

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

M.V., Appellant)	
)	
and)	Docket No. 22-0797
)	Issued: September 8, 2023
U.S. POSTAL SERVICE, HIGHLAND POST OFFICE, Albuquerque, NM, 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
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On April 25, 2022 appellant filed a timely appeal from a February 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.

ISSUE

The issue is whether OWCP properly denied appellant's request for authorization for treatment of her medical conditions.

¹ The Board notes that following the February 22, 2022 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.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 2, 1999 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging on that date he injured his back while in the performance of duty.³ OWCP accepted the claim for back strain/sprain. It later expanded the acceptance of the claim to include lumbar spondylosis. Appellant returned to work on May 22, 2002.

On March 28, 2002 appellant filed a claim for a recurrence of disability (Form CA-2a) alleging that on March 18, 2002 he developed an additional right shoulder condition due to his April 23, 1997 and June 2, 1999 employment injuries. He stopped work on March 18, 2002 and returned to light-duty work on June 3, 2002. Appellant retired in August 2002 and received disability retirement benefits from the Office Personnel Management.

After development of the claim, OWCP, by decision dated March 18, 2003, accepted that appellant sustained a recurrence of disability during the period February 26 through May 22, 2002.

Appellant continued to seek OWCP-approved treatment for his accepted right shoulder and low back conditions.

On April 12, 2019 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan which demonstrated discogenic endplate changes at L2-3, broad disc osteophyte complex and left-sided extruded fragment at L2-3, bilateral facet arthrosis at L3-4, L4-5, and L5-S1 with minimal central disc protrusion at L4-5 and lumbar spondylosis at L2-3.

In an August 9, 2019 report, Dr. Jonas Skardis, an osteopath specializing in pain medicine, recounted his findings on examination of appellant's low back and right shoulder. He noted that appellant underwent RFA in May and that he found this procedure painful with insignificant symptom improvement. On physical examination, Dr. Skardis found, *via* ultrasound, partial width full-thickness distal tearing of the supraspinatus tendon, tearing of the subscapularis, with tendinosis, tearing of the biceps tendons and deltoid tendons. He opined that these additional right shoulder conditions were caused by the accepted employment injury.

In reports dated June 12 and July 15, 2020, appellant's attending physician, Dr. David A. Woog, specializing in anesthesiology, diagnosed lumbosacral spondylosis without myelopathy. He recounted appellant's history of medical treatment including RFA. Dr. Woog noted that appellant had benefited from RFA in the past, and agreed to repeat this procedure.

On July 16 and 24, 2020 Dr. Woog performed RFA on L3, L4, and L5 on the right and left lumbar medial branches, respectively. He recommended an additional epidural steroid injection at L5-S1. In a September 22, 2020 report, Dr. Woog recounted appellant's symptoms following RFA and found that he believed that the RFA went very well.

³ OWCP assigned the present claim OWCP File No. xxxxxx896. Appellant has previously-accepted claims under OWCP File No. xxxxxx469 for an April 23, 1997 right shoulder strain, OWCP File No. xxxxxx560 for a December 1, 1999 thoracic strain, and OWCP File No. xxxxxx720 for lumbar spondylosis developing from employment activities beginning in May 8, 1995. OWCP administratively combined OWCP File Nos. xxxxxx469, xxxxxx560, xxxxxx720 and xxxxxx896, with the latter designated as the master file.

On November 3, 2020 and April 6, 2021 Dr. Sann R. Gossum, a Board-certified orthopedic surgeon, recommended right shoulder arthroscopy, including biceps tenodesis, due to the diagnosed conditions of biceps tendinitis of the right shoulder and labral tear of the long head of the right biceps tendon.

In an April 1, 2021 note, Dr. Theresa Genovese-Elliott, a physician Board-certified in pain medicine, examined appellant due to his lumbar spondylosis and recommended an additional MRI scan. An April 17, 2021 MRI scan of the lumbar spine demonstrated mild degenerative changes with left lateral disc extrusion at L2-3 with lateral recess stenosis and impingement of the L3 root.

On May 3, 2021 OWCP approved appellant's request for right shoulder arthroscopy. He underwent this procedure on May 17, 2021 due to biceps tendinosis of the right shoulder.

On May 12, 2021 Dr. Genovese-Elliott reviewed the April 17, 2021 MRI scan. She noted that appellant had frequent RFA procedures through Dr. Whalen, and that he was adamant that these were helpful, but explained that she would not be able to perform extensive RFA procedures bilaterally. Dr. Genovese-Elliott requested L3, L4, and L5 RFA procedures in two different appointments.

OWCP by development letter dated June 4, 2021, informed appellant that it was unable to authorize his request for RFA procedures because the evidence of record was insufficient to establish that the proposed procedures were medically necessary for his accepted employment conditions. It advised him of the type of medical evidence needed to authorize the request.

On June 9, 2021 Dr. Gossum requested physical therapy following appellant's OWCP-authorized right shoulder surgery. On July 6, 2021 OWCP informed appellant that it had approved physical therapy for the right shoulder.

On July 7, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a list of questions to Dr. Keith W. Harvie, an osteopath and a Board-certified orthopedic surgeon, for a second opinion evaluation to assess his accepted work-related conditions, the extent of disability, and the need for further treatment including RFA.

