

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Fort Meade, SD, Employer)

Docket No. 06-2161
Issued: July 13, 2007

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 26, 2006 appellant filed a timely appeal from the September 28, 2005 and January 5, 2006 merit decisions of the Office of Workers' Compensation Programs, which denied reimbursement of travel expenses. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the travel expense issue.

ISSUE

The issue is whether the Office abused its discretion in denying reimbursement of travel expenses effective June 13, 2005.

FACTUAL HISTORY

On April 17, 1989 appellant, then a 46-year-old nursing assistant, sustained an injury in the performance of duty. She stated: "I was getting a patient out of bed. Patient was standing upright. Patient is able to do this. Patient walks with a walker. Patient's legs gave out and

started to buckle. Laid patient back on bed. I felt a pull in low back.” The Office accepted her claim for spasmodic torticollis and paid compensation benefits.

For years, the Office authorized medical treatment in Omaha, Nebraska, where Dr. Bernadette A. Hughes, a Board-certified neurologist, provided Botulinum toxin injections for appellant’s spasmodic torticollis. The Office reimbursed appellant for her related travel expenses. When appellant telephoned the Office on June 10, 2005 requesting authorization for more travel vouchers, the Office advised her that it could not continue to pay travel expenses for several hundred miles each month. The Office claims examiner noted: “Claimant stated there were specialists in her town, but she does not trust them. I told her she could continue to see the same doctor, but travel expenses would be limited.” On June 15, 2005 the Office claims examiner advised appellant as follows: “Told her I could only authorize medical travel up to 100 miles, with no overnight stay.” The Office noted that appellant’s physician was over 500 miles away and that appellant saw the doctor each month, for which she claimed mileage and motel expenses each trip. The Office continued to authorize the injections.

In a decision dated September 28, 2005, the Office notified appellant that she was authorized to continue seeking treatment from Dr. Hughes but that her travel expenses to and from that treatment would not be reimbursed. The Office stated:

“The FECA [Federal Employees’ Compensation Act] regulations require that you seek medical care as close to your residence as possible. On June 13, 2005 you indicated that there were other physicians within the State of South Dakota, but you were not comfortable seeking treatment with those physicians. You were notified that further travel reimbursement will not be authorized as of June 13, 2005. You are authorized to continue to seek treatment from Dr. Hughes; however, your travel expenses to and from that treatment will not be reimbursed. The travel expense of 590 miles each way along with motels and food are not reasonable and necessary medical expenses.”

On November 20, 2005 appellant took issue with the Office’s assertion on the availability of local services. She noted:

“You stated June 13, 2005 that I said there are other physicians within South Dakota but I did not want to go to them (wrong). I don’t know where you got this information but it is not true. I did not say that at all. Please send me a copy of this. Please get this off my record. This is a false statement.”

Appellant explained why she went to Dr. Hughes in Omaha:

“Dr. Bernadette A. Hughes is a specialist.... For this kind of disability the injection in my neck and EMG done before she inject me with Botulinum toxin and she knows where to put the Botulinum toxin. And I need a doctor like that because this is very much needs a specialist. Not any old doctor can do this injection. I don’t think you would want any doctor with a M.D.

“Note. I call around to see if we had any doctor that could do this treatment on me with this kind of care. I call around and there is one in Sioux City, Iowa, and I

call Rapid City, S.D. Hospital in this town does not have a neurologist that can do this injection on me. I talk to a person here and she said Dr. [Brian E.] Tschida can do some Botox, but not in my neck. He is the doctor that testing me in 1992.... So please get this right if you need more information let me know.

“Right now I’m keeping Dr. Hughes to do my injection. I’m sorry we don’t have a specialist. Note. This is why I need to keep my Dr. Hughes down in Omaha, NE. I have been treated from her clear back in 1994 I think.”

On December 16, 2005 appellant requested reconsideration.

In a decision dated January 5, 2006, the Office denied appellant’s request for reconsideration, purportedly without reviewing the merits of her case. The Office determined that appellant’s statement lacked supporting documents from local neurologists confirming that they could not or would not provide the treatment locally. The Office noted that there were qualified neurologists in the Rapid City area who did provide these injections for appellant’s condition, including Dr. Tschida and Dr. [Craig G.] Mills with Black Hills Neurology. “Therefore,” the Office concluded, “your allegations that they cannot or will not and that there are no specialists in your local area that can or will provide this treatment for you are not valid arguments for error on the part of the Office.”

