

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

E.S., Appellant)	
)	
and)	Docket No. 22-0511
)	Issued: August 16, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Jersey City, NJ, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Russell Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 15, 2022 appellant, through counsel, filed a timely appeal from an August 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for authorization of a spinal cord stimulator.

FACTUAL HISTORY

On October 23, 2015 appellant, then a 37-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed lumbar radiculitis, lumbar disc displacement, and lumbar sacroiliitis due to factors of her federal employment. She noted that she first became aware of her condition on August 21, 2015 and realized its relation to her federal employment on September 24, 2015. Appellant stopped work on October 16, 2015. OWCP accepted the claim for cervical disc displacement at the C3-4, C4-5, and C5-6 levels; thoracic disc displacement at the T6-7 and T7-8 levels; lumbosacral disc displacement at the L4-5 and L5-S1 levels; and bilateral sacroiliitis and sacroiliac (SI) joint dysfunction. It paid appellant wage-loss compensation on the supplemental rolls effective October 20, 2015, and on the periodic rolls effective July 24, 2016.

Appellant underwent OWCP-authorized thoracic and lumbar surgeries on October 25, 2017 and March 28, 2018.

In a report dated June 11, 2018, Dr. Scott S. Katzman, a Board-certified orthopedic surgeon, indicated that appellant was a couple of months status-post lumbar fusion at L4-5 and L5-S1, but had not seen a lot of improvement. On examination of appellant's lumbar spine, Dr. Katzman observed tenderness and spasms and decreased flexion and extension. He diagnosed neck pain, status-post lumbar fusion at L4-5 and L5-S1, and thoracic spine pain status-post laminectomy. Dr. Katzman recommended physical therapy and a bone stimulator to stabilize her back.

In a July 6, 2018 letter of medical necessity, Dr. Katzman indicated that appellant underwent lumbar fusion surgery on March 28, 2018 to redo a failed laminectomy. He reported that at three months post-op evaluation, she still complained of pain in the lumbar spine and x-ray evaluation showed no clear bony bridging. Dr. Katzman opined that appellant required electrical bone stimulation, and explained that it helped in the healing of the lumbar fusion, maximized the most positive outcome of surgery, and minimized the potential for serious complications. He concluded that a bone growth stimulator device was a medically necessary adjunctive treatment for success of appellant's lumbar fusion surgery.

In a January 18, 2019 report, an OWCP district medical adviser (DMA) advised that the spinal stimulator recommended by Dr. Katzman was not medically necessary to treat appellant's accepted lumbar conditions.

By decision dated February 21, 2019, OWCP denied authorization for a spinal cord stimulator, finding that the medical evidence of record was insufficient to establish that it was medically necessary to treat her work-related injury.

On February 28, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. In a May 23, 2019 decision, the hearing representative set aside the February 21, 2019 decision and remanded the case for further development of the medical evidence.

OWCP subsequently referred appellant, along with a statement of accepted facts and a copy of the record, to Dr. Frank Corrigan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 27, 2019 report, Dr. Corrigan conducted an examination and reported that she continued to have residuals of her accepted cervical disc displacement at C3-4, C4-5, and C5-6, thoracic disc displacement at T6-7 and T7-8, lumbosacral disc displacement at L4-5 and L5-S1, bilateral sacroiliitis, and SI joint dysfunction conditions. He opined that a spinal cord stimulator was not medically appropriate.

By decision dated July 31, 2019, OWCP again denied authorization for a spinal cord stimulator, finding that the medical evidence of record was insufficient to establish that it was medically necessary to treat appellant's work-related conditions.

On August 6, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated January 10, 2020, the hearing representative set aside the July 31, 2019 decision, finding that there was a conflict in medical opinion between Dr. Katzman, appellant's treating physician and Dr. Corrigan, OWCP's second opinion examiner, regarding whether the recommended spinal cord stimulator was medically necessary to treat her work-related conditions. He remanded the case for referral for an impartial medical examination.

On remand, OWCP referred appellant to Dr. Howard Pecker, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), to resolve the conflict regarding appellant's request for a spinal cord stimulator.

In a report dated April 2, 2020, Dr. Pecker related that on August 21, 2015 appellant injured her back when pushing heavy equipment at work. He noted that she subsequently underwent spinal fusion surgery at L4-5 and L5-S1 in March 2018. On examination of the cervical and lumbar areas of appellant's spine, Dr. Pecker observed no paravertebral spasms or tenderness. He provided range of motion findings, and diagnosed degenerative disc disease of the cervical and lumbar areas of the spine and opined that this condition was not due to appellant's work-related injury. Dr. Pecker reported that the objective findings showed no evidence of disability as a result of the work-related injury. He opined that there was "no evidence that a spinal cord stimulator ... is medically necessary secondary to [appellant's] accepted conditions." Dr. Pecker completed a work capacity evaluation (Form OWCP-5c), indicating that appellant could return to work without restrictions.

