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

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| **M.M., Appellant** | ) | |
| **and** | ) | **Docket No. 23-1088** |
| | ) | **Issued: February 7, 2024** |
| **DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, Houston, TX, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On August 11, 2023 appellant, through counsel, filed a timely appeal from an August 1, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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 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] The Board notes that counsel did not appeal OWCP's April 5 and June 23, 2023 merit decisions. Therefore, those decisions are not presently before the Board. *See* 20 C.F.R. § 501.3.

[3] 5 U.S.C. § 8101 *et seq*.

## ***ISSUE***

The issue is whether OWCP properly denied authorization for the medications Neurontin and Nexium, effective February 28, 2023.

## ***FACTUAL HISTORY***

On January 26, 2005 appellant, then a 36-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 2004 she injured her right foot and ankle when she twisted her ankle while walking on a slippery wet floor while in the performance of duty. OWCP accepted the claim for right ankle sprain/strain, right plantar nerve lesion, and effusion of right ankle/foot joint. It subsequently expanded its acceptance of the claim to include right foot and ankle chronic pain syndrome, and constipation due to medication. OWCP also accepted right lower limb reflex sympathetic dystrophy; however, it subsequently rescinded acceptance of this condition on October 19, 2011. It initially paid appellant wage-loss compensation on the supplemental rolls commencing September 6. 2005. Appellant has received wage-loss compensation on the periodic rolls since October 24, 2010.

In reports covering the period April 8, 2021 through January 4, 2023, Dr. Mobeen Choudhri, a Board-certified physiatrist, evaluated appellant for bilateral upper and lower extremity complex regional pain syndrome (CRPS), type 1. She noted that the medications Nexium and Neurontin were prescribed for appellant's pain. Dr. Choudhri diagnosed CRPS, Type 1 of the left lower extremity; chronic pain syndrome; right lower limb plantar nerve lesion; right ankle effusion; and right ankle ligament sprain.

On May 16 and July 7, 2022 Optum, the pharmacy benefit manager (PBM), advised appellant that it was managing pharmacy benefits for injured employees covered under FECA. It noted that a drug formulary, or list of medications that a claimant was eligible to receive under FECA, had gone into effect on December 9, 2021. The PBM informed appellant that her currently prescribed drugs Nexium and Neurontin were no longer being refilled within the plan allowances. It requested that she notify her physician to determine if there was an alternative medication available or, if not, to have her physician complete a Prior Authorization Request Form (PARF) to request continued use of the nonformulary medicine. The PBM indicated that it would allow the medication until December 8, 2022.

In a May 16, 2022 letter, the PBM requested that Dr. Choudhri transition appellant to a formulary-approved medication, or complete a PARF to request approval for the nonformulary medication. No response was received.

On July 7, 2022 the PBM again notified appellant that the currently prescribed drug Neurontin was not allowed under its formulary. It requested that she notify her physician to determine if there was an alternative medication available or, if not, to have her physician complete a PARF to request continued use of the nonformulary medicine. The PBM indicated that it would allow the medication until December 8, 2022. It provided a similar letter to Dr. Choudhri. No response was received.

On October 14, 2022 the PBM issued a final notice to appellant that Nexium and Neurontin were not covered by its formulary, and indicated that it would only allow the medication until December 8, 2022. It again requested that she switch to another medication covered by the formulary or submit a PARF and request approval for Nexium and Neurontin. In a separate letter of even date, the PBM advised Dr. Choudhri that Nexium and Neurontin were not covered under its formulary, and requested that he either transition appellant to another medication or submit a PARF to request approval for Nexium and Neurontin. No response was received.

In a January 10, 2023 letter, the PBM informed appellant of alternatives for Nexium and Neurontin. It informed her that authorization for medications prescribed was not ending yet, however, PBM advised that this final notice was to allow additional time for appellant to safely transition to a medication within the formulary allowances or have her physician submitted a PARF to Optum for consideration. No response was received.

By decision dated February 28, 2023, OWCP denied authorization for the medication Nexium, effective March 9, 2023. In another decision of even date, it denied authorization for the medication Neurontin, effective March 9, 2023.

On March 9, 2023 appellant requested reconsideration of the February 28, 2023 decisions.

OWCP subsequently received reports dated March 1, April 28, and June 26, 2023 from Dr. Choudhri which were repetitive of prior reports.

