United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 16-1173**
	)	**Issued: February 16, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Brookville, FL, Employer	)	

Appearances:
William Hackney, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 16, 2016 appellant, through counsel, filed a timely appeal from a February 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for an orthopedic adjustable bed.

[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] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated July 28, 2009, the Board affirmed OWCP's April 3, 2008 decision denying appellant's claim for a schedule award.[3] The facts and the circumstances set forth in the prior appeal are incorporated herein by reference.

On July 18, 2001 appellant, then a 48-year-old letter carrier, experienced low back pain after pulling tubs/trays of mail and casing mail. He stopped work on July 19, 2001 and sought medical treatment. OWCP accepted appellant's claim for a lumbar strain and aggravation of lumbar degenerative disc disease and paid wage-loss benefits. Appellant returned to part-time light-duty work on July 30, 2001 and full-time light-duty work on January 2, 2002. He stopped work again on August 4, 2002. By decision dated June 25, 2002, OWCP terminated appellant's wage-loss compensation and medical benefits of that date. On June 11, 2005 appellant returned to work part time as a modified distribution retail clerk. He stopped work on June 14, 2005. The claim was later expanded to include the conditions of right-sided lumbar radiculopathy and major depressive disorder, single episode, moderate to severe. Two subsidiary cases were doubled into this master file to facilitate cross-reference: case file number xxxxxx556, accepted for bilateral carpal tunnel syndrome; and case file number xxxxxx065, accepted for ulnar nerve lesion.[4] The facts relevant to the present appeal are set forth below.

On August 6, 2014 OWCP received a request for authorization to purchase an adjustable orthopedic bed. Attached to the request were prescription slips from Dr. David A. Petersen, a Board-certified orthopedic surgeon, dated July 29, 2014 and Dr. Samir F. Bishai, a Board-certified emergency physician, dated July 21, 2014, when recommended the purchase of either the Craftmatic or Tempurpedic adjustable orthopedic bed. Dr. Petersen indicated that the bed was medically necessary for appellant's severe back pain.

On August 7, 2014 OWCP referred the medical file to its medical adviser for an opinion on whether appellant would benefit from an adjustable orthopedic bed. Appellant's accepted conditions of lumbar sprain; degeneration of lumbar intervertebral disc; major depression, single episode, moderate; and lumbosacral radiculitis, right were noted on the referral form.

In an August 7, 2014 report, OWCP's medical adviser recommended that the request for a Tempurpedic bed/mattress be declined. He noted that appellant had chronic lower back pain with multilevel degenerative disc disease of the lumbar spine with no history of back surgery.

[3] Docket No. 08-1515 (issued July 28, 2009).

[4] By decision dated November 20, 2009, OWCP vacated its prior denial of appellant's claim for a schedule award as the weight of the medical evidence of record established a permanent impairment of the right leg causally related to the accepted work injury. By decision dated November 23, 2009, it awarded appellant a schedule award for three percent permanent impairment of the right leg. The award ran for 8.64 weeks of compensation for the period November 13, 2009 through January 12, 2010. By decisions dated March 1 and June 6, 2011, OWCP denied modification of its schedule award decision as the evidence was insufficient to support an impairment due to his work-related injury greater than three percent right lower extremity impairment previously award. By decision dated May 17, 2012, it vacated its March 1, 2011 decision based on additional medical evidence which supported impairment of the legs due to a work-related back condition. By decision dated May 25, 2012, it awarded him 15 percent permanent impairment of the right leg and 15 percent permanent impairment of the left leg. The award ran for 86.4 weeks of compensation for the period May 8, 2012 to January 2, 2014.

The medical adviser indicated that the onset occurred in 2001, that appellant was treated at pain clinics, and that he required opiates for relief. Appellant has pain all over his body and has sleep apnea requiring a continuous positive airway pressure (CPAP) machine. He was requesting a $6,800.00 Tempurpedic bed/mattress. The medical adviser indicated that the same advantage and support for appellant's back and axial spine could be achieved with a bed board (5/8 inch plywood) between the box spring/innerspring, and using firm wedge pillows for support of back and his neck and/or placed under knees to afford appropriate degree of knee flexion as the pain relief dictates. He indicated that appellant needed to refrain from use of Oxycodone at least six hours prior to bed time to avoid insomnia.

By decision dated October 3, 2014, OWCP denied authorization for the Tempurpedic or Craftmatic bed based on the opinion of its medical adviser.

