United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
	)	
and	)	**Docket No. 19-0163**
	)	**Issued: July 17, 2019**
DEPARTMENT OFJUSTICE, U.S. MARSHALS SERVICE, Lexington, KY, Employer	)	

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2018 appellant filed a timely appeal from August 9 and October 17, 2018 merit decisions 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 October 17, 2018 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.*

ISSUES

The issues are: (1) whether OWCP abused its discretion by denying appellant's request for an attendant's allowance; and (2) whether OWCP abused its discretion in denying his request for authorization of an electric/motorized wheelchair and lift.

FACTUAL HISTORY

On October 25, 2000 appellant, then a 46-year-old deputy U.S. Marshal, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he slipped and fell when walking up slick steps while in the performance of duty. OWCP initially accepted the claim for lumbar strain. It subsequently expanded acceptance of the claim to include the additional condition of a herniated nucleus pulposus at L4-5. Appellant stopped work on the date of injury. He returned to work for one day on November 13, 2000, but again stopped work. Appellant then returned to light-duty work on December 11, 2000, but the employing establishment was unable to accommodate appellant's restrictions which were in effect as of May 5, 2001. He received wage-loss benefits on the periodic rolls.

On June 3, 2017 appellant underwent an authorized laminectomy with decompression at L2-3, L3-4, and L4-5 as well as a discectomy, partial at L2-3 and L3-4 on the left side.

On October 16, 2017 appellant requested an attendant allowance. He indicated that his condition would never improve and his wife had to quit her job to become his caretaker indicating that he could not put his shoes and socks on.

In a letter dated October 23, 2017, OWCP advised appellant that it required additional information from him and his treating physician in order to determine whether it could authorize payment for services of an attendant. It noted that 20 C.F.R. § 10.314 allowed payment for services of an attendant where medical documentation supported that he required assistance to care for basic personal care needs. OWCP advised that services must be rendered by a home health aide, licensed practical nurse, or similarly trained individual. It attached a Form CA-1090 for appellant's treating physician to complete and submit, so that he could explain and support with medical reasons the necessity for an attendant. OWCP also requested that appellant complete a questionnaire. It afforded him 30 days to submit the requested information.

Dr. Pravian Avula, a Board-certified internist, completed the Form CA-1090 on November 7, 2017, and indicated that appellant required 24 hours assistance with his activities of daily living such as bathing, dressing, and entering and exiting vehicles. In a November 9, 2017 report, he opined that appellant was permanently disabled and unable to return to the work force. Dr. Avula indicated that appellant's activities of daily living were restricted.

In a February 7, 2018 report, Dr. Phillip Singer, a Board-certified orthopedic surgeon, noted that appellant had persistent symptoms of pain with sitting and standing, had limited walking abilities, relied on a cane to walk, and his mobility improved with the use of a walker. He explained that appellant was disabled because he had multilevel spondylosis of the lower back with associated nerve element compression and radiculopathy and claudicatory pain. Dr. Singer advised that the mechanical nature of appellant's back pain was severe and at multiple levels and

that appellant was unable to tolerate most activities of daily living or any activity needed for work. He also explained that enjoyment of life, such as sitting, was significantly curtailed because of his back conditions. Dr. Singer opined that appellant had a progression of spondylosis of the lower back and not specifically just at the L4-5 level.

In a February 27, 2018 report, Dr. David A. West, an osteopath Board-certified in orthopedic surgery serving as an OWCP second opinion physician, noted that appellant used a cane and opined that he would benefit from the use of a power wheelchair for ambulation and convenience.

In a March 14, 2018 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon and OWCP district medical adviser (DMA), noted that he had reviewed the reports of Dr. Avula and Dr. West and indicated that he did not agree that the use of a power wheel chair was medically necessary for appellant's accepted conditions, but rather would be necessary only for appellant's preexisting conditions of obesity and degenerative arthritis. The DMA opined that the equipment was not medically necessary because weight loss with an aggressive conditioning program would improve appellant's endurance and ability to ambulate.

By decision dated May 4, 2018, OWCP denied appellant's request for an attendant's allowance. It found that Dr. Avula and Dr. Singer had not provided a medical opinion supported by medical rationale sufficient to support the necessity for an attendant.

On May 4, 2018 OWCP requested clarification from Dr. West, the second opinion physician, regarding the use of a power wheelchair.

On May 14, 2018 appellant requested reconsideration of the May 4, 2018 decision.

In a May 30, 2018 addendum, Dr. West opined that in addition to appellant's accepted conditions, his preexisting conditions of obesity and his deconditioned state were aggravated by his employment injury, which in part caused his current condition. He further opined that appellant would benefit from a motorized wheelchair to improve his ability to ambulate and convenience. Dr. West agreed that an aggressive conditioning program would improve appellant's endurance and ability to ambulate, but "as a convenience and assistance to his body habitus, a power wheelchair would also be a reasonable suggestion for him."

On July 17, 2018 OWCP determined that a conflict had arisen between Drs. Avula, West, and Ugokwe, the DMA, regarding the requested motorized wheelchair. By letter dated August 7, 2018, it referred appellant for an impartial medical examination with Dr. Joseph Zehner, a Board-certified orthopedic surgeon.

