U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAXINE D. MEER and U.S. GOVERNMENT,
Melbourne, FL

Docket No. 97-1925; Submitted on the Record;
Issued November 23, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an attendant's allowance.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

The Office has accepted that appellant, then a 40-year-old office worker, sustained a herniated disc at L5 and low back strain on April 16, 1958 when the floor of the employing establishment collapsed and she fell from a chair. On August 24, 1995 appellant requested that the Office reimburse her attendant's allowance.[1] She explained that she had employed an attendant care giver since May 1, 1995, when her "afternoon aide was discontinued." Appellant listed the services provided by her attendant including, assistance with dressing, daily therapy and exercise; driving to medical and therapy appointments; pharmacy and grocery shopping, cooking and laundry. The Office denied appellant's claim for attendance allowance by decision dated February 29, 1996. The Office denied appellant's claim for attendant allowance on the grounds that appellant's "injury was to the back only, and one of over 38 years ago. As such, [appellant] is not totally incapacitated as to require the constant care of an attendant as provided for under 5 U.S.C. § 8111(a)." The Office denied appellant's request for reconsideration, after merit review, on March 10, 1997.

The Federal Employees' Compensation Act provides at § 8111(a) that an injured employee who has been awarded compensation may be entitled to an attendant allowance, if the services of an attendant are required constantly because the employee is totally blind, has lost the use of both hands or both feet, is paralyzed and unable to walk, or has other disability resulting

[1] This record has been reconstructed and appears to be incomplete. The record indicates that appellant was granted an attendant allowance in 1969 and was also reimbursed for home nursing care. The record does not reflect when or why such reimbursements were terminated.

from the injury which makes the employee so helpless as to require constant attendance for personal needs, such as feeding, dressing or bathing.[2]

On August 25, 1995 Dr. Dale S. Ryon, reported that he had been appellant's treating physician since 1966 and that her "medical problems" had largely been related to her chronic back condition. He noted that appellant had sustained an injury at work in 1958, and that in recent years appellant had developed urinary bladder dysfunction and partial paraplegia due to her back disease. Dr. Ryon explained that appellant's present back disability had been brought about by her original injury in 1958, that she was in continuous pain, and her functional abilities were limited. He also explained that without some home assistance "on a near full-time basis" appellant would need to be placed permanently in a nursing facility, and that her well being would better be served if she could remain at home. In a report dated August 21, 1996, Dr. Ryon further explained that appellant had sustained a severe back injury on April 16, 1958 which was accepted by the Office and for which she was allowed attendant care services because she could not provide for herself. He explained that medically appellant had undergone operations, tests, and procedures, which had resulted in arachnoiditis and further damage to her spine. Dr. Ryon stated that appellant was now "quite helpless" with near paralysis of all four extremities. He concluded that due to the natural progression of her condition, which resulted from her original injury, she was now so helpless that she was in need of constant attendant care. Finally, Dr. Ryon reported that appellant's list of daily or recurring needs was lengthy but included such items as assistance with bathing and dressing, preparing for doctor's appointments and driving to them, meal preparation, obtaining medication and laundry.

Appellant also submitted to the record a magnetic resonance imaging (MRI) scan dated May 20, 1991 which indicated that appellant "appeared to have had bilateral laminectomies at L5-S1." This MRI scan further stated that the facets were hypertrophied, overgrown and bulbous, right greater than left, with some degree of canal stenosis present particularly from the right side, but no recurrent disc herniation noted.

Where the evidence strongly suggests that the claimant may require the services of an attendant or where the claimant inquires about such entitlement, the Office's own procedures require that the claimant complete Form CA-1086, request to employee for information to determine entitlement to attendant allowance and Form CA-1090, and that appellant's treating physician complete a request to physician or hospital for report on need for attendant. Following

[2] 5 U.S.C. § 8111(a).

receipt of this evidence, the Office district medical adviser is to review the record to determine whether the claimant requires the services of an attendant.[3]

The Office did not request that appellant or her physician complete the forms required for a complete assessment for the necessity of an attendant's allowance. On February 26, 1996 the Office did request that the district medical adviser address whether based on the accepted condition of HNP L5 it was necessary for appellant to have an attendant. The Office medical adviser responded that appellant's accepted condition of lumbar HNP L5 appeared to have ceased and therefore appellant did not require an attendant.

The Board finds that as appellant's treating physician did recommend attendant's services for appellant arising from her incapacity caused by her employment-related low back condition, and as the Office medical adviser opined that attendant's services were not necessary because appellant's employment-related condition had resolved, a conflict existed in the medical opinion evidence. 5 U.S.C. § 8123 (a) provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

The Board also notes that the Office in denying appellant's request for attendant services concluded that appellant did not require "constant" care. The Board has previously stated that the Office may pay an attendant's allowance upon finding that a claimant is so helpless that she is in need of constant care. The claimant is not required to need around-the-clock care. She only has to have a continually recurring need for assistance in personal matters. The attendant's allowance, however, is not intended to pay an attendant for performance of domestic and housekeeping chores such as cooking, cleaning, doing the laundry or providing transportation services. It is intended to pay an attendant for assisting a claimant in her personal needs such as dressing, bathing or using the toilet.[4] In this case, appellant has alleged that she requires help with dressing and bathing, which would be duties properly within the realm of an attendant, as well as with domestic chores which would not be properly within an attendant's allowable duties.

On remand the Office should refer appellant to an impartial medical specialist and an opinion regarding appellant's medical need for an attendant allowance. The Office, if necessary, shall also clarify the number of hours per day attendant's services are required. After such further development as necessary the Office shall issue a *de novo* decision.

[3] Federal (FECA) Procedure Manual, Chapter 2.812.8, Periodic Review of Disability Cases, Part 2 -- Claims, July 1993. The factors to be considered in evaluating entitlement to attendant's allowance are as follows: "(a) The particular kinds of activities for which assistance is needed. (The assistance must be for personal needs such as bathing or dressing, not for such tasks as cooking or housekeeping.) (b) The need for daily assistance in these activities. (c) The nature of the disability. (d) The amount which the claimant pays the attendant, or the reasonable value of the actual assistance rendered by the attendant. (e) Any other facts which may be relevant to the situation."

[4] *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

The decision of the Office of Workers' Compensation Programs dated March 10, 1997 is hereby set aside and this case is remanded to the Office for further development.

Dated, Washington, D.C.
November 23, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member