U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY V. ABSHER and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

Docket No. 99-1545; Submitted on the Record;
Issued December 7, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reimbursement for purchase of a Jacuzzi on October 12, 1998.

On October 27, 1997 appellant, a 50-year-old postmaster, filed a claim for benefits, alleging that he had sustained a back condition due to factors of his federal employment; *e.g.*, lifting, boxing and distributing mail. The Office accepted appellant's claim for lumbar strain and physical therapy and paid appropriate compensation benefits.

On October 12, 1998 appellant purchased a whirlpool Jacuzzi, at the cost of $2,800.00, to provide hydrotherapy for his employment-related back condition.

In a report dated December 21, 1998, Dr. Charles R. Hall, a Board-certified family practitioner, related his history of treating appellant for his back condition and indicated his support for appellant's purchase of the Jacuzzi. He stated:

> "[Appellant] has a long history of chronic cervical, thoracic and [lumbosacral] strain. He has been treated with physical therapy, osteopathic manipulation, various injections of Dep-Medrol as well as anti-inflammatory medications. Finally, it was felt that whirlpool-type therapy would help [appellant] significantly in the treatment of his chronic back pain and would alleviate the long term cost of having to go to frequent physical therapists and other specialists for treatment and evaluation. In fact, since [he] has started the treatments in his Jacuzzi he has felt tremendously better and this has certainly been the best therapy we could [have] recommended for [him] to start. Please assist [appellant] in obtaining reimbursement for this Jacuzzi whirlpool type machine [as] it has greatly decreased his expense to your company since he no longer has to see as many physicians for the treatment of this back."

By letter dated December 31, 1998, the Office requested that appellant submit a detailed report from his physician which addressed the medical necessity for the Jacuzzi so that it could determine whether the cost was reimbursable or whether the appliance was the least expensive size, model and style suitable for treatment of the work injury. In a response dated January 7, 1999, Dr. Hall recommended the Jacuzzi as the most effective and proven form of treatment to improve appellant's range of motion and lumbar condition. He provided handwritten answers, dated January 7, 1999, in response to specific questions regarding appellant's usage of the requested equipment and to support the medical necessity for the Jacuzzi. Dr. Hall specifically stated that the Jacuzzi was required for routine, daily whirlpool treatments, not to exceed 20 minutes and was needed to provide improved range of motion for appellant's spine. He advised that, through the use of the Jacuzzi, appellant was less likely to injure himself and would miss less time at work. Dr. Hall also advised that the Jacuzzi was by far the best treatment, noting that appellant had already improved his range of motion by 25 percent since he started using it.

In a report dated February 10, 1999, an Office medical adviser recommended that the Office deny reimbursement for the Jacuzzi. He stated:

> "In my opinion, the main therapeutic effect of a Jacuzzi whirlpool is through the [salutary] effects of warm moist heat. This therapeutic component can be just as effectively administered by a warm tub bath. [Office] procedure requires the least expensive measure to be approved that will provide the same beneficial effect. In this instance there is no compelling medical documentation to make one believe that the need and or benefits from the proposed Jacuzzi cannot be obtained from a conventional warm tub bath."

By decision dated February 17, 1999, the Office denied appellant's request for reimbursement for his purchase of the Jacuzzi. The Office found that Dr. Hall's December 21, 1998 report was speculative and unrationalized, lacked objective evidence and failed to explain the necessity for purchasing a $2,800.00 Jacuzzi, when appellant could have purchased a substantially lesser-priced Jacuzzi which could be attached to a bathtub and provide similar treatment.

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

Section 8103 of the Federal Employees' Compensation Act[1] 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 the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[2] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8103.

broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. 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.[3]

The Board finds that there is a conflict in the medical evidence between the opinions of Dr. Hall and the Office medical adviser regarding whether appellant's purchasing of the Jacuzzi was a reasonable and necessary medical expense. As noted above, the only restriction on the Office's authority to authorize medical treatment is one of reasonableness.[4] In this case, the Office accepted that appellant sustained a lumbar strain in the performance of duty and authorized physical therapy for treatment of the accepted condition. On October 12, 1998 he purchased a Jacuzzi whirlpool, which cost $2,800.00, so that he could undergo hydrotherapy for his back condition. At the behest of appellant, Dr. Hall, his treating physician, submitted a December 21, 1998 report which attempted to explain the necessity for such a substantial expenditure for this type of medical equipment. In addition, in his January 7, 1999 responses to the Office's December 31, 1998 questionnaire, Dr. Hall recommended the Jacuzzi as the most effective and proven form of treatment to improve appellant's range of motion and lumbar condition. In a letter received by the Office on December 29, 1998 appellant asserted that as further justification for obtaining the Jacuzzi, there was no health club with a Jacuzzi within 70 miles.[5] The Office medical adviser recommended in his February 10, 1999 report that the Office deny reimbursement for the Jacuzzi, thereby creating a conflict in the medical evidence. He provided no medical substantiation that a Jacuzzi placed in a bathtub would provide a similar type of hydrotherapy for appellant's back in view of the limited space in a normal bathtub considering appellant's height and body weight.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[6] In order to resolve the conflict of medical opinion, the Office should, pursuant to 5 U.S.C. § 8123(a), refer appellant, the case record, a statement of accepted facts to an appropriate, impartial medical specialist or specialists for a reasoned opinion to resolve the aforementioned conflict. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized

[3] *Daniel J. Perea*, 42 ECAB 214 (1990).

[4] *See Francis H. Smith*, 46 ECAB 392 (1995).

[5] In a letter received by the Office on March 10, 1999, appellant asserted that the Jacuzzi was not used for relaxation or enjoyment. He stated that he was engaged in aquatic therapy for six months and contended that he and Dr. Hall had concluded that normal exercise therapy was counterproductive to his recovery. Appellant also alleged that he was able to engage in daily exercises in his Jacuzzi without much pain and asserted that he was unable to perform these exercises in a bathtub.

[6] Section 8123(a) of the Act provides in pertinent part, "[i]f there is a 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

and based upon a proper factual background, is entitled to special weight.[7] After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Office's decision of February 17, 1999 is therefore set aside and the case is remanded to the Office for a *de novo* decision in accordance with this opinion.

Dated, Washington, DC
December 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[7] *Aubrey Belnavis*, 37 ECAB 206 (1985).