

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL W. DOMBROWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Olympia, WA

*Docket No. 99-200; Submitted on the Record;
Issued January 12, 2001*

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 determined appellant's entitlement to an attendant's allowance.

On April 28, 1993 appellant, then a 41-year-old letter carrier, sustained injury while in the performance of duty resulting in a right shoulder dislocation with multi-directional instability of the right shoulder. Appellant received continuation of pay and appropriate compensation for total disability until his return to light-duty work on April 29, 1995. The Office authorized surgical procedures to appellant's right shoulder on July 2 and August 17, 1993, April 4 and October 5, 1994, May 13 and September 3, 1996, January 28 and April 1, 1997, and May 26, 1998. By decision dated July 13, 1995, the Office found that appellant's wage-earning capacity was fairly and reasonably represented by his actual earnings as a general clerk.¹

By letter dated August 13, 1996, appellant inquired into receipt of payment for the services of an attendant, prospectively to help him wash, prepare meals, cut his food and dress himself and to claim 18 months of past attendant benefits. Appellant enclosed a listing of his shoulder surgical and reconstruction reports and provided an estimate of the hours an attendant's care was required. Appellant also submitted the September 3, 1996 report of Dr. Charles S. Paxon, his attending physician, addressing appellant's recurrent shoulder dislocations and surgeries. He opined that appellant would benefit from help in the home.

The Office requested additional information from appellant and Dr. Paxon on the request for an attendant's allowance. On March 4, 1997 appellant listed his daughters and ex-wife as having provided attendant care, indicating that he paid the attendant a wage of approximately \$1,700.00 a month. He indicated that of this amount, room and board would come to \$750.00 a

¹ This decision was not appealed to the Board and is not at issue in the present appeal. See 20 C.F.R. § 501.2(c).

month. Appellant noted that the approximate time attendant care was required as about six hours a day. He listed his reasons for requiring the services of an attendant, as: "To help me wash, eat, get up, get dressed, to help me remember when to take my medications (when you are on pain [p]ills your memory fades), to help me get undressed and other things along this line."

In an April 18, 1997 report, Dr. Douglas T. Harryman, II, an attending physician, noted that appellant had undergone a recent revision arthroplasty and, as a single parent, was in need of additional assistance for activities of daily living in managing his own care and for his children. He recommended approval of attendant care.

By letters dated May 27 and June 10, 1997, the Office requested Dr. Paxon to verify the beginning and ending dates that appellant required attendant care for feeding, traveling, dressing and bathing from April 23, 1993 onward. Dr. Paxon was requested to explain why appellant listed more than one hour each for feeding or using the bathroom and why it took more than one and one-half hours to dress and undress. In a July 16, 1997 response, Dr. Paxon noted that he was resubmitting a schedule of hours as compiled by appellant with annotations for the surgical operation that occurred. He indicated that appellant listed long bathing times, due in part to a perspiration dysfunction present for several years which he termed as dramatic and for which appellant bathed more than twice daily. He stated that appellant also had a "plethora" of orthopedic disorders besides his right shoulder condition that caused him to use the bathtub like a Jacuzzi for heat and soaking. Dr. Paxon noted that, while the long time for other listed activities did appear excessive, he noted that appellant's right shoulder remained dysfunctional after numerous surgical procedures. He noted that appellant had trouble walking due to give way and sprains of the left knee and a hamstring tendon removal from the right knee. Dr. Paxon concluded by stating: "If the times and hours are excessive, renumerate him for what the law allows. I do not think it is fruitful for either me or him to keep revisiting our requests."

By decision dated September 10, 1997, the Office approved payment of an attendant's allowance for a total of 136 hours between April 28, 1993 and April 7, 1997.

Appellant requested a hearing before an Office hearing representative, which was held on July 22, 1998.

By decision dated September 11, 1998, an Office hearing representative reviewed the medical reports of Dr. Paxon, noting that the physician indicated that the time appellant estimated for certain daily activities was excessive. The hearing representative stated that the Office discounted the long hours itemized for each daily activity, allowing one hour for bathing, one hour for feeding, one-half hour for dressing and one-half hour for use of the bathroom for a total of three hours per approved day. Based on this allowance, appellant was found entitled to an attendant's allowance of 136 hours in the amount of \$748.00. The hearing representative modified the Office's attendant's allowance, directing that appellant be granted an additional hour for bathing for a total of four hours per day.

