

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

A.M., Appellant)	
)	
and)	Docket No. 23-0593
)	Issued: August 24, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL EMERGENCY MANAGEMENT)	
AGENCY, Hyattsville, MD, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 14, 2023 appellant filed a timely appeal from a February 3, 2023 merit 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 this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the February 3, 2023 decision, OWCP and the Board 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.* The Board also notes that on appeal appellant raised issues regarding her receipt of Social Security Administration (SSA) benefits. The Board lacks jurisdiction to address appellant's receipt of SSA benefits. The Board's jurisdiction is limited to review of OWCP's February 3, 2023 decision. 20 C.F.R. § 501.2(c).

ISSUE

The issue is whether OWCP properly denied authorization for a prescription for promethazine with codeine.

FACTUAL HISTORY

On January 13, 2006 appellant, then a 48-year-old human services specialist, filed a traumatic injury claim (Form CA-1) alleging that on December 28, 2005 she developed congestion and a continuous cough after ceiling tiles above her workstation were removed. OWCP accepted the claim for acute bronchospasm, chronic bronchitis, asthma, diseases of the trachea and bronchus, and chronic obstructive pulmonary disease. It paid appellant wage-loss compensation on the supplemental rolls commencing March 19, 2006, and on the periodic rolls commencing February 17, 2008.

In an Authorization Request form and Certification/Letter of Medical Necessity dated August 13, 2021, Dr. Louis E. Steinberg, a physician Board-certified in pulmonary medicine and internal medicine, requested authorization for a prescription for promethazine with codeine for a diagnosis of asthma.

Optum, the pharmacy benefits manager (PBM), on behalf of OWCP, in letters dated May 5 and 17, 2022, advised appellant that pharmacy benefits for injured employees under FECA were managed under a drug formulary that went into effect December 9, 2021. It related that the medication, promethazine with codeine, was not covered by the formulary, but would be allowed until December 8, 2022. Optum noted that it would notify her doctor that the medication prescribed, promethazine with codeine, was nonformulary and to review her current medication to determine an appropriate medicine in the formulary. If an appropriate alternative was not available, her prescriber would need to complete a prior authorization request form (PARF) *via* the prescriber portal.

In letters dated May 17 and July 7, 2022, OWCP informed Dr. Steinberg that it had contracted with Optum to serve as the PMB for patients covered by FECA. It informed him that the formulary contained a list of medications, including quantity and generic allowances, that injured employees were eligible to receive under FECA. OWCP advised that the medication, promethazine with codeine, was not covered by the formulary, but would be allowed until December 8, 2022. It provided two alternatives to the medication prescribed by Dr. Steinberg to assist with transitioning appellant from the nonformulary medication currently prescribed. If an appropriate alternative was not available, he would need to complete a PARF *via* the prescriber portal.

OWCP, in final reminder letters dated October 4 and 14, 2022 to appellant and Dr. Steinberg, reiterated the upcoming changes to the drug formulary under FECA as noted in its July 2022 letters.

In a final reminder letter dated October 14, 2022, OWCP again advised appellant and Dr. Steinberg of the upcoming changes to the drug formulary. It noted this was a follow up to letters previously sent.

In a letter dated December 27, 2022, OWCP informed appellant that it had recently implemented its PBM, which listed the medications covered by FECA and included additional prescribing and dispensing guidelines for pharmacies and prescribers. It advised that all prescriptions were required to comply with FECA's formulary by December 9, 2022. OWCP noted that appellant and her prescriber had received notification from the PBM that her medication was not covered by the formulary, and that if there was no appropriate alternative available and/or there was a clinical need to continue with the nonformulary medication, her prescriber must complete a PARF *via* the Optum prescriber portal. It noted that she was currently receiving promethazine with codeine, a medication falling outside formulary allowances, which was last filled on September 2, 2022. OWCP advised appellant that while the medication currently prescribed would be covered until March 8, 2023, that this letter was a final notice to allow time for her prescriber to safely transition to an alternative on formulary medication or submit a PARF to Optum for consideration.

