

File Number:  
HR11-D-H

RECEIVED OCT 04 2019

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 50  
LONDON, KY 40742-8300  
Phone: (202) 693-0045

Date of Injury:  
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL FELSER  
7393 HODGSON MEMORIAL DR  
STE 102  
SAVANNAH, GA 31406

*If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.*

Washington DC, September 30, 2019

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

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DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of \_\_\_\_\_  
, Claimant; Employed by the \_\_\_\_\_ ; Case number \_\_\_\_\_

*Merit Consideration of the case file was completed on \_\_\_\_\_ Based on the review, the decision of the district office dated June 19, 2019 is set aside for the reasons set forth below.*

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The issue for determination is whether the Office abused its discretion in denying authorization for additional massage therapy.

\_\_\_\_\_ born \_\_\_\_\_ is employed as a \_\_\_\_\_ with \_\_\_\_\_. She filed Form CA-1 for a Traumatic Injury alleged to have occurred on \_\_\_\_\_. The electronic record reflects acceptance of disturbance of skin sensation, brachial plexus lesions, intervertebral disc disorder with myelopathy, thoracic region, and degeneration of cervical intervertebral disc. Appropriate medical and wage loss benefits have been paid.

According to the evidence of record, the claimant has been under the care of \_\_\_\_\_, M.D. of \_\_\_\_\_ Chronic Pain Services. Treatment rendered has included therapeutic exercises such as massage therapy. The evidence of record reflects that Ms. \_\_\_\_\_ has been receiving such therapy fairly regularly since \_\_\_\_\_.

According to the evidence of record, massage therapy had last been authorized through \_\_\_\_\_. It appears that the claimant may have switched to another provider at some point and that particular therapist was not registered with the Office's third party bill pay provider. Therefore, the claimant began paying for treatment out of pocket and requesting reimbursement.

The Office ultimately determined that further development was required relative to the claimant's ongoing massage therapy treatments. In a letter of \_\_\_\_\_ Ms. \_\_\_\_\_ was advised that she would be reimbursed for expenses incurred as a result of massage therapy. However, on this same date the Office referred her for a second opinion evaluation to assess continuing injury related residuals. One of the questions posed to the examiner pertained to massage therapy which the claimant had received near continuously since \_\_\_\_\_. Therefore, the examiner was to address whether continued therapy was indicated. In addition to the second opinion referral, the Office also wrote to Dr. \_\_\_\_\_ requesting an opinion relative to ongoing residuals of the work injury. This included questions regarding continued massage therapy.

On \_\_\_\_\_ the Office received Dr. \_\_\_\_\_ response to the above noted correspondence. He stated that massage therapy was indicated for pain control. He also noted that Ms. \_\_\_\_\_ was considering surgical options. A separate note dated \_\_\_\_\_ was also received from Dr. \_\_\_\_\_. He described the claimant's ongoing symptoms which included bilateral

upper extremity radicular complaints. He noted that the claimant had been at MMI for years but she required maintenance treatment including medication and massage therapy. He stated that massage therapy had been shown to provide pain relief, increase blood flow, decrease inflammation and lessen the need for pain medication. She was attending therapy 2 to 3 times per week which was appropriate.

The claimant was ultimately seen for a second opinion evaluation which took place on [redacted] with board certified orthopedist [redacted] M.D. It was his opinion that the claimant continued to suffer residuals of the work injury. He explained that massage therapy could promote decreased inflammation and increased blood/lymphatic flow. The benefit of this was decreased muscle pain. However, Dr. [redacted] explained that this should be employed on an as needed basis and should *not be expected on a continuous basis*. He went on to state, "Massage therapy may be indicated on an ongoing basis depending on symptomatology but it would not be expected to be a permanent ongoing regular basis. She could have intermittent treatment 2 to 3 times a week up to 4 to 6 weeks at a time. This would be expected to be no more than 2 to 3 times a year." He stated that treatment would be pain management as currently employed along with "episodic physical therapy and massage therapy for symptoms flare." He also stated that the claimant should be encouraged to participate in a home exercise program to minimize flares.

Following the second opinion exam, the claimant continued to submit treatment notes from Massage Envy relative to ongoing care.

The Office wrote to Dr. [redacted] on [redacted] and he was supplied with a copy of the second opinion report from Dr. [redacted]. He was asked to comment on the opinion rendered therein and provide further justification to support the need for ongoing massage therapy.

In a letter of [redacted] the claimant was advised that a letter had been sent to Dr. [redacted] on [redacted] and that no further massage therapy would be authorized while the issue was under development.

A letter dated [redacted] was received from Dr. [redacted]. He stated that the claimant's physical condition and pain control had been maintained by massage therapy. He stated that unlike physical therapy, massage therapy can not be taught to be performed on oneself. He stated, "Physical therapy is typically seen as something that the patient can carry forward and continue at home after having been given instruction by the physical therapist. This is not the case with massage therapy." However, Dr. [redacted] did state that a physical therapy referral would be indicated so that the claimant could be instructed on home therapy. He recommended that she do this 2 to 3 times per week, for 6 weeks. He recommended that she return at the end of a 6 week session to be evaluated as to the effectiveness of the therapy program.