The Board finds that the Office did not abuse its discretion in determining appellant's entitlement to an attendant's allowance.

The Federal Employees' Compensation Act provides for an attendant's allowance under section 8111(a), which states:

"The Secretary of Labor may pay an employee who has been awarded compensation an additional sum of not more than \$1,500.00 a month, as the Secretary considers necessary, when the Secretary 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 feet, or is paralyzed and unable to walk, or because of other disability resulting from injury making him so helpless as to require constant attendance."²

Under this provision, the Office may pay an attendant's allowance upon finding that a claimant is so helpless that he or she is in need of constant care.³ A claimant is not required to need around-the-clock care, but only has to have a continually recurring need for assistance in personal matters. An attendant's allowance, however, is not intended to pay an attendant for performing domestic and housekeeping chores such as cooking, cleaning, doing the laundry or providing transportation services. It is intended to pay an attendant for assisting the claimant in personal needs, such as dressing, bathing or using the toilet.⁴ In requesting an attendant's allowance, the claimant bears the burden of proof in establishing by competent medical evidence that he or she needs attendant care within the meaning of the Act.⁵ An attendant's allowance is not granted simply upon request of a disabled employee or upon request of the employee's physicians. The need for attendant care must be established through rationalized medical opinion evidence.⁶ The Office, in turn, may pay up to \$1,500.00 a month for full-time services, but it is not required to pay the maximum amount if not found to be necessary. It need only pay as much as it finds under the particular facts of a case necessary and reasonable for an attendant's services.⁷

In this case, appellant sustained injury to his right shoulder on April 28, 1993 resulting in a dislocation and multiple surgeries and resections of the right shoulder joint. To support his request for an attendant's allowance, appellant provided a statement in which he estimated the amount of time required for care from individuals, including his daughters and ex-wife, to consist of approximately six hours a day. The Board notes that the Office specifically requested that Dr. Paxon, appellant's attending physician, review his medical records and comment regarding the necessity of an attendant's allowance; if determined to be necessary, the date an attendant was first required; and the hours of daily care required. Dr. Paxon was requested to comment on the hours of estimated attendant care listed by appellant.

² 5 U.S.C. § 8111(a). While originally providing an attendant's allowance of \$500.00, the maximum amount permitted under the statute was increased to \$1,500.00. See Pub.L. 101-534, effective October 1, 1990.

³ See *Bonnie M. Schreiber*, 46 ECAB 989 (1995); *Grant S. Pfeiffer*, 42 ECAB 647 (1991).

⁴ *Id.*

⁵ See *Cynthia S. Snipes (Edward S. Snipes)*, 33 ECAB 379, 383 (1981).

⁶ See *Kenneth Williams*, 32 ECAB 1829, 1832 (1981).

⁷ See *Grant S. Pfeiffer*, *supra* note 3 at 652; see also *George L. Littleton*, 33 ECAB 904 (1982).

In a report of July 16, 1997, Dr. Paxon noted his concurrence that attendant care was necessary for residuals of appellant's right shoulder condition, providing a review of the surgical procedures performed. However, he was not fully responsive to the Office's request as to the number of hours required for attendant care and how such care pertained to the accepted right shoulder condition. Dr. Paxon noted that appellant had listed long bathing times, but noted that such was due to a nonemployment-related perspiration dysfunction and to a "plethora" of other orthopedic conditions besides those pertaining to the accepted right shoulder employment injury for which appellant soaked in heated water. He acknowledged that the six hours per day appellant provided in listed daily activities appeared excessive but did not provide any independent assessment or estimate of the time required for necessary attendant care to assist in dressing, bathing or using the toilet.

The Board finds, after review of appellant's statement and the medical evidence of record, that the Office properly allowed four hours a day of attendant care from April 23, 1993 to April 7, 1997 for 136 hours. As the Office is only required to pay an attendant as much as it finds reasonable and necessary, the Office did not err in authorizing the attendant's allowance for two hours of bathing, one hour for feeding, and one-half hour respectively for dressing and using the toilet. Appellant has failed to submit any evidence to establish that he is entitled to a greater attendant's allowance than that he has received.

The September 11, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member