In reports dated February 27 and April 22, 2020, Dr. Katzman provided examination findings, and diagnosed bilateral sacroiliitis; sacroiliac joint cyst, left greater than right, and back pain. He recommended a sacroiliac joint ablation block. Dr. Katzman explained that if the joint ablation block was not successful, then a "spinal cord stimulator might be her best option."

In a May 20, 2020 addendum report, Dr. Pecker noted that he reviewed diagnostic imaging reports of the lumbar, cervical, and thoracic regions of the spine and reported that the additional records did not affect his original determination. He opined that findings were consistent with a chronic and preexisting problem and showed no evidence of trauma-related injury. Dr. Pecker explained that multilevel findings in both the cervical and lumbar regions of the spine were consistent with the natural aging process and could not occur with a single traumatic event.

By decision dated June 18, 2020, OWCP denied authorization for a spinal cord stimulator based on the opinion of Dr. Pecker, the IME.

On June 23, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 24, 2020 report, Dr. Katzman provided examination findings and diagnosed sacroiliitis and status-post lumbar fusion at L4-5 and L5-S1. He recommended additional injections, pain management, and a bone stimulator. Dr. Katzman explained that the bone stimulator might help her pain and SI joint ablation.

In a decision dated August 19, 2020, the hearing representative set aside the June 18, 2020 decision, and remanded the case for OWCP to obtain a supplemental report from Dr. Pecker regarding whether appellant's request for a spinal cord stimulator was medically necessary to treat her accepted cervical, lumbar, and thoracic conditions.

In a supplemental report dated September 10, 2020, Dr. Pecker indicated that a spinal cord and/or bone stimulator was not a medically warranted treatment for appellant's accepted medical conditions. He explained that a spinal cord stimulator typically worked in cases where there was irritation of the nerve roots, and that there was no evidence of irritation of the nerve roots based on physical examination and review of the records. Dr. Pecker also noted that none of the documents showed evidence of medical causation to appellant's general physical condition and the conditions in the statement of accepted facts.

By decision dated February 22, 2021, OWCP again denied authorization for a spinal cord stimulator, finding that the special weight of the medical evidence rested with the April 2 and September 10, 2020 reports of Dr. Pecker, the IME.

On March 2, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 11, 2021.

By decision dated August 25, 2021, OWCP's hearing representative affirmed the February 22, 2021 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA³ 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 by or

³ 5 U.S.C. § 8103(a).

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 the monthly compensation.⁴ 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.⁵

In interpreting section 8103(a), the Board 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.⁶ 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.⁷

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.⁸

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.⁹ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰ When a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.¹¹

⁴ *Id.* See *O.M.*, Docket No. 20-0640 (issued April 19, 2021); *S.A.*, Docket No. 18-1024 (issued March 12, 2020); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *D.O.*, Docket No. 20-1245 (issued September 20, 2021); *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

⁶ *M.T.*, Docket No. 20-0321 (issued April 26, 2021); *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

⁷ *P.L.*, Docket No. 18-0260 (issued April 14, 2020).

⁸ *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁹ 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for authorization of a spinal cord stimulator.

OWCP accepted that appellant sustained cervical disc displacement at the C3-4, C4-5, and C5-6; thoracic disc displacement at the T6-7 and T7-8; lumbosacral disc displacement at the L4-5 and L5-S1; and bilateral sacroiliitis and SI joint dysfunction due to factors of her federal employment. It found that a conflict in medical opinion evidence existed between Dr. Katzman, appellant's treating physician, and Dr. Corrigan, OWCP's second opinion examiner, regarding whether the recommended spinal cord stimulator was medically necessary to treat appellant's accepted conditions. OWCP properly referred her to Dr. Pecker for an impartial medical examination to resolve the conflict in medical evidence pursuant to 5 U.S.C. § 8123.

In reports dated April 2 and May 20, 2020, Dr. Pecker reviewed the history of injury and provided findings on examination. He diagnosed degenerative disc disease of the cervical and lumbar regions of the spine and opined that these conditions were not due to appellant's work-related injury. Dr. Pecker discussed her diagnostic reports and indicated that the findings showed no evidence of trauma-related injury. In a September 10, 2020 supplemental report, he opined that a spinal cord and/or bone stimulator was not a medically warranted treatment for appellant's accepted medical conditions. Dr. Pecker explained that a spinal cord stimulator typically worked in cases where there was irritation of the nerve roots, and he found no evidence of irritation of the nerve roots on examination or review of the records.

The only limitation on OWCP's authority in approving or disapproving service under FECA is one of reasonableness.¹² OWCP obtained an impartial medical examination through Dr. Pecker, who explained that a spinal cord and/or bone stimulator was not medically warranted for treatment of appellant's accepted conditions, because he found no evidence of irritation of the nerve roots. Thus, the Board finds that OWCP properly denied her request for authorization of a spinal cord stimulator.

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 appellant's request for authorization of a spinal cord stimulator.

¹² *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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