In a letter of medical necessity dated March 9, 2023, Dr. Choudhri explained that medications Neurontin and Nexium were part of appellant's ongoing treatment plan for her chronic pain syndrome. She opined that appellant had a progressive form of CRPS that initially manifested in her right lower extremity, and had not progressed to her left lower extremity. Dr. Choudhri concluded that the medications of Neurontin and Nexium provided appellant with the best relief from her chronic pain symptoms and allow her to perform most of her daily living activities.

On June 5, 2023 OWCP requested that OWCP's clinical pharmacist address the medical necessity for the medications Neurontin and Nexium from Dr. Choudhri. In a July 14, 2023 report, OWCP's pharmacist noted the approved conditions and reviewed the medical evidence of record. OWCP's pharmacist noted that appellant reported stress at receiving the generic formulation rather than inadequate effects, and it appeared that she was doing well on one of the generic medications, but she was stressed over being denied the brand name. Appellant also claimed to have failed the two-month generic trial, but it does appear that she was dispensed both generic formulations during that period. Next, OWCP's pharmacist stated that there appeared to be a large mental component to the switch which has not been sufficiently addressed. In concluding, OWCP's pharmacist found no medical documentation in the record that appellant previously tried and failed other medications, including generic formulations. In support of this conclusion, OWCP's pharmacist reported that, in Dr. Choudhri's March 28, 2023 report, appellant stated that her pain was aggravated by weather changes, and there was no mention of her generic medications. Additionally, in a May 2, 2023 report, Dr. Choudhri reported appellant's frustration at not being able to receive brand name medications while noting she was doing well on her medications. She reported that appellant's pain condition was exacerbated when she becomes stressed and frustrated at changes to her regimen.

In a decision dated August 1, 2023, OWCP denied modification of the February 28, 2023 decisions.

## ***LEGAL PRECEDENT***

Section 8103(a) of FECA[4] 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] In general, drugs and medications which are necessary to treat an injury or occupational disease may be purchased at OWCP's expense on the recommendation of the attending physician. These include prescription as well as nonprescription medications.[6]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[7] The only limitation on OWCP's authority is that of reasonableness.[8] 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.

FECA Bulletin No. 22-02 provides that OWCP has contracted with Optum to serve as its PBM System for claimants covered under FECA.[9] It further provides, "PBMs are primarily responsible for developing and maintaining formularies which include an approved listing of prescriptions...."[10]

## ***ANALYSIS***

The Board finds that OWCP properly denied authorization for the medications Neurontin and Nexium, effective February 28, 2023.

In letters dated May 16, July 7, and October 14, 2022, and January 10, 2023 the PBM informed appellant that Neurontin and Nexium were not allowed to be refilled under the new plan allowances. It requested that she ask her physician if there were alternative medications available

[4] *Supra* note 3.

[5] 5 U.S.C. § 8103; *see T.W.*, Docket No. 23-0504 (issued July 11, 2023); *L.W.*, Docket No. 21-0607 (issued October 18, 2022); *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3a (October 1995).

[7] *T.W.*, *supra* note 5; *C.Y.*, Docket No. 21-0335 (issued November 7, 2022); *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

[8] *T.W.*, *id.*; *M.S.*, Docket No. 22-0113 (issued June 7, 2022); *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[9] FECA Bulletin No. 22-02 (issued November 23, 2021); *see also* FECA Bulletin No. 21-07 (issued March 9, 2021).

[10] *Id.*

or, if not, have the physician complete a PARF to request continued use of Neurontin and Nexium. The PBM also sent the May 16, July 7, and October 14, 2022 letters to Dr. Choudhri.

OWCP did not receive a completed PARF; however, Dr. Choudhri submitted a letter of medical necessity dated March 9, 2023. She explained the medications Neurontin and Nexium provided appellant with the best relief for her chronic pain syndrome and allowed her to perform daily living activities.

In a July 14, 2023 report, OWCP's clinical pharmacist found no medical documentation in the record that appellant had previously tried and failed other medications, including generic formulations, for an appropriate period of time. It stated that there appeared to be a large mental component to appellant's resistance to generic formulations, which has not been sufficiently addressed.

As OWCP reasonably determined that Dr. Choudhri's opinion was of diminished probative value due to the lack of evidence Neurontin and Nexium were medically necessary for treatment of appellant's accepted conditions, and OWCP's pharmacist found insufficient documentation that appellant had tried and failed the generic formulations for appropriate periods of time, the Board finds that OWCP did not abuse its discretion.

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.

## ***CONCLUSION***

The Board finds that OWCP properly denied authorization for the medications Neurontin and Nexium effective February 28, 2023.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 1, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2024
Washington, DC

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

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

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