U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. JOHNSON and ARCHITECT OF THE CAPITOL, HUMAN RESOURCES MANAGMENT DIVISION, Washington, DC

Docket No. 98-1013; Submitted on the Record;
Issued September 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was only entitled to an attendant's allowance for the period May 30 to July 15, 1997.

In the present case, appellant filed a claim for an injury on February 11, 1997 as a result of tripping and falling over a box of industrial trash bags. The Office accepted the claim for concussion, cervical strain, right shoulder tendon tear and contusion. The Office later accepted the condition of acute pulmonary edema. Appellant began receiving compensation for temporary total disability and was authorized to have right rotator cuff repair surgery. By decision dated January 23, 1998, the Office determined that appellant was entitled to an attendant's allowance for the period May 30 to July 15, 1997.

The Board has reviewed the record and finds that this case is not in posture for a decision due to a conflict in the medical opinion evidence.

The Federal Employees' Compensation Act provides for an attendant's allowance under section 8111(a), which provides that the Office may pay an employee who has been awarded compensation an additional sum of not more than $1,500.00 a month when the Office finds "that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from injury making her so helpless as to require constant attendance."[1]

In the present case, appellant argues that she is entitled to an attendant's allowance from February 12, 1997, the first day of the attendant's employment, until her discharge. In a letter

[1] 5 U.S.C. § 8111(a). The attendant's allowance is intended to pay an attendant for assistance in personal needs such as dressing, bathing, or using the toilet; it is not intended to pay an attendant for performance of domestic and housekeeping chores; *see Grant S. Pfeiffer*, 42 ECAB 647 (1991).

dated June 29, 1997, appellant requested an attendant's allowance and noted that her attendant commenced her services on February 12, 1997. In response to an Office request, Dr. Michael J. Magee, an attending Board-certified orthopedic surgeon, indicated on a Form EN1090-0189 dated July 14, 1997 that appellant required assistance for traveling, dressing herself, bathing herself, getting out of bed and taking exercise. Dr. Magee stated that appellant's attendant currently helped her with bathing, dressing, cooking and cleaning.

In a September 10, 1997 report, Dr. Magee, in response to an Office inquiry, stated that appellant required an attendant since February 12, 1997 up to and following her surgery on May 30, 1997. Dr. Magee stated that appellant had decreased range of motion of her shoulder and she was unable to reach behind her back. He opined that her "symptoms make it very difficult for her even to perform her activities of daily living." As of the date of the report, Dr. Magee opined that appellant could perform a light-duty situation.

The Office medical adviser reviewed the medical record and opined that appellant did not require attendant services. The Office referred appellant to Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, for a second opinion, together with a statement of accepted facts, the medical record and questions to be answered, as to whether appellant required attendant services from February 12, 1997.

Dr. Levitt submitted reports to the record dated September 4, September 30 and November 18, 1997. In his September 30, 1997 report, Dr. Levitt specifically addressed the question of attendant's allowance by noting that appellant had sustained a rotator cuff tear injury in February 1997 and that she underwent surgical repair of this condition on May 30, 1997. Dr. Levitt opined that appellant would have required an attendant to assist with activities of daily living for a period of six weeks following her surgery, but would not have required an attendant prior to surgery.

Section 8123(a) of the Act provides that when there is disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[2] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[3]

The Board accordingly finds that there is a conflict in the medical evidence under section 8123(a) between Dr. Levitt, an Office second opinion physician, and Dr. Magee, on when appellant first required the services of an attendant. The Office should refer the relevant factual and medical records to an appropriate specialist for a reasoned opinion as to whether appellant required attendant services from February 12, 1997 and the date she no longer required attendant services. After such further development as the Office deems necessary, it should issue an appropriate decision.

[2] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[3] *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

The decision of the Office of Workers' Compensation Programs dated January 23, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
September 21, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member