In an August 24, 2021 report, Dr. Harvie recounted appellant's history of injury and medical history. He diagnosed right shoulder superior labrum from anterior to posterior tear, biceps tendon degeneration, right shoulder sprain, rotator cuff tear, impingements syndrome, chronic pain, and depression as related to the accepted employment injuries. Dr. Harvie noted that OWCP had cancelled right shoulder physical therapy and found that appellant would eventually require a reverse total right shoulder replacement surgery. He opined that lumbar facet injection and additional lumbar RFA procedures did not produce any long-term improvements and, therefore, should not be authorized.

By decision dated September 22, 2021, OWCP denied authorization for treatment of appellant's accepted medical conditions.

OWCP received a note dated October 5, 2021, wherein Dr. Gossum reported that he had referred appellant for physical therapy following his right shoulder surgery and that OWCP had denied this request. Dr. Gossum again requested right shoulder physical therapy.

On October 18, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP received a November 12, 2021 report from Dr. Woog, diagnosing spondylosis with radiculopathy, lumbar region and again requesting RFA.

By decision dated February 22, 2022, OWCP's hearing representative reviewed the written record and affirmed the September 22, 2021 decision. It found only that the medical evidence did not support that the requested RFA procedures were causally related to, and medically necessary to, treat appellant's accepted medical conditions.

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 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 in the amount of monthly compensation.⁵ 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.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 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

⁴ 5 U.S.C. § 8103.

⁵ See *R.B.*, Docket No. 21-0598 (issued May 19, 2022); *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

⁶ See *K.E.*, Docket No. 21-1266 (issued May 13, 2022); *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).

⁷ 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); *K.E., id.*; *J.M.*, Docket No. 20-0457 (issued July 16, 2020); *D.W.*, Docket No. 19-0402 (issued November 13, 2019).

⁸ See *D.C.*, Docket No. 20-0854 (issued July 19, 2021); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *D.K.*, 59 ECAB 141 (2007).

⁹ See *K.E., supra* note 6; *D.K., supra* note 6; *A.W.*, Docket No. 16-1812 (issued March 15, 2017).

evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.¹⁰

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 to produce a contrary factual conclusion.¹¹

FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.¹² The reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹³

ANALYSIS

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

OWCP undertook development of the claim by referring appellant for a second opinion examination with Dr. Harvie. In his August 24, 2021 report, Dr. Harvie indicated that he had reviewed the SOAF and medical records. In regard to the request for RFA, he concluded, without rationale, that lumbar facet injections and additional lumbar RFA procedures did not produce any long-term improvements.

Dr. Harvie's August 24, 2021 report, therefore failed to sufficiently address the underlying issue of whether the proposed RFA procedures were causally related to appellant's accepted lumbar spondylosis and medically necessary to treat this condition.¹⁴ The Board, therefore, finds that his opinion is insufficient to carry the weight of the medical evidence.¹⁵

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁶ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that

¹⁰ *K.E.*; *id.*; *M.G.*, Docket No. 18-0099 (issued April 26, 2018); *see Debra S. King, supra* note 6.

¹¹ *See E.F.*, Docket No. 20-1680 (issued November 10, 2021); *J.L.*, Docket No. 18-0503 (issued October 16, 2018).

¹² 5 U.S.C. § 8124(a).

¹³ 20 C.F.R. § 10.126; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

¹⁴ *See M.T.*, Docket No. 20-0321 (issued April 26, 2021); *D.T.*, Docket No. 20-0234 (issued January 8, 2021).

¹⁵ *See M.T., id.*; *M.G.*, Docket No. 19-1791 (issued August 13, 2020).

¹⁶ *M.T., id.*; *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

justice is done.¹⁷ Because Dr. Harvie, serving as OWCP's second opinion examiner, has not provided a rationalized opinion, the Board finds that the case must be remanded to OWCP for further development.

On remand OWCP shall request a supplemental report from Dr. Harvie to obtain a rationalized medical opinion on whether appellant's request for authorization of RFA is medically necessary due to his accepted employment injuries. If Dr. Harvie is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a series of questions, to a second opinion physician in the appropriate field of medicine for a rationalized opinion on this issue.

The Board further finds that OWCP's hearing representative's February 22, 2022 decision did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition, so that appellant could understand the basis for the decision as well as the precise defect and the evidence needed to overcome it.¹⁸ The hearing representative did not make findings regarding the issue of whether or not appellant was entitled to physical therapy for his accepted right shoulder conditions and OWCP-approved surgery.¹⁹ He denied appellant's claim without complying with the review requirements of FECA and its implementing regulations.

The case shall therefore be remanded to OWCP for a proper decision, to include findings of fact and a clear and precise statement of reasons as to whether appellant is entitled to physical therapy for his right shoulder. 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.

¹⁷ *M.T., id.*; *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *see also Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁸ *See R.M.*, Docket No. 20-0163 (issued July 17, 2019); *M.J.*, Docket No. 18-0605 (issued April 12, 2019); *K.J.*, Docket No. 14-1874 (issued February 26, 2015). *See also J.J.*, Docket No. 11-1958 (issued June 27, 2012).

¹⁹ *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 8, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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