

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

J.J., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, NATIONAL INSTITUTES OF)
HEALTH, Bethesda, MD, Employer)
-----)

Docket No. 22-1125
Issued: September 12, 2023

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 July 26, 2022 appellant filed a timely appeal from a February 3 and 9, 2022 merit decisions and an April 11, 2022 nonmerit 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

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective February 3, 2022, as she no longer had disability causally

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 11, 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.*

related to her accepted September 18, 2014 employment injury; (2) whether OWCP abused its discretion by denying appellant's request to purchase a neuromuscular stimulator and electrical stimulator supplies; and (3) whether it properly denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On September 29, 2014 appellant, then a 59-year-old contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on September 18, 2014 she sustained head, neck, shoulder, left knee, and back injuries when she tripped over an uneven walkway tile as she entered the employing establishment, hitting her head on a door, and falling to the ground while in the performance of duty. She stopped work on September 18, 2014. OWCP accepted the claim for concussion, and left shoulder and upper arm acromioclavicular sprain. It subsequently expanded the acceptance of the claim to include postconcussive syndrome. OWCP paid appellant wage-loss compensation.³

On March 4, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Michael S. Sellman, a Board-certified neurologist, for a second opinion evaluation regarding the nature and extent of her current disability causally related to the accepted September 18, 2014 employment injury.

In a report dated March 26, 2021, Dr. Sellman discussed appellant's history of injury and reported the findings of his physical examination. He related that she had been stunned by the accident, but did not lose consciousness, and noted examination findings of headache; tinnitus; and neck, left shoulder, bilateral knee, and low back pain. Dr. Sellman related that appellant's objective findings included tenderness to palpation of her head, cervical and lumbar muscular spasm, tenderness to palpation of the left shoulder, and abnormal gait due to arthritis knee pain. A review of a March 11, 2016 brain magnetic resonance imaging (MRI) scan and an April 11, 2018 cervical MRI scan demonstrated normal results. Dr. Sellman concluded that appellant sustained a cerebral concussion from head injuries sustained due to the September 18, 2014 employment injury. He opined that her condition had not resolved since she continued to have subjective complaints of tinnitus and post-traumatic headaches. Dr. Sellman concluded that no further medical treatment was required as she had reached maximum medical improvement and was capable of performing her job duties as a contract specialist.

In prescription notes dated April 8 and July 12, 2021, Dr. Ricardo O. Pyfrom, an orthopedic specialist, prescribed a wearable pain management device for treatment of appellant's elbow and hand/wrist based on diagnoses of left acromioclavicular joint sprain, acute concussion, and postconcussive syndrome.

In a May 10, 2021 report, Dr. Zahara B. Ahmed, a family medicine physician, diagnosed postconcussive syndrome, depressive disorder, bilateral tinnitus, and cervical radiculopathy. She

³ On April 15, 2017 the employing establishment removed appellant from her job due to medical inability to perform her job.

noted examination findings, including persistent tense neck and upper shoulder muscles and stiffness on neck rotation.

On June 11, 2021 OWCP referred appellant, together with a SOAF, the medical record, and a series of questions, to Dr. Rafael Lopez, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of her current disability causally related to the accepted September 18, 2014 employment injury.

In a development letter dated July 12, 2021, OWCP advised appellant that additional information was required to determine whether the wearable pain management device and components prescribed by Dr. Pyfrom were medically necessary for treatment of her accepted conditions of left acromioclavicular shoulder and upper arm sprain and concussion. It informed her of the evidence required and provided her 30 days to submit the requested evidence. No evidence was received.

In a report dated July 17, 2021, Dr. Lopez reviewed the SOAF and medical record and conducted a physical examination. He noted appellant's physical examination findings and then related that her subjective findings were volitional in the areas of range of motion, sensation, tenderness, and pain. Dr. Lopez opined that the accepted conditions had resolved and that she was capable of returning to her date-of injury job. In support of this conclusion, he noted sprains were usually minor injuries which heal within days or weeks, an MRI scan did not show a sprain, and the medical evidence of record did not support a diagnosis of a sprain.

On August 9, 2021 appellant was seen by Dr. Asha Swain, a Board-certified family medicine physician, who noted appellant's complaints and provided examination findings. Diagnoses included postconcussive syndrome, depressive disorder, headache, cervical radiculopathy, bilateral tinnitus, and migraine.