A memorandum to the file dated January 18, 2023 noted that effective December 9, 2022 all prescriptions had to comply with FECA's formulary by December 9, 2022 as outlined in FECA Bulletin No. 22-02. It noted that all parties were advised that by December 8, 2022 they must transition to a medication covered by the drug formulary or the provider could submit a PARF if there were no appropriate alternatives available and/or a clinical need to continue with the nonformulary medication. As appellant continued to receive the nonformulary medication, and no PARF had been received, OWCP indicated that authorization for the medication would not cease on December 9, 2022, as previously advised, to ensure appellant had adequate time to safely transition to an alternative medication on the drug formulary. It noted that a decision would be issued on appellant's continued entitlement to the medication referenced upon completion of any additional development, due process, and clinical intervention deemed necessary.

By decision dated February 3, 2023, OWCP denied authorization for promethazine, with codeine, effective March 9, 2023, finding that it was not covered by the FECA Drug Formulary effective November 23, 2021, and that all prescriptions were required to comply with FECA's formulary by December 9, 2022. It noted that by letter dated December 27, 2022 appellant had been advised that the medication was outside the drug formulary, would be allowed until March 8, 2023. OWCP further found the evidence of record was insufficient to establish that the medication was medically necessary to address the effects of her accepted condition under FECA.

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 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.⁴ While OWCP is obligated to pay for treatment of employment-related conditions, the employee

³ *Id.*

⁴ *Id.* § 8103(a); *see O.M.*, Docket No. 21-1383 (issued March 1, 2023); *R.B.*, Docket No. 21-0598 (issued May 19, 2022); *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *Thomas W. Stevens*, 50 ECAB 288 (1999).

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 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.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

FECA Bulletin No. 22-02, issued November 23, 2021, noted that in accordance with 5 U.S.C. § 8103 and 20 C.F.R. § 10.809, OWCP had contracted with Optum to serve as FECA's PBM for claimants covered under the FECA. OWCP advised that pursuant to FECA Bulletin No. 21-07, issued March 9, 2021,⁹ that all FECA claimants are now required to use the FECA PBM for prescribed drugs. However, claimants with a prescription with a corresponding date of service after December 9, 2021 for a medication that the claimant has taken in the past six months for their accepted work injury, were considered legacy prescriptions. Claims for legacy prescriptions for the accepted work-related injury would continue to be paid regardless of whether the medication is or is not on the formulary for the period December 9, 2021 thru December 8, 2022. After December 8, 2022, if a legacy prescription had not been switched to a formulary alternative or the legacy claimant's prescriber had not submitted a prior authorization request by December 8, 2022, requests to refill the legacy prescription would be denied at the pharmacy unless extenuating circumstances are present.¹⁰

ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying authorization for a prescription for promethazine with codeine.

In letters dated May 5, 17, October 14, and December 27, 2022, OWCP informed appellant that it was implementing a drug formulary through the PBM, Optum which listed medications

⁵ *R.B., id.; J.M.*, Docket No. 20-0396 (issued April 9, 2020); *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

⁶ *O.M., supra* note 4; *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).

⁷ *R.B. supra* note 5; *P.L.*, Docket No. 18-0260 (issued April 14, 2020).

⁸ *R.B., id.; J.M., supra* note 6; *C.S.*, Docket No. 19-0516 (issued August 15, 2019).

⁹ FECA Bulletin No. 21-07 (issued March 9, 2021).

¹⁰ FECA Bulletin No. 22-02 (issued November 23, 2021).

covered by FECA and including additional prescribing and dispensing guideline for prescribers and pharmacies. In correspondence dated May 17, July 7, October 4, and 14, 2022, it informed Dr. Steinberg that the medication he prescribed, promethazine with codeine, was not covered by FECA drug formulary, and was advised to submit a PARF through the prescriber portal to request authorization for continued use. Dr. Steinberg did not submit a PARF requesting authorization for continued use of the noncovered medication, promethazine with codeine.

As noted, FECA Bulletin No. 22-02 implemented new FECA prescription management policies requiring that all prescriptions must comply with FECA's drug formulary by December 2, 2022. Although both, appellant and her physician, Dr. Steinberg, received multiple letters notifying them of this requirement, the record contains no evidence that Dr. Steinberg submitted a PARF through the Optum prescriber port. Thus, OWCP properly denied authorization for the prescription for promethazine with codeine.

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 did not abuse its discretion in denying authorization for a prescription for promethazine with codeine.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2023
Washington, DC

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

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

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