United States Department of Labor
Employees' Compensation Appeals Board

CAROL L. GUTMAN, Appellant	)	
and	)	**Docket No. 05-705**
	)	**Issued: October 14, 2005**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Albany, NY, Employer	)	

Appearances:
Carol L. Gutman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2005 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated December 17, 2004, which denied authorization for a self-adjusting or memory foam mattress and a heated pool. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office abused its discretion in refusing to authorize payments for installation of a heated pool and for a self-adjusting or memory foam mattress.

FACTUAL HISTORY

On July 15, 1987 appellant, a 33-year-old part-time flexible clerk, filed a traumatic injury claim alleging that on July 13, 1987 she injured her back, shoulders and neck while lifting two packs over head. The Office accepted the claim for acute lumbar strain and placed her on the

periodic rolls for temporary total disability effective December 23, 1987.[1] The Office expanded the claim to include atypical affective disorder, right knee contusion and right knee soft tissue injury and authorized pool therapy.

In a September 23, 2002 report, Dr. Neil S. Lava, a treating Board-certified neurologist, prescribed a hot tub. He noted that appellant benefited from the pool therapy due to her ability to "to go to the pool every day," but the facility appellant "uses no longer has weekend pool time and she needs to have her therapy every day." Dr. Lava stated that appellant would use "the hot tub every day that she is not at the pool and would be expected to use this for the rest of her life."

By decision dated October 31, 2002, the Office denied appellant's request for authorization of a hot tub/heated pool. It noted the facility she used continues "to have pool hours available six (6) days a week."

In a report dated November 25, 2002, Dr. Lava prescribed a hot tub/heated pool and noted that appellant "uses hot water as a way to control her pain" and that at present she can only do this six days a week. Dr. Lava opined that appellant "clearly would benefit from daily hot water therapy" which would "be achieved by her having access to a hot tub" seven days a week. In concluding, Dr. Lava noted appellant's access to "a hot tub would make it easier to keep the patient comfortable."

Appellant filed an appeal with the Board on June 11, 2003, which the Board docketed as No. 03-1598. On August 27, 2003 the Board issued an order remanding case as the record on appeal was incomplete and directed the Office to reassemble the case record and issue an appropriate decision.[2]

Upon return of the case record, appellant submitted a report by Dr. Lava. In a December 8, 2003 report, he stated:

> "Because the pool is not an adequate answer to her problem, it is requested that a hot tub be supplied at her home so that she can continue to take her warm water therapy and therefore keep her pain level reduced. She has done quite well since this pool therapy in heated water has started. It would be anticipated that the hot tub would help to continue this reduced pain level.

In a December 9, 2003 report, Dr. Lava prescribed a self-adjusting mattress stating that it would provide appellant support and comfort.

On January 14, 2004 the Office reissued its October 31, 2002 decision denying authorization for purchase of a hot tub/heated pool.

In a letter dated January 21, 2004, appellant requested a review of the written record by an Office hearing representative.

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[1] On February 19, 2000 appellant elected to receive benefits under the Federal Employees' Compensation Act in lieu of retirement benefits.

[2] Docket No. 03-1598 (issued August 27, 2003).

In a March 17, 2004 report, Dr. Richard Stevens, an employing establishment physician, based upon a review of the medical evidence, concluded that the evidence was insufficient to warrant authorization of a hot tub. He stated: "Dr. Lava has not established a reason for a home hot tub."

Dr. Lava, in an April 20, 2004 report, diagnosed chronic back pain and noted hot water "helps reduce her pain." He noted that appellant "would benefit from continued hot water therapy; however, a bathtub would not be effective." He then recommended a hot tub/heated pool as this "would certainly make a difference for her and help reduce the amount of time" appellant spends traveling in her car to her therapy.

By decision dated May 3, 2004, an Office hearing representative set aside the January 14, 2004 decision and remanded to the Office for referral to a Board-certified specialist to determine whether authorization should be granted for a hot tub/heated pool.

On October 1, 2004 the Office referred appellant to Dr. Norman M. Heyman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Lava and Dr. Stevens, regarding whether appellant's need for a heated pool for treatment of her July 13, 1987 employment injury.

In November 1, 2004 report, Dr. Heyman, based upon a review of the medical evidence, physical examination of appellant and statement of accepted facts, concluded that appellant was totally disabled due to a "combination of her musculoskeletal and her nonorganic problems and factors." With regard to the issue of a hot tub/heated pool, the physician opined:

> [T]he indoor heated spa is a convenience and that the claimant can ambulate and though she suffers from chronic pain, the back injury is minor and does not preclude traveling a short distance to a health club or indoor spa or trying the already tried modalities that she has rejected or have been resistant to. I therefore do not recommend authorization for the government to provide an indoor spa/pool for this claimant."

