appliances and supplies pursuant to section 8103 and the only limitation on its authority is that of reasonableness.[11] It has discretion to authorize medical supplies which it considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation.[12] In denying appellant's request for TENS unit leads, OWCP evaluated the request as a request for recurrence of disability, rather than a request for medical supplies. Appellant's treating physician opined that other treatment modalities were not available to her and the TENS unit and associated leads were the only pain management modality that offered her pain relief.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[13] In this case, OWCP found that the evidence of record did not establish that appellant continued to require a TENS unit and associated leads due to a worsening of her accepted condition. However, it did not develop and make findings as to whether she required authorization for TENS unit leads to give relief from her accepted employment injury.

On remand OWCP shall refer appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions for a second opinion evaluation, to obtain a rationalized medical opinion on whether or not appellant has a continuing need for TENS unit leads, causally related to the accepted October 27, 2004 employment injury. Following this and other 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.

[11] *See D.K.*, *supra* note 5; *A.W.*, Docket No. 16-1812 (issued March 15, 2017).

[12] 5 U.S.C. § 8103; *see O.M.*, Docket No. 20-0640 (issued April 19, 2021); *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *G.A.*, Docket No. 18-0872 (issued October 5, 2018); *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[13] *W.H.*, Docket No. 21-0139 (issued October 26, 2021); *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2021 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this decision of the Board.[14]

Issued: November 28, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[14] In light of the Board's findings with regard to Issue 1, Issue 2 is moot.