By decision dated August 20, 2021, OWCP denied authorization for a wearable pain management device and related components, finding the requested medical evidence had not been submitted.

In a September 28, 2021 notice of proposed termination, OWCP advised appellant that it would terminate her wage-loss compensation, the weight of the medical evidence represented by second opinion physicians Drs. Sellman and Lopez supported that she was no longer had employment-related disability due to her accepted employment injury. It afforded her 30 days to challenge the proposed termination of her wage-loss compensation.

OWCP subsequently received an October 6, 2021, wherein Dr. Swain repeated her findings and diagnoses.

In a report dated October 22, 2021, Barbara G. Love, Ph.D., a licensed clinical psychologist specializing in neuropsychology, provided an update on appellant's neuropsychological status. She noted her disagreement with OWCP's proposal to terminate appellant's wage-loss compensation. Dr. Love explained that neuropsychological evaluations yielded a better functional profile for individuals with significant traumatic brain injury than brief neurological evaluations, as performed by Dr. Sellman. The neuropsychological evaluation she performed documented deficiencies in auditory working memory, memory for tasks overtime, auditory learning or

unrelated information, and complex visual memory. Dr. Love also reported that appellant showed slowed speech, hearing loss, body pain, chronic headache, fatigue, sleep problems, fatigue, and tinnitus. In concluding, she opined that appellant continued to suffer from post-traumatic concussion syndrome due to the accepted September 18, 2014 employment injury based on her initial evaluation and accumulated clinical data from 2016. Dr. Love further opined that appellant was permanently disabled from performing her date-of-injury job due to her marked limitations in understanding, remembering, or applying information, interacting with other individuals, concentrating, persisting, or maintaining pace, and adapting or managing herself. In addition, she reported that appellant was unable to drive to work in heavy traffic, sit in a brightly lit, crowded and distracting office, read and organize work materials, meet deadlines, sustain focus and effort for lengthy periods of time without a rest, hear adequately in a distracting environment, work on any blue light device of computer for more than a brief time, and come to work with a migraine.

In a report dated November 15, 2021, Dr. Pyfrom provided examination findings and diagnosed bilateral ulnar nerve lesion, C4-5 and C5-6 cervical disc disorder with radiculopathy, lumbosacral intervertebral disc disorders with radiculopathy, cervicobrachial syndrome, cervicalgia, postconcussion syndrome, left shoulder impingement syndrome, bilateral knee osteoarthritis, and bilateral carpal tunnel syndrome. He explained that the ulnar nerve condition was attributable to the accepted September 18, 2014 work injury when appellant tripped and fell into a plate glass door. Dr. Pyfrom noted that she lost consciousness and fell on all four extremities to the floor. According to him, appellant developed bilateral elbow ulnar nerve compression and bilateral wrist carpal tunnel syndrome as a result of hitting the floor with her arms. Dr. Pyfrom also noted that she was not working because she retired on medical disability due to her work-related conditions. He found appellant permanently disabled from work due to her persisting headaches and painful paresthesias.

On December 13, 2021 OWCP received a request for authorization for neuromuscular stimulator and electrical stimulator supplies.

In a letter dated December 22, 2021, OWCP informed appellant that it was unable to authorize her request for a neuromuscular stimulator, electronic shock unit, and electrical stimulator supplies at that time. It noted that the diagnoses given for the requested treatment were bilateral carpal tunnel syndrome, ulnar nerve lesion, and left ulnar nerve lesions and that her claim had been accepted for left shoulder sprain, concussion, and postconcussion syndrome. OWCP requested that appellant submit evidence explaining how and why the new diagnoses were causally related to the accepted September 18, 2014 injury. It afforded her 30 days to provide the requested information.

By decision dated February 3, 2022, OWCP finalized its termination of appellant's wage-loss compensation, effective the same date.

By decision dated February 9, 2022, OWCP denied authorization for a neuromuscular stimulator and electrical stimulator supplies, finding that the medical evidence showed that the request was necessary to address the conditions of bilateral carpal tunnel syndrome and bilateral ulnar nerve lesion, which had not been accepted.

OWCP subsequently received reports dated January 24 and February 8, 2022, wherein Dr. Pyfrom, repeated his prior findings and diagnoses.