On October 14, 2014 OWCP received appellant's October 8, 2014 request for a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on May 13, 2015. Appellant testified that he had tried using a plywood bed board as recommended by OWCP's medical adviser, but had found it ineffective because it could not be adjusted as needed. He also tried using wedge pillows, but indicated that they would not stay in place throughout the night. Appellant testified that using the method recommended by OWCP's medical adviser caused him additional pain due to his carpal tunnel condition, increased his sleepless nights, and increased his anxiety and depression. He testified that he needed to be able to adjust the bed throughout the night to change pressure points, which was not possible with a flat piece of plywood. Appellant argued that all of his accepted injuries should be considered in determining the necessity of an adjustable bed. He indicated that he purchased the Tempurpedic bed and that his sleep had improved. Appellant also indicated that he no longer takes Oxycodone.

In a September 8, 2014 report, Dr. Petersen disagreed with the medical adviser's recommendation and opined that appellant needed an adjustable bed with significant padding to reduce pressure points. He noted that an adjustable bed "allows for proper positioning, which changes, even throughout the night, which is not possible with a flat piece of plywood." Appellant suggested that the bed might allow appellant to avoid surgery.

In a September 23, 2014 report, Dr. Walter E. Afield, a Board-certified psychiatrist, requested that authorization of the bed be reconsidered. He noted that appellant had poor sleep due to his work injury and reported improved quality of sleep due to having purchased the Tempurpedic bed.

In a May 22, 2015 report, Dr. William Dinenberg, a Board-certified orthopedic surgeon and OWCP referral physician, opined that the accepted lumbar conditions had not resolved and that appellant required chronic pain management. He noted that appellant ambulated into the room with a slow nonantalgic gait and did not use a cane, crutch, or walker. Appellant also climbed onto the examination table independently. Objective findings noted were bilateral radicular symptoms, diminished range of motion of lumbar spine, and tenderness of the lumbar spine to palpation in addition to magnetic resonance imaging (MRI) scans of record.

In a June 2, 2015 report, Dr. James R. Edgar, a Board-certified psychiatrist and OWCP referral physician, opined that appellant suffered from major depressive disorder, recurrent, generalized anxiety disorder, and chronic pain. He noted that the major depressive disorder was originally accepted as causally related to the other work injuries of lumbar strain. Dr. Edgar indicated that the lumbar problems and carpal tunnel syndrome problems have not resolved, nor had the depression.

By decision dated July 1, 2015, an OWCP hearing representative set aside OWCP's October 3, 2014 decision and remanded the case to OWCP for further development. She found that the referral to OWCP's medical adviser should identify the accepted back conditions in the master case as well as the conditions in the subsidiary cases and should comment on the medical reasoning offered by Dr. Peterson and Dr. Afield to justify the medical necessity of an adjustable orthopedic bed and provide medical rationale for his opinion. If additional development was necessary, OWCP could send appellant for a second opinion examination.

On July 13, 2015 OWCP requested that its medical adviser comment on the alleged medical necessity of an adjustable orthopedic bed. It noted all of appellant's accepted conditions including those in appellant's subsidiary cases, which included bilateral carpal tunnel syndrome and lesion of ulnar nerve, bilateral elbows.

In a July 13, 2015 report, OWCP's medical adviser indicated that Dr. Dinenberg's May 22, 2015 orthopedic second opinion report contained no basis to justify the necessity of an adjustable bed. Specifically, she noted that, during Dr. Dinenberg's examination, appellant walked without a limp and sat on the examination table without assistance.

By decision dated July 16, 2015, OWCP denied appellant's request for a Tempurpedic or Craftmatic bed based on the opinion of its medical adviser.

On January 27, 2016 OWCP received appellant's request for reconsideration. Counsel argued that OWCP failed to ask its second opinion physician, Dr. Dinenberg, about the medical necessity of the adjustable bed. He further contended that OWCP failed to follow instructions and refer appellant for a second opinion.

OWCP received a September 29, 2015 statement from appellant regarding his pain management, and additional medical evidence. This included reports from Dr. Afield dated August 5, 19, September 30, and December 28, 2015 and reports from Dr. George S. Sidhom, a Board-certified anesthesiologist, dated May 18 and June 19, 2015.

In an August 31, 2015 report, Dr. Petersen opined that appellant should get an adjustable bed because of his constellation of issues with his various compensation claims, including his back, carpal tunnel, and ulnar nerve issues. He advised that it was unreasonable to ask appellant to put a chair under the upper half of his bed to get the upper half raised up.

