



result of repetitive factors of his federal employment including sorting, casing, lifting, and delivering mail. He noted that he first became aware of his condition on May 5, 2009 and its relationship to his federal employment on July 23, 2009.<sup>2</sup> On September 29, 2009 OWCP accepted the claim for cervical and left shoulder sprains. It subsequently authorized massage therapy treatment for appellant's left shoulder, cervical spine, bilateral arm, and upper back conditions commencing March 2, 2011.

On October 23, 2012 OWCP expanded the acceptance of appellant's claim to include left shoulder impingement syndrome, left superior labrum anterior and posterior (SLAP) lesion, left biceps tendinitis, and aggravation of cervical stenosis and cervical degenerative disc disease.

OWCP subsequently authorized continued massage therapy treatment commencing September 3, 2012.

In outpatient progress notes dated May 4, August 4, and December 1, 2020, Dr. Jack L. Rook, an attending Board-certified physiatrist, noted that he performed follow-up evaluations of appellant's neck and left shoulder work-related conditions every three to four months. He related that appellant had no maintenance massage therapy for two months due to the coronavirus pandemic, but that he had resumed treatment once per week and was feeling better.

In prescription notes dated August 5, 2020, and January 15, 2021, Dr. Rook ordered massage therapy.

In a development letter dated January 27, 2021, OWCP listed appellant's accepted conditions, and informed appellant of the deficiencies of his request for massage therapy. It noted that while massage therapy had been furnished for an extended period, it had not resulted in the anticipated increased function or decreased level of disability. OWCP requested that appellant submit a report containing a rationalized medical opinion that explained, *inter alia*, the need for prolonged or intensive treatment of his accepted conditions. It afforded him 30 days to respond.

OWCP subsequently received medical evidence, including medical records from Dr. Rook. In prescription notes dated October 10, 2021, and January 3, March 13 and 29, and June 22, 2022, Dr. Rook continued to order massage therapy.

In outpatient progress notes dated February 24, May 18, August 26, and December 16, 2021, and April 14, 2022, Dr. Rook addressed the need for maintenance massage therapy to treat appellant's neck and left shoulder conditions. In the February 24, 2021 outpatient progress note, he specifically responded to OWCP's January 27, 2021 development letter. Dr. Rook noted that appellant continued to suffer from left shoulder and neck problems. He reported that a left shoulder magnetic resonance imaging (MRI) scan demonstrated a rotator cuff tear. Dr. Rook further reported that a cervical MRI scan demonstrated severe spinal stenosis at the C5-6 level associated with severe foraminal narrowing; a thecal sac at the C5-6 level which narrowed to 6.3 millimeters (mm); and a thecal sac at C6-7 which narrowed to 7.4 mm. On physical examination, he observed a palpable spasm of the left-sided paracervical muscles extending to the left upper trapezius. These muscles were soft and non-tender on the right side. There was diminished left shoulder active

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<sup>2</sup> Appellant retired from the employing establishment in 2012.

range of motion compared to the right shoulder. Dr. Rook indicated that appellant required prolonged maintenance massage therapy once per week to help control the muscle spasm in his left-sided neck and left shoulder region, which was perpetuated by the underlying abnormalities in his cervical spine and left shoulder that were identified on MRI scans. He advised that the muscle spasm caused additional discomfort on top of the orthopedic abnormalities, which impaired appellant's function. Dr. Rook indicated that after each massage treatment appellant had almost one week of clinical improvement with an overall decrease in his muscle spasm, which resulted in improved function in his performance of upper extremity activities. He related that appellant had difficulty performing chores such as, shoveling snow, mowing the lawn, lower extremity dressing, and driving due to neck stiffness which made it difficult to look side to side and created a potential safety issue. Dr. Rook advised that continued massage therapy was necessary due to the underlying objective pathology in appellant's cervical spine and left shoulder joint problems associated with his employment injury. He advised that these problems were not expected to spontaneously improve over time. Therefore, Dr. Rook maintained that there was no termination date for the required maintenance treatment. Additionally, he related that surgical intervention was possible if appellant's condition was not adequately controlled. Dr. Rook concluded that maintenance massage therapy once per week was reasonable and medically necessary to cure and relieve symptoms related to appellant's work-related injury.

