

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

_____)	
J.M., Appellant)	
)	
and)	Docket No. 20-0396
)	Issued: April 9, 2021
DEPARTMENT OF THE NAVY, NAVAL)	
SUPPLY SYSTEMS COMMAND, Gulfport, MS,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 11, 2019 appellant filed a timely appeal from August 12 and September 18, 2019 merit decisions and a November 25, 2019 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 the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the November 25, 2019 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 in denying authorization for opioid medication after May 4, 2019; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On July 10, 2008 appellant, then a 49-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right arm injury on July 8, 2008 when unloading pallets while in the performance of duty. He underwent OWCP-authorized right arm surgery on February 16, 2009 and returned to modified duty on March 2, 2009. Appellant was removed from federal employment for cause in April 2009. OWCP initially accepted sprain of the right elbow and forearm, lateral epicondylitis and later expanded acceptance of the claim to include entrapment/lesion of ulnar nerve right elbow, and articular cartilage disorder of the right upper arm elbow. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 13 to March 13, 2009. By decision dated September 29, 2009, OWCP denied his claim for disability compensation.

³ In a November 15, 2010 decision, the Board affirmed September 29, 2009 and January 4, 2010 OWCP merit decisions that denied appellant's claim for a schedule award. Docket No. 10-0823 (issued November 15, 2010). In a February 14, 2013 decision, the Board found that, by a July 26, 2012 decision, OWCP properly denied appellant's request for a hearing. Docket No. 12-1699 (issued February 14, 2013). In a second February 14, 2013 decision, the Board affirmed an August 17, 2012 decision on the issue of whether appellant established clear evidence of error regarding the denial of his claim for disability compensation. The Board, however, found that OWCP erroneously issued a denial of his request for reconsideration regarding his entitlement to a schedule award under the clear evidence of error standard. The Board remanded the case to OWCP to review and develop newly submitted medical evidence and issue an appropriate decision regarding appellant's request for a schedule award. Docket No. 12-1906 (issued February 14, 2013). In a series of orders dismissing appeal, the Board found that there was no adverse decision over which it had jurisdiction. Docket No. 13-1938 (issued January 13, 2014), Docket No. 13-1275 (issued March 14, 2014), Docket No. 14-0232 (issued April 25, 2014), Docket No. 14-1357 (issued December 1, 2014), and Docket No. 14-2006 (issued July 21, 2015). In an October 24, 2016 decision, the Board found that appellant had not met his burden of proof to establish more than seven percent permanent impairment of the right arm for which he received a schedule award, that OWCP properly refused to reopen his claim for further review of the merits of the schedule award, and that it properly denied his request for a hearing. Docket No. 16-0669 (issued October 24, 2016). By decision dated April 10, 2018, the Board found that appellant failed to establish that carpal tunnel syndrome was caused by the July 8, 2008 employment injury, that OWCP properly denied authorization for decompression surgery, and that OWCP properly refused to reopen his claim for further review of the merits on this issue. It further found that the case was not in posture for decision regarding the degree of impairment of appellant's right upper extremity. Docket No. 17-1603 (issued April 10, 2018). By order dated October 22, 2019, the Board remanded the case to OWCP to obtain a complete copy of a July 11, 2018 report from Dr. Joseph McGowin, III, a Board-certified orthopedic surgeon, who provided a second opinion evaluation and an impairment rating. *Order Remanding Case*, Docket No. 19-0601 (issued October 22, 2019).

Appellant began pain management treatment with Dr. Brian Tsang, a Board-certified anesthesiologist, on December 8, 2011. He saw appellant on a periodic basis thereafter and prescribed hydrocodone and other opioid medications.

On June 6, 2017 OWCP issued FECA Bulletin No. 17-07 providing opioid prescribing guidelines.⁴

By correspondence dated June 14, 2018, OWCP informed appellant that it was instituting a new policy for long-term high-dose opioid use, such as his, and would inform him, after review of his case, if it would require that his physician submit a Letter of Medical Necessity (LMN) prior to authorization of continued opioids.

On June 15, 2018 OWCP issued FECA Bulletin No. 18-04.⁵ The Bulletin indicated that its purpose was to provide supplemental guidance on the management of cases and the authorization of opioid prescriptions if a claimant was receiving opioids for a work-related condition other than cancer. It advised that it was instituting a new supplemental policy to address long-term and high-dose opioid therapy, indicating that where the prescribed opioid therapy was deemed to require further management, completion of an LMN would be required upon its request. Claims examiners were directed to review factors such as the claimant's morphine-equivalent dose, recent surgeries, and the cumulative continuous length of treatment in assessing the most appropriate action to take in each particular case.