LEGAL PRECEDENT

Medical expenses, along with transportation and other expenses incidental to securing medical care, are covered by section 8103 of the Act.¹ This section 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 of the period of any disability, or aid in lessening the amount of any monthly compensation. The employee may initially select a physician to provide medical services, appliances and supplies, in accordance with such regulations and instructions as the Secretary considers necessary, and may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances and supplies. In interpreting this section, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office’s authority is that of reasonableness.²

Office regulations provide that the employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, the Office will consider the availability of services, the employee’s condition and the means of transportation.

¹ 5 U.S.C. § 8103(a).

² *Lecil E. Stevens*, 49 ECAB 673, 675 (1998); see *Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

Generally, 25 miles from the place of injury, the work site, or the employee's home, is considered a reasonable distance to travel.³

ANALYSIS

In its September 28, 2005 decision, the Office found that appellant's travel to Omaha, together with motels and food, was not a reasonable and necessary medical expense. The Office properly considered appellant's condition and the availability of services, noting that appellant had indicated that there were other physicians within the State of South Dakota but that she was not comfortable seeking treatment with those physicians. Indeed, the record shows that on June 10, 2005 appellant advised the Office in a telephone conversation that there were specialists in her town, but she did not trust them. Given the apparent availability of services locally, the Board notes that the Office reasonably exercised its discretion in prospectively denying reimbursement for trips to Omaha. Previously reimbursing this expense did not preclude the Office from later exercising reasonable discretion to deny further reimbursement.

The Board, however, cannot affirm the Office's September 28, 2005 decision in its entirety. The decision indicated that the Office would reimburse no travel expenses as of June 13, 2005. The Office explained: "You were notified that further travel reimbursement will not be authorized as of June 13, 2005." However, on June 10, 2005 the Office advised appellant that she could continue to see Dr. Hughes "but travel expenses would be limited." On June 15, 2005 the Office claims examiner put a number on it: "Told her I could only authorize medical travel up to 100 miles, with no overnight stay."

The Board finds that the Office exercised its discretion under section 8103 of the Act when it made this representation. Having authorized a limited travel expense beginning June 15, 2005, the Office cannot later find that "travel reimbursement will not be authorized as of June 13, 2005." This was an abuse of discretion. The Board will set aside that part of the Office's September 28, 2005 decision. From June 15 to September 28, 2005, appellant is entitled to reimbursement for the limited travel expense the Office advised her it could authorize. The Board will affirm the Office's September 28, 2005 decision to the extent that it prospectively denies reimbursement for trips to Omaha, will set aside the decision to the extent that it retroactively rescinds the June 2005 authorization of limited travel expenses and will remand the case for appropriate reimbursement of any unpaid travel expenses to Omaha between June 15 and September 28, 2005.

Although the Office's January 5, 2006 decision purported not to review the merits of appellant's claim, the Board finds that this is a decision on the merits. Appellant requested reconsideration in part because she needed a specialist like Dr. Hughes. She apparently inquired but could find no specialist locally who could provide the Botulinum toxin injection in her neck. This was an argument not previously considered by the Office. The Office did not deny appellant's request for reconsideration on the grounds that she did not present evidence or argument meeting one of the three standards for obtaining a merit review of her case.⁴ Instead,

³ 20 C.F.R. § 10.315 (1999).

⁴ *See id.* at § 10.606(b)(2).

the Office addressed the merits of her argument. The Office found for the first time that there were in fact qualified neurologists in Rapid City who provided these injections for appellant's condition. The Office named two such neurologists and found that appellant's argument to the contrary was therefore not valid.

The Board will affirm the Office's January 5, 2006 decision, in part. Considering appellant's condition and the availability of named local specialists willing to provide the injections she was receiving from Dr. Hughes, the Office properly exercised its discretion to deny further authorization for trips to Omaha. Appellant may continue to see Dr. Hughes if she wishes, but she will travel to Omaha at her own expense. She may also ask Dr. Hughes to recommend a specialist in her local area. Appellant may also ask the Office for authorization to see a specialist at Black Hills Neurology, where the Office indicates she will receive the same Botulinum toxin injections for her spasmodic torticollis.

CONCLUSION

The Board finds that the Office abused its discretion under section 8103 of the Act when it denied reimbursement of the limited travel expenses it authorized on June 15, 2005. Further action is therefore warranted on appellant's travel expenses to Omaha between June 15 and September 28, 2005. The Board also finds that the Office properly exercised its discretion to deny reimbursement for any travel expense to Omaha beginning September 28, 2005.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The Office's September 28, 2005 decision is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: July 13, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board