On [redacted] the Office referred the case to the District Medical Advisor for review. A response dated [redacted] was received from [redacted] M.D. It was his opinion that the proposed continued massage therapy was not related to the accepted conditions on the case and there was no indication that there was an ongoing muscular injury. Dr. [redacted] reviewed the opinion of Dr. [redacted] and he agreed with the assessment that individuals can not perform self-massage on themselves. However, he stated that current medical evidence did not support that this therapy was an effective and efficacious treatment for chronic lumbar and cervical spine pain. He went on to explain, "At this time, the claimant is receiving massage therapy for chronic pain. However, that is not an accepted condition. There is no evidence of a muscular injury, which is what massage can treat. Her accepted conditions of disc disorder are not treated effectively by massage." Dr. [redacted] further noted that there had been no objective progress in the claimant's functional abilities and the

requested treatments were palliative and not curative in nature. He maintained that there was no indication for ongoing therapy.

On [redacted] the Office issued a decision formally denying authorization for massage therapy. The Office stated that the evidence failed to support that the requested supervised treatment modality was medically necessary to address the effects of the work related injury or condition under the FECA. The weight of medical evidence was afforded to Dr. [redacted].

The claimant disagreed with this decision and an oral hearing was requested. In accordance with this request, I have conducted an initial review of the file and find that the case is not in posture for a hearing at this time.

The decision of the District Office dated [redacted] be *SET ASIDE* and the case file *REMANDED* for further development.

Section 8103 of FECA 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 the monthly compensation.<sup>1</sup>

In interpreting section 8103, the Board has recognized that OWCP has broad discretion in approving services provided under FECA. 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. OWCP, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.<sup>2</sup> 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.<sup>3</sup> While OWCP is obligated to pay for treatment of 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.<sup>4</sup>

The issue on appeal is whether the Office abused its discretion in denying authorization for additional massage therapy.

On review, I find that the Office's [redacted] decision was premature as further medical development is indicated to assess the need for continued massage therapy treatments. Specifically, I find that there is an unresolved conflict between second opinion examiner Dr. [redacted] and attending physician Dr. [redacted].

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>5</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>6</sup>

<sup>1</sup> 5 U.S.C. § 8103(a).

<sup>2</sup> *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

<sup>3</sup> *See Debra S. King*, 44 ECAB 203 (1992).

<sup>4</sup> *Kennett O. Collins, Jr.*, 55 ECAB 648, 654 (2004).

<sup>5</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321 (2012); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>6</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.<sup>7</sup>

Chapter 2-0808 (6)(g) of the FECA Procedure Manual dictates that if after reviewing the reports it is determined a conflict of medical opinion exists between the DMA and the claimant's physician or second opinion physician regarding work-related impairment, the CE should refer the claimant for an independent medical examination with a referee examiner to resolve the conflict.

The Employees' Compensation Appeals Board has stated that an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning.<sup>8</sup>

As outlined above, Ms. [redacted] was seen by second opinion examiner Dr. [redacted] on [redacted]. He opined that she continued to suffer residuals of the work injury. He proceeded to describe the benefits of massage therapy. However, he explained that this treatment should be employed on an "as needed basis" and should *not* be expected on a continuous basis. He went on to state, "Massage therapy may be indicated on an ongoing basis depending on symptomatology but it would not be expected to be a permanent ongoing regular basis. She could have intermittent treatment 2 to 3 times a week up to 4 to 6 weeks at a time." However, he stated that this would be expected to be *no more* than 2 to 3 times a year.

In contrast, Dr. [redacted] maintained that the claimant required regular massage therapy. He addressed the functional benefits this provided relative to the work injury and why it needs to continue. In report of Dr. [redacted] argued that massage therapy was required for pain control. In separate correspondence dated [redacted] he noted that the claimant had been at MMI for years but she required maintenance treatment including medication and massage therapy. He explained that massage therapy had been shown to provide pain relief, increase blood flow, and decreased inflammation. Additionally, it lessened the need for pain medication. He indicated that she was attending therapy 2 to 3 times per week which he maintained was appropriate. In a follow-up report of Dr. [redacted] again stated that the claimant's physical condition and pain control had been maintained by massage therapy. He further stated that unlike physical therapy, massage therapy could not be performed on oneself.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>9</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.<sup>10</sup>

Upon return of the case file, the District Office must update the Statement of Accepted Facts as necessary and refer the claimant for an impartial examination to resolve the conflict identified between attending physician Dr. [redacted] and second opinion examiner Dr. [redacted]. The conflict pertains to the need for ongoing massage therapy. The examiner should be advised that Ms. [redacted] has been receiving massage therapy on a regular basis since approximately [redacted]. He must be asked to address whether continued therapy is medically indicated and necessary secondary to the work injury and effects thereof. If yes, he/she must address the diagnosis for which the therapy is indicated. The examiner must also address the benefit of extended massage therapy

<sup>7</sup> (Gary R. Sieber, 46 ECAB 215, 225 (1994)).

<sup>8</sup> (James F. Roberts, 31 ECAB 1010).

<sup>9</sup>See Vanessa Young, 55 ECAB 575 (2004).

<sup>10</sup>See Richard E. Simpson, 55 ECAB 490 (2004).

and the therapeutic goals to be achieved. Additionally, he/she must discuss the functional deficits to be treated, including a description of how these affect the claimant's physical activities. The specific functional goals of additional massage therapy should be indicated as well as the expected duration and frequency of treatment. The examiner should also indicate whether the claimant is a candidate for a program of self-directed home therapy or an alternative form of treatment. If so, he/she must provide an explanation of the recommendations. Medical rationale must be provided to support the opinions rendered. The impartial examiner must be sure to address the opinions of Dr. and Dr. and address any/all points of disagreement. Upon receipt and review, the Office should take any further development action deemed necessary and issue a *de novo* decision addressing the claimant's request for medical treatment.

Consistent with the above findings, the decision of the district office dated is hereby set aside and **remanded** for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs

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