On February 25, 2019 appellant began treatment with Dr. Benjamin Gray Guevara, a Board-certified orthopedic surgeon. He described upper extremity findings and diagnosed right elbow arthritis and right ulnar neuritis. Dr. Guevara ordered oxycodone/acetaminophen, but did not provide an explanation regarding why this opioid medication was medically necessary.

In correspondence dated March 7, 2019, OWCP informed Dr. Tsang that it would allow one additional opioid prescription for appellant for the period March 6 to May 4, 2019, and after which a new LMN would be required that should include physical examination findings and further explanation of the need for the dispensation of opioid medication. It specifically informed him that if opioid usage was anticipated to be necessary beyond the 60-day authorization period, a complete evaluation of the patient was necessary and must be documented in a medical report. OWCP continued that, if Dr. Tsang were continuing to treat appellant, his report must include pertinent clinical diagnostic evidence, should address demonstrated improvement in both pain and function, and provide a rationalized explanation on the continued medical necessity of the opioid

⁴ FECA Bulletin No. 17-07 (June 6, 2017). This bulletin advised that, since OWCP had the discretion to provide an injured employee medications, it was implementing a new policy and program to monitor and manage the prescription of opioid medications. It indicated that the new policy applied only to newly prescribed opioid use (claims where an opioid had not been prescribed within the past 180 days, if ever, except for those of employment-related cancer). The Bulletin further indicated that authorizations would require a letter of medical necessity prior to authorization of any opioid medication following an initial 60-day period, and described further limitations and procedures. It indicated that cases with continued opioid use should be reviewed by either a district medical adviser (DMA) or an OWCP referral physician every six months from the first authorization.

⁵ FECA Bulletin No. 18-04 (June 18, 2018).

medication. It also asked him to provide answers to specific questions regarding appellant's prior opioid medication. OWCP sent appellant a copy of the letter.

Dr. Tsang submitted an April 4, 2019 treatment note in which he provided physical examination findings and described appellant's pain level and medication regimen. He diagnosed chronic pain due to trauma, right elbow sprain, right elbow lateral epicondylitis, right upper limb lesion of ulnar nerve, other articular cartilage disorders of right shoulder, long-term opiate analgesic use, and uncomplicated opioid dependence.

By letter dated April 8, 2019, OWCP informed appellant that it was instituting greater scrutiny of opioid medications. It informed him that he would receive 60 days of opioid medication, but for authorization after that period, his physician would have to complete an LMN, and that it would not approve more than two opioid medications at the same time. OWCP continued that the LMN had to be properly and fully completed or it would not be able to fill a prescription for opioid medication beyond the initial 60-day period.

On April 12, 2019 OWCP received a letter dated April 8, 2019 in which appellant requested reimbursement for pain medication.

In a treatment note dated May 2, 2019, Dr. Tsang described pain management treatment and reiterated his findings and conclusions. He completed an LMN on May 6, 2019. On the LMN, by checking form boxes, Dr. Tsang noted that 45 mg. oral oxycodone HCL/acetaminophen was requested for a diagnosis of right lateral epicondylitis, for an anticipated length of 90 days. He checked "Yes" to a series of form questions regarding the necessity for the prescription. Question 40 specifically asked that he provide a narrative explaining why the opioid was medically necessary. Dr. Tsang left this portion of the LMN blank.

In letters dated May 6 and June 3, 2019, OWCP informed appellant of the necessity of having a properly and fully completed LMN submitted in order to authorize future opioid medication.

On May 10, 2019 OWCP notified Dr. Tsang's office that authorization for opioid medication was denied. It indicated that there was insufficient medical documentation to support the use of opioid medication.

Dr. Tsang continued to provide pain management. He submitted a second LMN on August 7, 2019, for the period August 7 to October 5, 2019 and again failed to include the requested narrative statement under Question 40.

By decision dated August 12, 2019, OWCP denied authorization for opioid medication for the period August 7 to October 5, 2019. It indicated that Dr. Tsang had not responded to the March 7, 2019 development letter addressing the need for opioid medication. OWCP explained that it was appellant's responsibility to ensure that the information was provided to OWCP. It also wrote Dr. Tsang that day, informing him of the decision. On August 13, 2019 OWCP informed Dr. Tsang's clinic that authorization for oxycodone/acetaminophen was denied.

