

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EUGENE A. GRAY and DEPARTMENT OF DEFENSE,  
DEFENSE COMMISSARY AGENCY, Fort Lee, VA

*Docket No. 99-1408; Oral Argument Held April 10, 2002; Submitted on the Record;  
Issued April 26, 2002*

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Appearances: *Eugene A. Gray*, for appellant; *Julia Mankata, Esq.*, for the  
Director, Office of Workers' Compensation.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to an attendant's allowance from October 31, 1993 through October 31, 1994, as a result of the October 31, 1993 employment injury; and (2) whether appellant established that he sustained an injury in the performance of duty on February 28, 1997.

The Office of Workers' Compensation Programs accepted appellant's claim for acute cervical and lumbar strains, concussion and traumatic brain injury resulting from an October 31, 1993 employment injury.

By letter dated May 31 and August 15, 1997, appellant requested an attendant's allowance for the services of Carmelita Garmon his companion for the period October 31, 1993 through October 15, 1994. He claimed that during this time period he required Ms. Garmon's services for dressing, bathing, getting out of bed, walking, transportation to his doctor's office, physical therapy and the hospital, taking his medication, cooking, cleaning laundry, cutting his grass, maintaining his house, walking and exercising. Appellant stated that he returned to work part time April 19 through September 1994 but still required Ms. Garmon's services during that time period.

In a report dated April 21, 1994, Dr. David X. Cifu, a Board-certified physiatrist, released appellant to return to full-time, unrestricted work on May 1, 1994. In a report dated December 31, 1994, he instructed appellant to engage in regular exercise, specifically swimming and indoor stationary bicycle riding. In a progress note dated October 5, 1995, Dr. Durrani stated that appellant began using the YMCA in June 1994 and that he should continue to do physical therapy until June 1995 to improve his neck and back muscles.

By letter dated June 13, 1997, the Office requested additional information from appellant and submitted a CA1086-0288 form, for him to complete. On June 27, 1997 appellant completed the form and described the services Ms. Garmon performed, including dressing and bathing him, cleaning his house and driving him to medical appointments.

On June 20, 1997 on an Office Form EN1090-1089, appellant's treating physician, Dr. A.Waheed K. Durrani, a family practitioner, stated that appellant required that an attendant look after him from October 31, 1993 through October 17, 1994 and checked the boxes indicating that appellant required assistance for travel, walking, getting out of bed, getting out of doors and exercises. He checked the boxes indicating that appellant did not require assistance for feeding, dressing or bathing himself.

By decision dated October 24, 1997, the Office denied appellant's claim, stating that he did not meet the requirements for establishing his need for an attendant's allowance from October 31, 1993 to October 31, 1994.

By letter dated November 23, 1997, appellant requested a review of the written record by an Office hearing representative.

Appellant submitted a medical report from Dr. Durrani, dated December 8, 1997, who stated that he released him to return to work in October 1994 and from his care in April 1995, but that appellant had not completely healed from the October 31, 1993 employment injury. He stated that appellant needed constant care for feeding, dressing and bathing, assistance with cooking and household chores and to be driven to his doctors appointments and physical therapy sessions. Dr. Duranni stated that Ms. Garmon helped appellant with his daily needs of feeding, dressing and bathing.

By decision dated March 5, 1998, the Office hearing representative affirmed the Office's October 24, 1997 decision.

The Board finds that the Office properly determined that appellant is not entitled to an attendant's allowance from October 31, 1993 through October 31, 1994.

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

"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."<sup>1</sup>

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<sup>1</sup> 5 U.S.C. § 8111(a).