By decision dated August 9, 2018, OWCP denied modification of the May 4, 2018 decision regarding the request for an attendant's allowance. The decision, written by a senior claims examiner, contained only "xxx" where findings were to be provided.

In a September 6, 2018 report, Dr. Zehner noted appellant's history of injury, medical treatment, and physical examination findings. He diagnosed herniated nucleus pulposus at L4-5, lumbar strain/sprain, degenerative disc disease of the lumbar spine, spinal stenosis of the lumbar spine, lumbar radiculopathy bilaterally with secondary weakness, and balance deficit. Dr. Zehner

found that appellant's surgical treatment was ineffective and he remained disabled from work. Regarding the power wheelchair, he explained that it would only be warranted if appellant was unable to safely ambulate with a cane. Dr. Zehner indicated that appellant could stand up straight from a chair and ambulate within his home with a cane and therefore, he opined that a power wheelchair was not warranted.

By decision dated October 17, 2018, OWCP denied authorization for an electric/motorized wheelchair and lift, finding that the medical evidence of record failed to establish that the equipment was medically necessary to address the effects of a work-related injury.

LEGAL PRECEDENT -- ISSUE 1

FECA[3] provides for an attendant's allowance under section 8111(a). OWCP may pay an employee who has been awarded compensation an additional sum of not more than $1,500.00 a month when it finds that the service of an attendant is necessary constantly because the employee is totally blind or has lost the use of both hands or both feet or is paralyzed and unable to walk or because of other disability resulting from injury making him or her so helpless as to require constant attendance.[4]

According to 20 C.F.R. § 10.314, in the exercise of discretion afforded by 5 U.S.C. § 8111, the cost of providing attendant's services will be paid by OWCP under 5 U.S.C. § 8103, for personal care services that have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual. In interpreting 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. OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on its authority is that of reasonableness.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.[5] Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons. The Board has held that 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.[6]

[3] *Supra* note 1.

[4] *See R.C.*, Docket No. 15-1373 (issued December 22, 2015).

[5] 5 U.S.C. § 8124(a).

[6] *Id.*; *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *L.C.*, Docket No. 12-0978 (issued October 26, 2012); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

ANALYSIS -- ISSUE 1

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

In its August 9, 2018 decision, OWCP did not provide findings of fact and a statement of reasons to explain why appellant was denied an attendant allowance. As such, it 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 the denial of his traumatic injury claim.[7] As noted above, 5 U.S.C. § 8124(a) provides: "[OWCP] shall determine and make a finding of facts and make an award for or against payment of compensation." Also, 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons. As OWCP did not provide any findings of fact and a statement of reasons, appellant was unable to understand the precise defect of the claim and the kind of evidence which would overcome it.[8]

The case shall therefore be returned 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 an attendant allowance. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides for the furnishing of services, appliances, and supplies prescribed or recommended by a qualified physician that 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 the amount of monthly compensation.[9] In interpreting 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.[10] OWCP therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.[11]

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.[12] While OWCP is obligated to pay for treatment of

[7] *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).

[8] *See supra* note 6.

[9] 5 U.S.C. § 8103(a).

[10] *G.A.*, Docket No. 18-0872 (issued October 5, 2018); *see Dale E. Jones*, 48 ECAB 648, 649 (1997).

[11] *See G.A., id.; Mira R. Adams*, 48 ECAB 504 (1997).

[12] *See G.B.*, Docket No. 18-1478 (issued February 4, 2019); *see also Debra S. King*, 44 ECAB 203 (1992).

employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[13]

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[14] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[15]

ANALYSIS -- ISSUE 2

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

OWCP found a conflict in the medical opinion evidence between Drs. Avula, West, and the DMA as to whether purchase of a motorized wheelchair should be authorized. It referred appellant to Dr. Zehner for a referee evaluation to resolve the conflict, pursuant to 5 U.S.C. § 8123(a). The Board has held that if there is a disagreement between OWCP's physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.[16] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[17]

OWCP's second opinion physician, Dr. West, agreed with appellant's treating physician, Dr. Avula, that appellant would medically benefit from authorization of a motorized wheelchair. The DMA disagreed, but provided insufficient rationale. Therefore his was not of equal weight. As no true conflict existed in the medical evidence at the time of the referral to Dr. Zehner, the Board finds that his report may not be afforded the special weight of an impartial medical specialist and should instead be considered for its own intrinsic value.[18]

After OWCP solicited the report from Dr. Zehner, the medical opinion evidence reached equipoise. As a conflict now exists in the medical opinion evidence regarding authorization of a motorized wheelchair, OWCP shall refer appellant for a new impartial medical evaluation. After any further development deemed necessary, it shall issue a *de novo* decision.

[13] *See L.S.*, Docket No. 18-1746 (issued April 9, 2019); *Kennett O. Collins, Jr.*, 55 ECAB 648, 654 (2004).

[14] 5 U.S.C. § 8123(a).

[15] *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

[16] 5 U.S.C. § 8123(a); *see V.G.*, Docket No. 17-1341 (issued July 16, 2018).

[17] *See M.R.*, Docket No. 17-0634 (issued July 24, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[18] *See F.R.*, Docket No. 17-1711 (issued September 6, 2018).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 31 and August 9, 2018 decisions of the Office of Workers' Compensation Programs are set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 17, 2019
Washington, DC

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

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

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