Imari Creer, a nurse practitioner in Dr. Tsang's office, provided treatment notes describing pain management on June 27, July 25, and August 22, 2019.

In correspondence dated August 18 and September 2, 2019, appellant maintained that pain medication should be authorized.

On September 9, 2019 OWCP issued FECA Bulletin No. 19-04.⁶ It provided updated guidance regarding the authorization of opioid products (including compounded medications containing an opioid), for newly prescribed opioid users for a work-related condition other than cancer. The Bulletin indicated that, beginning in the fall of 2019, it was instituting a new opioid policy to impose additional limitations and reduce the 60-day period for the required prior approval. This included limiting the duration of certain subsequent fills and requiring prior LMN authorization at 28 days and described procedures required for injured workers who were newly prescribed opioids and were again prescribed the medications after the initial 28-day period.

By decision dated September 18, 2019, OWCP denied authorization for opioid medication for the period May 5 to July 3, 2019. It noted that it had authorized medication for the period March 6 to May 4, 2019 and that letters had been sent to both appellant and Dr. Tsang regarding updated procedures for obtaining opioids. OWCP found that it had been provided insufficient evidence to authorize opioid medication for this period.

By letter dated September 17, 2019, received by OWCP on September 24, 2019 appellant maintained that he had been on opioid medication for years and therefore the new opioid guidelines were not applicable to him.

On September 30, 2019 OWCP responded to appellant and informed him that its policy provided that any claimant who received his or her first opioid prescription within the last 180 days would be classified as a new entrant. It advised him that, since he had not received any opioid prescription from it from February 9 through November 15, 2018, he was currently classified as a new entrant. OWCP continued that, as a new entrant, appellant was required to submit a LMN to obtain approval for opioid medication.

On October 10, 2019 appellant forwarded a pharmacy statement that described prescriptions for him from January 8 to December 15, 2018. The statement did not indicate who specifically paid for these prescriptions, indicating that some were paid by “plan,” and some by “patient.”

In a report dated October 17, 2019, nurse practitioner Ms. Creer, who was employed at Dr. Tsang’s clinic, related that she had reviewed pharmacy reports dated from January 11, 2018 through October 17, 2019 and deemed them appropriate.

In correspondence dated October 17, 2019, OWCP advised that it had received appellant’s request for his status to be changed from a new entrant to a legacy claimant. It advised him that it could not accommodate his request because the evidence did not support entitlement to legacy status. OWCP noted that appellant provided a list of prescriptions, but advised that these were not processed through OWCP’s web portal.

⁶ FECA Bulletin No. 19-04 (September 9, 2019).

On November 19, 2019 appellant requested reconsideration of the September 18, 2019 decision. In an attached statement he maintained that he should continue to be in legacy status as he had been in since 2018, seemingly indicating that, because opioid medication had previously been authorized, it should continue to be authorized.

By decision dated November 25, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA⁷ 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 the amount of monthly compensation.⁸ While OWCP is obligated to pay for treatment of employment-related conditions, the employee 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

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.¹⁰ OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal.¹¹

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.¹²

FECA Bulletin No. 18-04, issued June 18, 2018, provided supplemental guidance on the management of cases and the authorization of opioid prescriptions where a claimant was receiving opioids for a work-related condition other than cancer. It indicated that it was instituting a new supplemental policy to address long-term and high dose opioid therapy. The Bulletin advised that for long-term and/or high dose users where the prescribed opioid therapy was deemed to require further management, completion of an LMN would be required upon its request. Claims

⁷ *Supra* note 1.

⁸ 5 U.S.C. § 8103(a).

⁹ *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

¹⁰ *J.M.*, Docket No. 20-0457 (issued July 16, 2020); *Daniel J. Perea*, 42 ECAB 214 (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).

¹¹ *P.L.*, Docket No. 18-0260 (issued April 14, 2020).

¹² *J.M.*, *supra* note 10; *C.S.*, Docket No. 19-0516 (issued August 15, 2019).

examiners were to review factors such as the claimant's morphine-equivalent dose, recent surgeries, and the cumulative continuous length of treatment in assessing the most appropriate action to take in each particular case.¹³

FECA Bulletin No. 19-04, issued September 9, 2019, provided updated guidance regarding the authorization of opioid products for newly prescribed opioid users for a work-related condition other than cancer. The Bulletin advised that, beginning in the fall of 2019, it was instituting a new opioid policy to impose additional limitations and reduce the 60-day period for the required prior approval.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not abuse its discretion in denying authorization for opioid medication after May 4, 2019.