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.<sup>2</sup> 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 injured employee in personal needs, such as dressing, bathing or using the toilet.<sup>3</sup> In requesting an attendant's allowance, the employee bears the burden of proof in establishing by competent medical evidence that he or she needs attendant care within the meaning of the Act.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

In his May 31 and August 15, 1997 requests for an attendant's allowance, appellant claimed that he required Ms. Garmon's services from October 31, 1993 through October 31, 1994 for dressing and bathing as well as getting out of bed, walking, transportation to medical appointments, taking his medication, cooking, cleaning, laundry, cutting his grass, maintaining his house and walking and exercising. On the June 20, 1997 form appellant's treating physician, Dr. Durrani, indicated that appellant did not require assistance for feeding, dressing or bathing. In his April 21, 1994 report, Dr. Cifu released appellant to full-time, unrestricted work on May 1, 1994. In his December 31, 1994 report, Dr. Cifu instructed appellant to engage in regular exercise, specifically swimming and indoor stationary bicycle riding. In his October 5, 1995 progress note, Dr. Durrani indicated that appellant had been using the YMCA since June 1994 for exercise and swimming and should continue to do so. These reports do not establish the need for constant care in assisting appellant in his personal needs.

Appellant subsequently submitted a report from Dr. Durrani, dated December 8, 1997, who noted with reference to releasing appellant to work in October 1994, that he required constant care for feeding, dressing and bathing in addition to assistance with cooking, household chores and transportation. His opinion, however, is not fully rationalized in addressing appellant's need for an attendant from October 31, 1993 through October 31, 1994. In his December 8, 1997 report, Dr. Durrani did not specify the dates appellant required an attendant. Further, he did not explain the change in his opinion from his June 20, 1997 report, which indicated that appellant did not require an attendant for feeding, dressing and bathing.

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<sup>2</sup> *Michael W. Dombrowski*, 52 ECAB \_\_ (Docket No. 99-200, issued January 12, 2001); *see Nowling D. Ward*, 50 ECAB 496, 497 (1999).

<sup>3</sup> *Michael W. Dombrowski*, *supra* note 2; *see Bonnie M. Schreiber*, 46 ECAB 989 (1995).

<sup>4</sup> *See Cynthia S. Snipes (Edward S. Snipes)*, 33 ECAB 379, 383 (1981).

<sup>5</sup> *See Kenneth Williams*, 32 ECAB 1829, 1832 (1981).

<sup>6</sup> *See supra* note 3; *see Grant S. Pfeiffer*, 42 ECAB 647, 652 (1991).

Dr. Durrani also did not explain how appellant's need to be fed, dressed and bathed related to the October 31, 1993 employment injury. His December 8, 1997 opinion, therefore, fails to establish appellant's need for an attendant's allowance. The Office did not abuse its discretion in denying an attendant's allowance in this case.

The next issue to be addressed is whether appellant sustained an injury in the performance of duty on February 28, 1997.

On March 5, 1997 appellant, then a 36-year-old contract specialist, filed a traumatic injury claim, alleging that, on February 28, 1997, while at Applebee's during an office birthday luncheon, he hit his head against a low hanging ceiling fixture, fell and hurt his back on the chair and hurt his left eye. Appellant's supervisor, Harold B. White, Jr., stated that appellant was at a restaurant a few miles from the installation in an off-duty status during the scheduled lunch period. He noted that the luncheon was voluntarily attended by several coworkers and others "in celebration of birthdays for three coworkers."

In a statement dated March 28, 1997, appellant stated that he contributed \$3.00 in payment for a monthly birthday luncheon, which was held from 11:00 a.m. to 1:00 p.m. He submitted an employee attendance sheet to show that he was on administrative leave to attend the luncheon. The attendance sheet, dated February 16 to March 1, 1997, shows that appellant was typically on pay status for his lunch hour from 11:30 a.m. to 2:00 p.m. and that on February 28, 1997 he was on pay status through 1:00 p.m., at which time he took two hours of annual leave from 1:00 p.m. to 3:00 p.m. Appellant's usual workday ended at 3:00 p.m. On March 2, 1997 a coworker who attended the lunch, Marjorie J. Morris, stated that she heard a thud and when she looked up the "tiffany style hanging lamp" was swinging back and forth and appellant was staggering toward the window and the seat. She heard him say that he had hit his head on the lamp and subsequently he stated that his head was swelling and his vision was impaired. Another coworker, Leona C. Lee, who attended the luncheon stated that appellant fell against her chair, saying "Ooooooh" and she turned around to see the light swinging back and forth and appellant was standing and rubbing the left side of his head.