On July 20, 2022 Dr. Jack L. Miller, a Board-certified physiatrist serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and the medical record, including Dr. Rook's February 24, 2021 outpatient progress note. The DMA disagreed with Dr. Rook's opinion on massage therapy. He explained that with the exception of his February 24, 2021 report, Dr. Rook's opinion was based on subjective findings without objective validation. The DMA noted that Dr. Rook did not document a physical examination of symptomatic areas of the neck and left shoulder. He further explained that the MRI scan results referenced by Dr. Rook did not contain a date. The DMA maintained that, generally passive treatment such as, massage, was therapeutic exercise. He concluded that appellant would be better served by a therapeutic home exercise program.

In additional outpatient progress notes dated August 11, 2022, Dr. Rook reiterated examination findings and opinion on maintenance massage therapy from his prior outpatient progress notes. He maintained that such treatment was reasonable and medically necessary to cure and relieve symptoms associated with appellant's accepted employment injury.

OWCP, by decision dated August 22, 2022, denied appellant's request for authorization for maintenance massage therapy, finding that the medical evidence of record was insufficient to establish that the requested therapy was necessary to treat the effects of the work-related conditions.

### **LEGAL PRECEDENT**

Section 8103(a) of FECA<sup>3</sup> 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

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<sup>3</sup> *Id.* at § 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.<sup>4</sup> 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.<sup>5</sup>

Section 10.310(a) of OWCP's implementing regulations provide that an employee is entitled to receive all medical services, appliances, or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

Abuse of discretion is 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.<sup>9</sup>

FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>10</sup> For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>11</sup>

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<sup>4</sup> *Id.*; see *D.S.*, Docket No. 18-0353 (issued May 18, 2020); *L.D.*, 59 ECAB 648 (2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>5</sup> *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

<sup>6</sup> 20 C.F.R. § 10.310(a); see *D.W.*, Docket No. 19-0402 (issued November 13, 2019).

<sup>7</sup> *B.I.*, Docket No. 18-0988 (issued March 13, 2020); 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).

<sup>8</sup> *D.S.*, *supra* note 4.

<sup>9</sup> *Id.*; *P.L.*, Docket No. 18-0260 (issued April 14, 2020); *D.S.*, *supra* note 4; *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*, *supra* note 7.

<sup>10</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *L.C.*, Docket No. 20-866 (issued February 26, 2021); *B.I.*, *supra* note 7; *Shirley L. Steib*, 46 ECAB 309 (1994).

<sup>11</sup> *L.C.*, *id.*; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

### ANALYSIS

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

OWCP accepted appellant's occupational disease claim for cervical and left shoulder sprains, left shoulder impingement syndrome, left SLAP lesion, left biceps tendinitis, and aggravation of cervical stenosis and cervical degenerative disc disease. It authorized massage therapy treatment for appellant's left shoulder, cervical, arms, and upper back conditions commencing March 2, 2011.

Appellant's treating physician, Dr. Rook, thereafter, sought authorization for continued maintenance massage therapy to treat appellant's accepted left shoulder and neck conditions. He explained in a February 24, 2021 outpatient progress note that the requested therapy was supported by his physical examination findings and MRI scan results. Dr. Rook noted that after each massage therapy treatment appellant previously received, he had nearly one week of clinical improvement with an overall decrease in muscle spasm in his left shoulder and neck, which improved his ability to perform upper extremity activities. He noted that there was no end date for the requested therapy as appellant's conditions were not expected to spontaneously improve over time. Dr. Rook opined that the requested massage therapy treatment was reasonable and medically necessary to cure and relieve the accepted left shoulder and neck conditions.

By contrast, Dr. Miller, OWCP's DMA, opined in a July 20, 2022 report, that the requested massage therapy was not medically necessary. He reasoned that while Dr. Rook noted appellant's subjective complaints, the physician did not provide objective medical findings to support his opinion on massage therapy. The DMA recommended a therapeutic home exercise program which would better treat appellant's accepted neck and left shoulder conditions.

As Dr. Miller, OWCP's DMA, and Dr. Rook, appellant's attending physician, disagreed as to whether appellant's request for maintenance massage therapy was medically warranted for the treatment of his accepted neck and left shoulder conditions, the Board finds that there is a conflict in the medical opinion evidence. The case must therefore be remanded for referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a). Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 22, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 22, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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