United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 18-1024**
	)	**Issued: March 12, 2020**
DEPARTMENT OF THE AIR FORCE, SHAW AIR FORCE BASE, SC, 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:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 23, 2018 appellant, through counsel, filed a timely appeal from a December 13, 2017 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 case.[3]

[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.*

[3] The Board notes that, following the December 13, 2017 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.*

ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for authorization of implant neuroelectrodes, a spine generator, and a neurostimulator.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 26, 2012 appellant, then a 47-year-old high voltage electrician, filed a traumatic injury claim (Form CA-1) alleging that on July 25, 2012 he slipped and fell on a bucket cover injuring his tail bone while in the performance of duty. He stopped work on July 25, 2012 and returned to full-time limited-duty employment on August 1, 2012. OWCP accepted the claim for a contusion and sprain of the sacrum, and a contusion and sprain of the coccyx. It subsequently expanded acceptance of the claim to include a back contusion, a buttock contusion, an aggravation of degeneration of a lumbar intervertebral disc, other specified disorder of the coccyx, an aggravation of lumbosacral radiculitis, and an aggravation of lumbosacral spondylosis without myelopathy.

An electromyogram (EMG) dated December 9, 2015 revealed active chronic right S1 radiculopathy.

On January 19, 2016 Dr. Michael T. Warrick, a Board-certified anesthesiologist, evaluated appellant for continued lower back pain and numbness radiating down the right leg. He noted that the EMG had confirmed S1 radiculopathy. Dr. Warrick diagnosed lumbar radiculopathy, lumbar spondylosis, and chronic pain syndrome. He opined that appellant had chronic lumbar and leg pain without a surgically correctable lesion. Dr. Warrick recommended neurostimulation for long-term pain relief and functional restoration.

In a medical authorization record dated January 27, 2016, Dr. Warrick requested authorization for neuroelectrodes and neurostimulation implantation.

On January 27, 2016 OWCP notified Dr. Warrick that his request for authorization of the neuroelectrodes and neurostimulation implantation could not be approved at that time. It indicated that the evidence then of record was insufficient to authorize the proposed surgery because the requested treatment did not appear to be medically necessary for and/or causally related to the accepted conditions.

OWCP requested that a district medical adviser (DMA) address whether the requested surgical authorization for neuroelectrodes and neurostimulation implantation was warranted and necessitated by the accepted conditions.

In a February 3, 2016 report, Dr. Nizar Souayah, a Board-certified neurologist serving as a DMA, reviewed the medical evidence of record and opined that neuroelectrodes and

[4] Docket No. 13-0164 (issued March 28, 2013) (the Board affirmed the denial of the claim, which was ultimately accepted).

neurostimulation implantation was not medically necessary. He referenced the "Medical Treatment Utilization Schedule" which recommended spinal cord stimulators for patients where less invasive procedures had failed or were contraindicated for conditions. Dr. Souayah also referenced state workers' compensation guidelines which recommended a spinal cord stimulator (SCS) for those with failed back syndrome or persistent severe disabling back pain despite conventional nonsurgical treatments. He noted that a thorough psychological evaluation must be performed prior to such a procedure. Dr. Souayah opined that there was no documentation that appellant had any of the above indications for a SCS. He related that, "There is no evidence of failed previous surgery, radiculopathy, or true neuropathic pain. There is no documentation of the outcome of the lumbar facet injection performed on December 2, 2016. There is no clear evidence of failure of more conservative therapies, including physical therapy and pain medications with good compliance."

On February 16, 2016 OWCP notified Dr. Warrick that his request for authorization of the neuroelectrodes and neurostimulation implantation could not be approved at that time. It indicated that the evidence was insufficient to authorize the proposed surgery because the requested treatment did not appear to be medically necessary for and/or causally related to the accepted conditions. OWCP provided Dr. Warrick with a copy of the DMA's report and requested that he review and submit additional medical documentation.

In a report dated March 2, 2016, Dr. Warrick provided additional information in support of his request for authorization for a SCS trial. He noted that appellant had sustained a work injury on July 25, 2012 when he fell five feet down onto metal. Since that time appellant had chronic back pain and progressive right leg pain. His condition was conservatively managed for over two years using oral medications and injections which provided marginal relief. Dr. Warrick diagnosed lumbar radiculopathy and chronic pain syndrome. He indicated that neurodiagnostic tests had confirmed chronic irreversible S1 nerve damage in his back affecting his right leg. Dr. Warrick advised that a SCS trial was an effective treatment for chronic nerve pain from radiculopathy. He opined that this treatment modality would provide substantial relief of pain beyond current treatment and restore appellant's ability to work with reduced restrictions.

On March 17, 2016 OWCP requested that a DMA address whether the requested surgery authorization for neuroelectrodes and neurostimulation implantation was warranted and necessitated by the accepted conditions. It provided Dr. Warrick's report dated March 2, 2016 for review.