By letter dated March 31, 1997, Mr. White stated that the birthday luncheon on February 28, 1997 was not authorized by the employing establishment as an official function. He stated that a group of employees merely decided to have lunch together during their off-duty lunch period at a specific location to honor the birthday of fellow employees. Mr. White stated that management did not participate in any way other than in their personal capacity as coemployees who happened to know the honorees. He stated that the employing establishment did not collect money for the luncheon but money was collected through voluntary contributions by coworkers to pay for the lunches of the honorees that were celebrating birthdays.

By decision dated April 29, 1997, the Office denied appellant's claim, stating that he did not establish that his injury on February 28, 1997 arose in the performance of duty.

By letter dated May 5, 1997, appellant requested an oral hearing before an Office hearing representative. On June 5, 1997 he changed his request to a written review of the record. In a statement dated April 28, 1997, appellant claimed that "when money was collected from among office employees," the employer implied that it was "almost mandatory" to attend to promote

office morale and the attendees discussed office business and procedures at the luncheon. He stated that, contrary to Mr. White's statement that no administrative leave was given, his attendance sheet from February 16 through March 1, 1997 showed that he was on a pay status at the time of his accident, at 12:30 p.m. Appellant explained that he took two hours of annual leave at 1:00 p.m. to go for treatment of his injury. He also stated that a list of his coworkers showed all but one of them attended the luncheon.

In a statement dated July 24, 1997, the Chief of Personnel Management Support Office, Aram G. Darakjian, stated that the birthday luncheon was not a management sponsored activity. He stated that it was planned by two coworkers who did the work "of getting support of most of the employees in the Equipment Branch to take three other employees out to lunch to celebrate their birthdays." Mr. Darakjian stated that the branch chief allowed the employees to attend and went to the luncheon as a guest, along with others who wished to go. He stated that the branch chief acknowledged permission for the employees to attend. Mr. Darakjian stated that the lunch "was totally unofficial." He stated that, while nearly all of the employees in the branch attended, two contracting officers in the branch did not attend because they had other plans. Mr. Darakjian stated that other senior "team" members attended the luncheon and did not engage in conversation about official business or anything else related to the conduct of business in the office. He stated that subordinate staff members who were seated near appellant did not recall that "shop talk" or any other business was discussed during the luncheon.

By decision dated September 2, 1997, the Office hearing representative affirmed the Office's April 29, 1997 decision.

By letter dated October 20, 1997, appellant requested reconsideration of the Office's September 2, 1997 decision. He contended that the Office hearing representative did not adequately review the documentation submitted, including his attendance sheet. Appellant also submitted several flyers describing birthday luncheons to take place on September 25 and October 9, 1997.

By decision dated January 14, 1998, the Office denied appellant's request for reconsideration.

By letter dated October 26, 1998, appellant requested reconsideration of the Office's January 14, 1998 decision. He submitted a copy of his attendance sheet for the relevant time period, medical evidence and a letter showing that his disability retirement had been approved on August 19, 1998.

By decision dated January 27, 1999, the Office denied modification of the prior decision.

The Board finds that appellant did not establish that he sustained an injury in the performance of duty on February 28, 1997.

Section 8102(a) of the Act provides for payment of compensation for disability or death of an employee resulting from personal injury "sustained while in the performance of his duty."<sup>7</sup>

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<sup>7</sup> 5 U.S.C. § 8102(a).

This phrase is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws; namely, "arising out of and in the course of employment."<sup>8</sup> Whereas "arising out of the employment" addresses the causal connection between the employment and the injury, "arising in the course of employment" pertains to work connection as to time, place and activity.<sup>9</sup>

In determining whether an injury arises in the performance of duty, Larson's treatise on workers' compensation law states:

"Recreational or social activities are within the course of employment when:

(1) They occur on the premises during a lunch or recreational period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."<sup>10</sup>

These are three independent links by which recreational or social activities can be tied to employment and, if one is found, the absence of the others is not fatal.<sup>11</sup> Accordingly, when an employee is injured during a recreational or social activity, he or she must meet one of the above-noted criteria in order to establish that the injury arose in the performance of duty. The evidence in the instant case fails to satisfy any of the above-noted criteria.