In a letter dated February 15, 2022, Dr. Pyfrom requested expansion of appellant's claim to include bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. In support of his request for expansion, he explained that her falling on both wrists and elbows caused inflammation and contusion of these body parts, which in turn led to a compressive phenomenon. This compressive phenomenon caused external median carpal tunnel pressure at both wrists and ulnar nerve pressure in the cubital tunnel of both elbows. Dr. Pyfrom noted that these diagnoses were first reported in 2016 and confirmed by electromyograph (EMG) testing. EMG testing performed on November 18, 2021 showed bilateral elbow ulnar nerve compression neuropathy progression.

Dr. Pyfrom, in a March 23, 2022 report, noted his disagreement with Dr. Lopez' opinion that appellant was capable of working.

In a form dated and received on March 25, 2022, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 11, 2022, OWCP denied appellant's request for a review of the written record, finding that the request was untimely filed.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁴ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 3, 2022.

OWCP accepted appellant's traumatic injury claim for left shoulder and upper arm acromioclavicular sprain, concussion, and postconcussive syndrome. It based its decision to

⁴ *C.K.*, Docket No. 21-0237 (issued August 16, 2022); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *See C.K., id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *C.K., id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

terminate her wage-loss compensation on the opinions of Drs. Sellman and Lopez, OWCP's referral physicians, who found that she was capable of performing her date-of-injury job.

In a report dated March 26, 2021, Dr. Sellman reported the findings of the evaluation he conducted on that date. He noted appellant's continued complaints of headache, tinnitus, and neck, left shoulder, bilateral knee, and low back pain. Dr. Sellman diagnosed a cerebral concussion from the head injury sustained on September 18, 2014. He found that appellant's condition had resolved although she continued to have subjective complaints of tinnitus and post-traumatic headaches. Dr. Sellman concluded that she was capable of performing her date-of-injury job. However, he failed to adequately explain, with rationale, how appellant could perform her regular work as contract specialist given her symptoms of post-traumatic headaches and tinnitus.⁷ The Board thus finds that Dr. Sellman's opinion did not contain sufficient medical reasoning to establish that she no longer had disability due to her accepted September 18, 2014 employment injury.⁸ Thus, his report is insufficient to carry the weight of the medical evidence.⁹

In a July 17, 2021 report, Dr. Lopez noted appellant's accepted conditions and provided examination findings. He opined that her accepted conditions had resolved and that she could return to work. In support of this conclusion, Dr. Lopez noted no evidence of a sprain on an MRI scan or in the medical record. He explained that sprains are usually minor injuries which resolve within days or weeks. Dr. Lopez, however, provided only brief responses to OWCP's questions and did not explain, with rationale, that appellant's accepted left shoulder and upper arm acromioclavicular sprains had resolved.¹⁰ Therefore, the Board finds that Dr. Lopez' report is also insufficient to carry the weight of the medical evidence.

For the reasons set forth the above, the Board finds that OWCP failed to meet its burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA¹¹ 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.¹² In interpreting this section of FECA, the Board has recognized that OWCP has

⁷ *P.G.*, Docket No. 20-0348 (issued April 13, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

⁸ *See P.G., id.; J.W., id.; S.B., id.; S.J.*, Docket No. 17-0543 (issued August 1, 2017).

⁹ *P.G., id.; M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *see also G.G.*, Docket No. 20-0513 (issued January 12, 2021).

¹¹ *Supra* note 1 at § 8103(a).

¹² *Id.*; *see W.N.*, Docket No. 20-1315 (issued July 6, 2021); *Thomas W. Stevens*, 50 ECAB 288 (1999).

broad discretion in determining whether a particular type of treatment is likely to cure or give relief.¹³ The only limitation on OWCP's authority is that of reasonableness.¹⁴

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹⁵ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁶

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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request to purchase a neuromuscular stimulator and electrical stimulator supplies.

Appellant requested authorization for a neuromuscular stimulator and electrical stimulator supplies. In a letter dated December 22, 2021, OWCP informed her that it had not accepted the conditions of bilateral carpal tunnel syndrome and bilateral ulnar nerve lesion. It requested that appellant submit a rationalized medical opinion explaining how the new diagnoses were causally related to the accepted September 18, 2014 employment injury. By decision dated February 9, 2022, OWCP denied authorization for neuromuscular stimulator and electrical stimulator supplies, noting that it had not received any medical evidence addressing the conditions of bilateral carpal tunnel syndrome and bilateral ulnar nerve lesion, which had not been accepted.

