U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. CERASALE and DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Yuma, AZ

Docket No. 00-1203; Submitted on the Record;
Issued April 10, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether Office of Workers' Compensation Programs abused its discretion in denying appellant's request for purchase of a whirlpool spa tub; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Office accepted that, on December 4, 1986, appellant, then a 40-year-old firefighter, sustained cervical and lumbosacral strain, internal derangement of the left knee and subluxation at L5 when he slipped on a truck step. Appellant stopped work on March 26, 1989 and was placed on the automatic rolls for temporary total disability.

In a report dated March 24, 1999, Dr. Scott R. Van Wilpe, a chiropractor, recommended a jacuzzi or massage therapy to compliment the chiropractic adjustments appellant received.

On March 24, 1999 Dr. Terry D. Holt, an attending Board-certified family practitioner, prescribed a home whirlpool device with total body immersion. In a subsequent report dated March 31, 1999, Dr. Holt opined that "a home whirlpool device enabling total body immersion" would give relief and be more effective than the medical treatment and physical therapy appellant had been receiving.

In an April 2, 1999 report, Dr. Carol A. Phillips, an attending Board-certified psychiatrist, recommended a whirlpool as therapy for appellant's back pain, which was secondary to his accepted employment injury.

In a May 27, 1999 report, the Office medical adviser concluded that a whirlpool was not necessary as there were "less expensive measures available that produce the same therapeutic effect."

In a report dated August 6, 1999, Dr. Harold H. Chakales, a second opinion Board-certified orthopedic surgeon, concluded that a whirlpool was not necessary. Dr. Chakales opined

that appellant "probably would benefit from either some outpatient physical therapy consisting of hydrotherapy or heat modalities, or the use of a home whirlpool consistently."

In a decision dated October 25, 1999, the Office denied appellant's request for purchase of a whirlpool on the grounds that the evidence failed to support the medical necessity of such spa tub, but authorized massage therapy.[1]

By letter dated December 17, 1999, appellant requested reconsideration of the Office's refusal to authorize the purchase of a home motomassage whirlpool tub. He argued that it would be more cost effective to install the whirlpool tub in his home than to pay for whirlpool therapy.

By nonmerit decision dated January 7, 2000, the Office denied appellant's request for reconsideration.

The Board finds that the case is not in posture for decision because of a conflict in the medical opinion evidence.[2]

Section 8103(a) of the Federal Employees' Compensation Act,[3] 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 Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.[4]

In interpreting section 8103 of the Act, the Board explained in the case of *Daniel J. Perea*,[5] that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services, appliances and supplies provided under the Act. As 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 broad administrative discretion in choosing means to achieve this goal. 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. The only limitation on the Office's authority is that of reasonableness.

A conflict exists in the medical opinion evidence between appellant's treating physicians, Drs. Holt, Phillips and Van Wilpe, who prescribed purchase of a whirlpool spa tub for treatment of appellant's cervical and lumbosacral strain and subluxation at L5, and the Office medical

[1] The Board notes that the Office in a decision dated June 22, 1993 denied authorization for a moto-massage whirlpool spa. By letter dated August 27, 1997, the Office authorized the purchase of a portable whirlpool that would fit in appellant's tub and stated that no authorization would be given for the installation of a permanent whirlpool.

[2] *See generally Elizabeth J. Davis-Wright*, 39 ECAB 1232 (1988).

[3] 5 U.S.C. § 8103(a).

[4] 20 C.F.R. § 10.310(a) (1999); *Lisa DeLindsay*, 51 ECAB ____ (Docket No. 99-1769, issued August 24, 2000).

[5] 42 ECAB 214 (1990).

advisor and the Office's second opinion physician, Dr. Chakales, who opined that appellant does not require a whirlpool spa.

Section 8123 of the Act 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.[6] Accordingly, the case will be remanded to the Office for resolution of the conflict. On remand, the Office should refer appellant, along with a statement of accepted facts and the medical records, to an appropriate specialist for an impartial medical examination and report as to whether a whirlpool spa tub is appropriate in the present case. After such further development as the Office deems necessary, it should issue an appropriate decision.[7]

The decisions of the Office of Workers' Compensation Programs dated January 7, 2000 and October 25, 1999 are hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
April 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[6] 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).

[7] Due to the disposition of this issue, the Board finds that it is not necessary to consider the issue of whether the Office abused its discretion in refusing to reopen appellant's claim for review of the merits.