On June 14, 2018 OWCP informed appellant that it was implementing a new policy regarding long-term opioid medication. In correspondence dated March 7, 2019, it informed Dr. Tsang that it would allow one additional opioid prescription for appellant from March 6 to May 4, 2019, and after which a new LMN would be needed with physical examination findings and further explanation of the need from opioid medication. OWCP specifically informed him that if opioid usage was anticipated to be necessary beyond the 60-day authorization period, a complete evaluation of the patient was necessary and must be documented in a medical report. It continued that if Dr. Tsang were continuing to treat appellant, his report must include pertinent clinical diagnostic evidence, should address demonstrated improvement in both pain and function, and provide a rationalized explanation on the continued medical necessity of the opioid medication. OWCP also asked him to provide answers to specific questions regarding appellant's prior opioid medication. It sent appellant a copy of the letter.

Dr. Tsang completed an LMN on May 6, 2019. On the LMN, by checking form boxes, he noted that specific opioid medication was requested for a diagnosis of right lateral epicondylitis, for an anticipated length of 90 days, and checked "Yes" to a number of questions regarding the necessity for the prescription. Question 40, which specifically asked for a narrative explaining why the opioid medication was medically necessary, was left blank. Dr. Tsang submitted a second LMN on August 7, 2019 and again omitted to include a narrative statement at Question 40 explaining why the opioid was medically necessary. Although he additionally provided treatment notes dated from May 2 and 30, 2019, these also did not contain a rationalized explanation as to why the opioid medication was medically necessary.

Dr. Guevara also prescribed opioid medications. His report, however, also did not contain any explanation as to why the opioid medication was medically necessary.

Appellant also submitted treatment notes from Ms. Creer, a nurse practitioner who is employed by Dr. Tsang. Certain healthcare providers such as physician assistants, nurse

¹³ *Supra* note 6.

¹⁴ *Supra* note 8.

practitioners, and physical therapists are not considered physicians as defined under FECA.¹⁵ Consequently, these reports will not suffice for purposes of establishing entitlement to FECA benefits.¹⁶

As noted, FECA Bulletin No. 18-04 indicates that an LMN may be required. Dr. Tsang failed to complete the compulsory question asking for a narrative explanation of the need for the opioid medication. OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief, and the only limitation on OWCP's authority is that of reasonableness.¹⁷ Dr. Tsang did not provide a rationalized explanation as to why the opioid was medically necessary. In denying appellant authorization for opioid medication, the Board finds that OWCP has not abused its discretion given that it has not committed manifest error, engaged in a clearly unreasonable exercise of judgment, or taken actions contrary to both logic and probable deductions from established facts.¹⁸

As to appellant's argument that, as a legacy compensationner, he was entitled to continue to be reimbursed for opioid medication, FECA Bulletins No. 18-04 required that for long-term opioid users an LMN be fully completed to authorize opioid medication. The record in this case does not contain a sufficient explanation of the need for opioid medication under these provisions.

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 2

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.¹⁹ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.²⁰ One such limitation is that the request for reconsideration

¹⁵ Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *J.R.*, Docket No. 20-0496 (issued August 13, 2020).

¹⁶ *Id.*

¹⁷ *Supra* note 14.

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. § 10.607.

must be received by OWCP within one year of the date of the decision for which review is sought.²¹

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²² When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant timely requested reconsideration on November 19, 2019. In his reconsideration request, he merely maintained that, because opioid medication had been authorized in the past, it should continue to be authorized. Appellant, however, did not show in his request for reconsideration that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered by OWCP. Consequently, the Board finds that he was not entitled to a review of the merits based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).²⁴

Moreover, the evidence submitted was either duplicative or immaterial to the merit issue in this case. OWCP received an October 10, 2019 pharmacy statement that described prescriptions for appellant from January 8 to December 15, 2018 and a report dated October 17, 2019 wherein Nurse Practitioner Creer related that she had reviewed pharmacy reports dated from January 11, 2018 through October 17, 2019 and deemed them appropriate. This evidence was immaterial to the underlying issue, *i.e.*, that appellant had not submitted a properly completed LMN form from a treating physician, explaining appellant's need for continued opioid medication.

²¹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. *Supra* note 15 at Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²² *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

²³ *Id.* at § 10.608.

²⁴ *J.V.*, Docket No. 19-0990 (issued August 26 2020).

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁵

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying authorization for opioid medication after May 4, 2019, and that it properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 25, September 18, and August 12, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 9, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁵ *Id.*; *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).