In an April 22, 2016 report, DMA Dr. Souayah noted that there was no clear documentation that appellant had exhausted all conservative therapies, including a trial of pain medication, without improvement. Additionally, he advised that there was no evidence that a successful temporary trial of a SCS had been attempted, noting that an indication for approval of stimulator implantation was a temporary trial demonstrating relief from pain by 50 percent, functional improvement, and reduced use of medication. Dr. Souayah further noted that there was no documentation that appellant had received psychological clearance for the SCS implantation.

On May 9, 2016 Dr. Warrick performed the SCS trial. He diagnosed lumbar radiculitis, disorder of the coccyx, lumbosacral spondylosis without myelopathy, lumbago, chronic pain syndrome, lumbar radiculopathy, and degenerative joint disease of the spine. Dr. Warrick noted findings of back pain, difficulty walking, numbness, and tingling.

In a May 16, 2016 report, Dr. Warrick indicated that appellant had received the SCS trial on May 9, 2016 with an improvement in back pain. He noted appellant took Hydrocodone which provided good relief and he was in full compliance. Dr. Warrick diagnosed lumbar radiculitis, disorder of the coccyx, lumbosacral spondylosis without myelopathy, lumbago, chronic pain syndrome, lumbar radiculopathy, and degenerative joint disease of the spine. He advised that appellant had over 75 percent relief with the SCS trial and recommended a permanent SCS implant.

On June 8, 2016 OWCP notified appellant that his request for authorization of the neuroelectrodes and neurostimulation implantation could not be approved at that time. It indicated that the evidence was insufficient to authorize the proposed surgery because the requested treatment did not appear to be medically necessary for and/or causally related to the accepted conditions. OWCP noted that, on April 22, 2016, the DMA had reviewed the claim and found that he had not shown a successful SCS trial, an adequate trial with pain management, or psychological clearance. It indicated that no further action would be taken on his request.

In a medical authorization record dated June 8, 2016, Dr. Warrick requested authorization for neuroelectrodes and neurostimulator implantation.

On June 16, 2016 Dr. Warrick noted that he had treated appellant since 2012. He indicated that a SCS trial in May 2016 was successful, but that he was unable to permanently implant a SCS because of a lack of authorization.

A July 18, 2013[5] memorandum from Dr. Bryan J. Funke, a flight surgeon Board-certified in occupational medicine, discussed appellant's history of a fall at work from a bucket lift truck on July 25, 2012 and subsequent treatment for sacrococcygeal contusions, chronic low back, tailbone pain, radicular pain, and paresthesia. He noted that a neurosurgeon had found that appellant was not a surgical candidate and had referred him for pain management. Dr. Funke opined that Dr. Warrick had exhausted all conservative measures by performing 10 lumbar interventions including epidural and facet injections, medial branch blocks, and radio frequency rhizotomies without lasting relief. He noted that the trial SCS implantation had provided good relief and functional improvement. Dr. Funke advised that appellant continued to experience low back and coccyx pain, numbness, and tingling radiating from his buttocks to his right leg in a S1 distribution, and was taking one to three tablets of Hydrocodone daily for pain. He opined that his physicians had exhausted all conservative treatment and recommended that OWCP approve the requested surgery.

On July 27, 2016 Dr. Warrick evaluated appellant for recurrent bilateral lumbosacral pain with radiation and numbness down both legs and into both feet. He noted that appellant had undergone over 10 lumbar interventions, including epidurals, facet injections, medial branch blocks, and rhizotomies without long-term relief. Dr. Warrick advised that appellant had engaged in physical therapy and home exercises, modified his work duties, and received chronic opioid therapy that had not improved his function sufficiently even with compliance. He again indicated that appellant was a good candidate for a SCS, noting that he had reported improvement of over 60 percent in pain relief and improved function with a trial of spinal cord stimulation.

By decision dated October 28, 2016, OWCP denied appellant's request for authorization for implant neuroelectrodes, a spine generator, and a neurostimulator as the evidence of record did

[5] The date of the report appears to be a typographical error and should be July 18, 2016.

not support that this procedure was medically necessary to address the effects of the work-related injury.

On November 7, 2016 appellant requested an oral hearing before an OWCP hearing representative which was held on June 15, 2017.

In a report dated January 31, 2017, Dr. Warrick noted that appellant had received bilateral L3-S1 facet injections on October 5, 2016 with more than 50 percent relief in symptoms. He diagnosed spondylosis of lumbosacral region without myelopathy or radiculopathy and performed lumbar fact injections at L3-4, L4-5, and L5-S1.

In a July 18, 2017 report, Dr. Warrick disagreed with Dr. Souayah's opinion regarding the medical necessity of implantation of a SCS for appellant's chronic pain. He asserted that the DMA had contradicted himself when he found that there was no evidence of lumbar radiculopathy in appellant's medical records, but noted that appellant had been diagnosed with chronic S1 radiculopathy by EMG performed December 9, 2015. Dr. Warrick further asserted that Dr. Souayah had found that there was no documentation showing that conservative treatment had failed as appellant had been complaint with medication and had undergone lumbar facet injections with only modest relief. He noted that Dr. Souayah had not treated appellant, who he found to be someone who "pushes himself to perform even with pain." Dr. Warrick opined that appellant was a good candidate for SCS implantation, noting that the SCS trial had been effective in reducing pain and improving function. He asserted that he had "no other option to improve pain and functionality" and that he was trying to stay productive despite "what would for many people be debilitating pain."