It is undisputed that appellant was off-premises at the time of the February 28, 1997 incident. While the incident occurred during his lunch hour, he and his supervisor noted that it occurred at a public restaurant, located off the employing establishment premises. Appellant failed to satisfy the first criterion that the incident "occur[ed] on the premises during a lunch or recreational period as a regular incident of the employment."<sup>12</sup>

With respect to the second criterion, whether the employing establishment required appellant to participate in the luncheon or otherwise made the activity part of his services as an employee, the record does not demonstrate that the employing establishment either expressly or implicitly required appellant's participation in the February 28, 1997 luncheon. Appellant contended that the birthday luncheon was "almost mandatory" in part "to promote office morale

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<sup>8</sup> *Mary A. Minter*, 52 ECAB \_\_ (Docket No. 99-2044, issued October 30, 2000); see *Bernard E. Blum*, 1 ECAB 1, 2 (1947).

<sup>9</sup> See *Mary A. Minter*, *supra* note 8; see *Robert J. Eglinton*, 40 ECAB 195 (1988).

<sup>10</sup> 1A Larson, *The Law of Workers' Compensation* § 22.00 (1993); see *Lindsay A.C. Moulton*, 39 ECAB 434 (1988).

<sup>11</sup> *Mary A. Minter*, *supra* note 8; *Anna M. Adams*, 51 ECAB \_\_ (Docket No. 98-757, issued October 28, 1999); *Archie L. Ransey*, 40 ECAB 1251 (1989); see Larson, *supra* note 10 at §§ 22.10, 22.30.

<sup>12</sup> Larson, *supra* note 10.

“and to discuss “business and procedures.” He stated that almost all his coworkers attended. Appellant also stated that his attendance sheet from February 16 through March 1, 1997 showed that he was on his customary paid leave for the lunch hour at the time the February 28, 1997 incident occurred. His supervisor, Mr. White, noted that the birthday luncheon was not authorized by the employing establishment, but was an informal social event organized by a group of employees. The employing establishment did not collect money for the luncheon and attendance was voluntary. Similarly, the Chief of the Personnel Management Support Office, Mr. Darakjian, stated that the birthday luncheon was not a management sponsored activity. He noted that “while nearly all” the employees attended, two contracting officers did not attend because they had other plans. Mr. Darakjian stated that no business was discussed at the luncheon.

The Board finds the evidence does not show that the birthday luncheon was other than an informal social function, which the employees were not required to attend. There is no indication from the record that appellant was specifically directed or required to attend the luncheon. The fact that he was on pay status at the time of the February 28, 1997 incident does not indicate that the employing establishment either financed or sponsored the event.<sup>13</sup> The employing establishment did not collect money or pay for the luncheon. Appellant has failed to demonstrate that the employing establishment required him to participate in the February 28, 1997 luncheon or otherwise made the activity part of his services as an employee.

Appellant has also failed to demonstrate that the employing establishment derived substantial direct benefit from the February 28, 1997 luncheon beyond the intangible value of improvement in employee health and morale. Mr. White and Mr. Darakjian noted that the luncheon was a social function, which was not sponsored by management. The evidence does not establish that the social activity in this case, *i.e.*, a birthday luncheon for employees, was in any way related to the employing establishment’s business. Consequently, the evidence of record does not establish that the employing establishment derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.<sup>14</sup> Appellant has, therefore, failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on February 28, 1997.<sup>15</sup>

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<sup>13</sup> See *Anna M. Adams*, *supra* note 11.

<sup>14</sup> *Larson*, *supra* note 10 at § 22.30; see *Anna M. Adams*, *supra* note 11.

<sup>15</sup> Appellant also challenged the Office’s decision on his claim for an injury resulting from his October 4, 1995 auto accident but that decision was not in the record and the Board is unable to review it. See *Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999).

The January 27, 1999 and March 5, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
April 26, 2002

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member