Dr. Heyman also concluded that appellant "does not need a memory foam or self-adjusting mattress" and recommended "a firm mattress that supports the heavy parts of her body as well as the light parts."

By decision dated December 17, 2004, the Office denied appellant's request for authorization for a self-adjusting or memory foam mattress and a heated pool. In support of its denial, the Office found the opinion of Dr. Heyman to constitute the weight of the evidence.[3]

[3] The Board notes that the Office incorrectly characterized Dr. Heyman as a second opinion physician. This is harmless error as the Office properly referred to Dr. Heyman as an impartial medical examiner at the time of its referred appellant for examination.

LEGAL PRECEDENT

Section 8103 of the Act[4] 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.[5] The language of section 8103 contains the term "shall" in authorizing the furnishing of services, appliances and supplies, but this directive is qualified by the phrase "which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of monthly compensation." This phrasing underscores the intent of Congress that discretion be delegated to the Secretary and hence to the Office in determining whether to grant or reimburse an employee for prescribed services, appliances and supplies under section 8103.[6]

In interpreting section 8103, 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 or her 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. The only limitation on the Office's authority is that of reasonableness.[7] 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.[8]

The Act at section 8123(a) 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.[9] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

ANALYSIS

The Office accepted that appellant sustained an acute lumbar strain, atypical affective disorder, right knee contusion and right knee soft tissue injury. The Office properly determined

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[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8103(a); *see Kennett O. Collins, Jr.*, 55 ECAB ___ (Docket No. 04-1018, issued August 23, 2004).

[6] *James R. Bell*, 49 ECAB 642 (1998).

[7] *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

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

[9] 5 U.S.C. § 8123(a).

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

that a conflict of medical opinion existed between Dr. Lava and Dr. Stevens, regarding whether appellant needs a heated pool or hot tub for treatment of her July 13, 1987 employment injury. Dr. Lava appellant's treating Board-certified neurologist, prescribed the installation of a hot tub/heated pool. Dr. Stevens, an employing establishment physician, based upon a review of the medical evidence, concluded that the evidence was insufficient to warrant authorization of a hot tub. The Office properly referred appellant to Dr. Heyman, for an impartial medical examination regarding the authorization of a heated hot tub.

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 and based upon a proper factual background, is entitled to special weight.[11]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Heyman. After reviewing appellant's complaints, her medical history, her medical records and conducting a physical examination, Dr. Heyman opined that the installation of a hot tub/heated pool was not warranted. He opined that the installation of a hot tub/heated pool was "a convenience" since appellant was able to ambulate and that, while "she suffers from chronic pain, the back injury is minor and does not preclude traveling a short distance to a health club or indoor spa or trying the already tried modalities that she has rejected or have been resistant to."

Dr. Heyman reviewed the case record and various reports, including Dr. Lava's reports. He examined appellant thoroughly, explained his clinical findings and provided medical rationale for his conclusion that the installation of a hot tub or indoor spa was unwarranted. Dr. Heyman provided an opinion that is sufficiently well rationalized and based upon a proper factual background such that his opinion is entitled to special weight. The Board finds that Dr. Heyman's report represents the special weight of the medical opinion evidence and establishes that installation of a hot tub or indoor spa was not necessary treatment for the accepted work injury.[12]

Accordingly, the Board finds that the Office properly denied authorization for the installation of a hot tub.

However, there was no conflict with regard to the denial of authorization for the self-adjusting mattress. Dr. Lava noted that the mattress would provide appellant support and comfort. He provided no explanation as to how this would "cure, give relief, or reduce the degree of period of disability." The Board has held than an opinion without supporting rationale is entitled to little probative value.[13] Dr. Heyman, on the other hand, concluded that appellant "does not need a memory foam or self-adjusting mattress" since "a firm mattress that supports the heavy parts of her body as well as the light parts" would provide the same support. The

[11] *Solomon Polen*, 51 ECAB 341 (2000).

[12] *David Alan Patrick*, 46 ECAB 1020, 1023 (1995) (impartial medical examiner's opinion was based on a complete review of the medical record and a thorough examination and was sufficiently rationalized to establish that appellant had no work-related residuals of his diagnosed condition; thus, his opinion was entitled to special weight).

[13] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

Office properly relied upon the opinion of Dr. Heyman as he supported his opinion with rationale that the self-adjusting mattress was not needed as the relief could be provided by other less expensive means. It cannot be found that the Office abused its discretion in denying medical benefits for the self-supporting adjustable mattress.

CONCLUSION

The Board finds that the Office did not abuse its discretion in refusing to authorize payments for the installation of hot tub at appellant's home and a self-adjusting mattress.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 17, 2004 is affirmed.

Issued: October 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board