In an October 14, 2015 report, Dr. Bishai provided examination findings of the dorsolumbar spine and conducted a neurological examination of both lower extremities. He diagnosed herniated lumbar discs at L4-5 and L3-4 levels, degenerative disc disease of the lumbar spine, chronic lumbosacral strain, spinal stenosis of the lumbosacral spine, radiculopathy of right and left lower extremities, and bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1.

Dr. Bishai disagreed with OWCP's medical adviser's recommendation that appellant put a sheet of plywood under his mattress as appellant needed to sleep in a certain position of flexion at the hips and flexion at the knees to help relieve pressure on the sciatic nerves and the nerve roots in the back which were the cause of his severe pain and radiculopathy. The same thing applied to him sleeping with the head of the bed elevated which would also be helpful in keeping him comfortable to sleep at night. Dr. Bishai indicated that all those changes in the posture and position of the body by appellant could not be achieved by a sheet of plywood underneath the bed. He argued that appellant's purchase of a Tempurpedic adjustable bed would provide a better sleep, reduce pain, and maybe reduce his intake of strong medications for pain relief. Dr. Bishai also noted that appellant had bilateral carpal tunnel syndrome and ulnar nerve entrapment neuropathy at the elbows and that he liked to change positions of his arms at night, which was much easier to do with an adjustable bed.

By decision dated February 19, 2016, OWCP denied modification of its July 16, 2015 decision as appellant's treating physicians failed to provide a rationalized opinion explaining how the purchase of an orthopedic adjustable bed would provide cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.

LEGAL PRECEDENT

Section 8103(a) of FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, 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 interpreting the section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[6]

The only limitation on OWCP's authority is that of reasonableness. 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.[7]

ANALYSIS

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

OWCP's medical adviser reviewed appellant's request for the adjustable orthopedic bed and was advised of all of appellant's accepted conditions, both the master and subsidiary cases. He explained with medical rationale that an adjustable orthopedic bed was not medically

[5] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[6] *W.T.*, Docket No. 08-812 (issued April 3, 2009); *A.O.*, Docket No. 08-580 (issued January 28, 2009).

[7] *J.G.*, Docket No. 15-1784 (issued October 2, 2015); *see also Daniel J. Perea*, 42 ECAB 214 (1990).

necessary as appellant walked without a limp and without assistance and was able to get on the examination table without assistance during Dr. Dinenberg's May 5, 2015 examination. The medical adviser indicated that the less costly alternative such as a bed board and wedge pillows would provide support and reduce appellant's pain. In his October 14, 2015 report, Dr. Bishai disagreed with the medical adviser's recommendation. He opined that an adjustable orthopedic bed was medically necessary to provide appellant with a better sleep, reduce pain, possibly reduce appellant's intake of strong medications for pain relief, and allow for easier change of positions of his arms due to bilateral carpal tunnel syndrome and ulnar nerve entrapment neuropathy at the elbows. Dr. Petersen also opined in his August 3, 2015 report that an adjustable orthopedic bed was medically necessary due to appellant's carpal tunnel syndrome and ulnar nerve issues. The medical adviser, however, failed to address the effect of or the advantage of the recommended alternative method on appellant's other accepted carpal tunnel syndrome and ulnar nerve conditions.

Orthopedic mattresses or hospital beds may be authorized when prescribed by the attending physician to relieve orthopedic or other medical conditions, but the less costly alternatives such as a bed board should be considered first whenever possible.[8] OWCP procedures require that upon receipt of a physician's report describing the need for special equipment and furniture, such as an adjustable bed, the opinion of OWCP's medical adviser should be obtained prior to authorization, and a second opinion may also be necessary.[9]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[10] As OWCP failed to develop the medical evidence submitted by appellant in support of his request for medical equipment, it has abused its discretion in this case. OWCP's medical adviser was previously asked whether appellant would benefit from an adjustable orthopedic bed to treat all conditions accepted under the master case and subsidiary case files, but failed to address this. Specifically, the medical adviser failed to comment on the effect of the requested adjustable orthopedic bed upon appellant's accepted carpal tunnel syndrome and bilateral ulnar nerve conditions. Upon remand, a referral should be made to a second opinion physician of appropriate specialty to review the request for the adjustable orthopedic bed. The specialist should explain his or her medical rationale for any opinion given. Following any additional development as necessary, OWCP shall issue a *de novo* decision on appellant's entitlement to the requested adjustable orthopedic bed.[11]

CONCLUSION

The Board finds this case not in posture for decision.

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.3.c(1) (October 1990).

[9] *Id.* at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.17.h(1) (June 2014).

[10] *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[11] In light of the disposition of this case, counsel's arguments on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2016 is set aside and remanded for action consistent with this decision of the Board.

Issued: February 16, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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