As noted, the only restrictions on OWCP's authority to authorize medical treatment is one of reasonableness.¹⁸ In the instant case, appellant has not submitted evidence to support that the requested neuromuscular stimulator and electrical stimulator supplies were medically necessary to assess her accepted conditions of left shoulder and upper arm acromioclavicular sprain,

¹³ *W.N., id.; R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

¹⁴ *W.N., id.; D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

¹⁵ *W.N., id.; R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

¹⁶ *W.N., id.; K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹⁷ *W.N., id.; D.S.*, Docket No. 18-0353 (issued February 18, 2020); *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).

¹⁸ *S.K.*, Docket No. 20-1348 (issued May 3, 2022); *see also E.F.*, Docket No. 20-1680 (issued November 10, 2021) (the Board found that OWCP did not abuse its discretion when the claimant failed to submit evidence to support that the requested medical service was medically necessary to treat her accepted conditions); *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).

concussion, and postconcussional syndrome. Additionally, she did not submit the requested medical evidence addressing how the diagnosed bilateral carpal tunnel syndrome and bilateral ulnar nerve lesion had been caused or aggravated by the accepted September 18, 2014 employment injury as of February 9, 2022. The Board, thus, finds that OWCP did not abuse its discretion by denying appellant's request for authorization for neuromuscular stimulator and electrical stimulator supplies.¹⁹

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.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."²⁰

Section 10.615 of Title 20 of the Code of Federal Regulations provides: "A hearing is a review of an adverse decision by a hearing representative.²¹ Initially, the claimant can choose between two formats: An oral hearing or a review of the written record." The hearing request must be sent within 30 days of the date of the decision for which the hearing is sought.²² However, OWCP has discretion to grant or deny a request that is made after this 30-day period.²³ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that a request for a review of the written record must be made within 30 days after the date of the issuance of an OWCP final decision. Appellant submitted an appeal request form dated March 25, 2022 requesting a review of the written record. As the request

¹⁹ *S.K., id.; D.C., supra* note 14; *B.J.*, Docket No. 17-1825 (issued February 23, 2018).

²⁰ 5 U.S.C. § 8124(b)(1).

²¹ 20 C.F.R. § 10.615.

²² *Id.* at § 10.616(a); *K.S.*, Docket No. 20-0304 (issued December 1, 2022); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

²³ *K.S., id.; G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

²⁴ *K.S., id.; K.L.*, Docket No. 19-0480 (issued August 23, 2019); *C.C.*, Docket No. 18-1769 (issued April 5, 2019); *James Smith, id.*

was dated more than 30 days following the issuance of the February 9, 2022 merit decision, the Board finds that it was untimely filed and she was not entitled to a review of the written record as a matter of right.²⁵ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing,²⁶

The Board finds that OWCP properly exercised its discretion in denying appellant's request for a hearing by determining that the issue in the case could be addressed equally well by requesting reconsideration and submitting new evidence relevant to the issue of whether she was entitled to the medical supplies requested due to her accepted September 18, 2014 injury.²⁷ OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.²⁸ The Board has held that the only limitation on OWCP's authority is reasonableness. An 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.²⁹ The Board thus finds that OWCP did not abuse its discretion in denying appellant's request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 3, 2022, as she no longer had disability causally related to her accepted September 18, 2014 employment injury. The Board further finds that OWCP properly denied her request to purchase a neuromuscular stimulator and electrical stimulator supplies and her request for a review of the written record.

²⁵ *W.K.*, Docket No. 20-0765 (issued February 26, 2021); *K.W.*, Docket No. 19-0529 (issued September 4, 2019).

²⁶ 5 U.S.C. § 8124(b)(1); *see L.S.*, Docket No. 18-0264 (issued January 28, 2020); *William F. Osborne*, 46 ECAB 198 (1994).

²⁷ *K.S.*, *supra* note 22.

²⁸ *See M.A.*, Docket No. 22-0850 (issued November 8, 2022); *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

²⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2022 decision of the Office of Workers' Compensation Programs is reversed and the decisions of the Office of Workers' Compensation Programs dated February 9 and April 11, 2022 are affirmed.

Issued: September 12, 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