By decision dated August 21, 2017, OWCP's hearing representative affirmed the October 28, 2016 denial of appellant's request for authorization of implant electrodes, a spine generator, and a neurostimulator.

On August 30, 2017 appellant, through counsel, requested reconsideration of the August 21, 2017 decision and submitted reports from Dr. Warrick dated April 20, 2016 and July 18, 2017, which were previously of record.

By decision dated December 13, 2017, OWCP denied modification of the August 21, 2017 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA[6] 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 the amount of monthly compensation.[7] In interpreting section 8103(a), the Board

[6] *Supra* note 2.

[7] 5 U.S.C. § 8103(a); *see N.G.*, Docket No. 18-1340 (issued March 6, 2019).

has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on OWCP's authority is that of reasonableness.[8]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[9] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[10] In order to prove that the procedure is warranted, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[11]

OWCP's procedures provide that, in cases of spinal surgery, it should refer the request to the DMA for review. Its procedures further provide:

> "If the DMA's opinion on the need for surgery is equivocal or negative, or if it indicates the need for clinical data not present in the file, the CE [claims examiner] may choose to prepare the file for a second opinion examination. The CE may alternatively choose to ask the AP [attending physician] to submit a report which includes the required clinical data so that the DMA may formulate an opinion on the medical necessity for surgery. Upon receipt of the AP's report, the CE should resubmit the case record to the DMA for comment."[12]

ANALYSIS

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

On March 2, 2016 Dr. Warrick, appellant's treating physician, discussed appellant's history of a July 25, 2012 employment injury and his subsequent progressive right lower extremity and back pain. He noted that diagnostic testing had demonstrated irreversible nerve damage at S1 affecting the right leg and recommended an SCS trial to relive his pain and improve his ability to work.

In reports dated February 3 and April 22, 2016, Dr. Souayah, the DMA, opined that the evidence of record did not support that the implant neuroelectrodes, spine generator, and neurostimulator procedure was medically necessary to address the effects of the work-related injury. He found no clear documentation that Dr. Warrick had exhausted all conservative

[8] *D.W.*, Docket No. 19-0402 (issued November 13, 2019); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

[9] *See R.M.*, Docket No. 19-1319 (issued December 10, 2019); *Debra S. King*, 44 ECAB 203, 209 (1992).

[10] *Id.*; *see also K.W.*, Docket No. 18-1523 (issued May 22, 2019); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[11] *See T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.10(d)(3) (September 2010).

therapies, demonstrated that pain medication had failed to improve appellant's symptoms, or shown that a trial of a SCS had provided pain relief of over 50 percent.

On May 9, 2016 Dr. Warrick performed a spinal cord stimulation trial. In a report dated May 16, 2016, he noted that appellant had experienced an improvement in back pain of over 75 percent relief.

On July 27, 2016 Dr. Warrick opined that the SCS implantation was medically necessary and that there were no other options to improve appellant's pain and functionality. He indicated that he had satisfied the criteria for the implantation of a SCS as he had undergone more than 10 lumbar interventions including epidurals, facet injections, medial branch blocks, and rhizotomies which had failed to provide long-term relief. Dr. Warrick advised that appellant had participated in physical therapy and home exercises programs, and complied with extended opioid therapy that had failed to provide functional improvement. He opined that he was a good candidate for a SCS, noting that he had achieved 60 percent relief from a trial SCS. In a report dated July 18, 2017, Dr. Warrick reiterated that appellant had tried conservative treatment with medication and undergone lumbar facet injections with only moderate relief. He again noted that the trial SCS had reduced his pain and improved his level of function.

OWCP procedures provide that, regarding requests for spinal surgery, the DMA should evaluate the request and, if his opinion on the need for surgery is negative or equivocal, OWCP should ask the attending physician to submit a report with the required data or refer appellant for a second opinion physician.[13] Upon receipt of the attending physician's report, it should again submit the case record to the DMA for review. Dr. Warrick provided additional clinical data regarding the need for surgery in his May 16 and June 27, 2016 reports, submitted after he performed a SCS trial. OWCP's, however, did not refer the case back to the DMA for an additional opinion in accordance with its procedures.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[14] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15]

On remand OWCP should request a supplemental report from the DMA regarding whether appellant's request for authorization of neuroelectrodes, a spinal generator, and a neurostimulator implant is medically necessary and causally related to the accepted employment injury.

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

[13] *Id.*; *see also W.H.*, Docket No. 17-1244 (issued November 7, 2017).

[14] *See L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[15] *Id*.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: March 12, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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