United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 09-2314**
	)	**Issued: August 20, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 14, 2009 appellant, through her representative, filed an appeal of a July 14, 2009 merit decision of the Office of Workers' Compensation Programs denying reimbursement for attendant services. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the attendant services issue.

ISSUE

The issue is whether the Office abused its discretion by denying appellant's claim for reimbursement for attendant services beginning August 30, 2007.

FACTUAL HISTORY

The Office accepted that appellant, a 53-year-old registered nurse, sustained a right wrist and shoulder sprain, right carpal tunnel syndrome and right rotator cuff tear as a result of her

employment.[1] Appellant underwent right shoulder surgery on August 30, 2007. She received disability benefits on the periodic rolls from August 28, 2007 through November 22, 2008.[2] On November 10, 2008 she returned to work in a limited duty, full-time permanent position as a telephonic nurse case manager at the employing establishment. By decision dated January 15, 2009, the Office found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss benefits to zero.

On August 23, 2007 Dr. Gabriel V. Rubanenko, a Board-certified orthopedic surgeon, advised that appellant would be unable to work and incapable of performing any activities at or above the shoulder level or do any lifting or strength activities with the right upper extremity. He noted that appellant's left upper extremity was totally paralyzed due to Erbs Palsy, a condition with which she was born. Dr. Rubanenko stated that she would require home health care after surgery to assist her with activities such as bathing, dressing and performing household chores since she would have very limited use of the right upper extremity. He noted rehabilitative therapy would start one month postsurgery.

On August 23, 2007 appellant contacted the Office. She claimed that she would need assistance following surgery as she would not have the use of her right arm and would like to have a friend or family member to assist her. The Office advised appellant that it could only pay for an authorized professional attendant.

On February 22, 2008 the Office received a February 13, 2008 letter from appellant's congressman concerning appellant's February 5, 2008 request for reimbursement of home health care and attendant care services provided by her sister, Veronica and a housemate. Appellant claimed $17,000.00 for the period August 26, 2007 to January 5, 2008. She enclosed copies of endorsed checks totaling $17,000.00 and made out to cash, her sister and the housemate for postsurgery home care.

In a February 26, 2008 letter, the Office advised appellant that additional information was required before payment for services of an attendant could be authorized. It asked her to respond to a list of questions and provided her with questionnaires to complete for herself and her physician. Appellant was informed that the Office could only pay services of an attendant where medical documentation supported that assistance was required to care for basic personal care needs and, if services are approved, payment for such services was limited to $1,500.00 per month by regulation. It noted that payments were billed by and paid directly to the professional providing attendant services and could only be paid for a home health aide, licensed practical nurse or similarly trained individual.

[1] Appellant has several other claims. Under case number xxxxxx681, date of injury May 22, 2003, the Office accepted a strain to the right hand, elbow, shoulder and tendinitis of right shoulder and hand due to a patient pulling her to the ground. This claim has been doubled into the present claim. Under case number xxxxx814, date of injury February 15, 2002, the Office denied appellant's claim for stress.

[2] On February 1, 2010 the Board affirmed a March 18, 2009 Office overpayment decision. It found that appellant received an overpayment in the amount of $2,631.13 from November 10 to 22, 2008 and that the Office properly denied waiver of the overpayment. Docket No. 09-1252 (issued February 1, 2010).

On May 12, 2008 appellant underwent a second opinion examination with Dr. Khodam-Rad Payman, a Board-certified orthopedic surgeon. In a May 14, 2009 report, Dr. Payman agreed that appellant was temporarily totally disabled. He felt that she was in need of attendant care, but did not specify the extent of care required.

In a June 4, 2008 report, Dr. Rubanenko advised that his August 23, 2007 report had recommended that appellant's physical condition would necessitate 24-hour attendant care for five months after surgery from August 30, 2007 through January 25, 2008. This was due to multiple problems in the right upper extremity as well as from the Erbs Palsy of her left arm, which was completely paralyzed. Dr. Rubanenko explained that the combination of these conditions made it impossible for appellant to care for herself after surgery. He indicated that she continued to require full-time attendant care. Dr. Rubanenko provided a note which advised appellant that she had authorization for attendant care, including from family members, which was reimbursable by the Office. Appellant paid for these services out of her own pocket, expecting to be reimbursed. Dr. Rubanenko indicated that his office sent the original request for authorization to appellant's employer. He advised that when she was given authorization for surgery, his chiropractic assistant incorrectly filled out a form on April 23, 2008 saying that she did not require attendant care despite his August 23, 2007 letter stating the opposite. Dr. Rubanenko reiterated that appellant required attendant care after surgery and continued to require care.

On a questionnaire signed June 23, 2008 appellant requested continued home health care, in the form of attendant care, seven days a week, four hours a day. She indicated that she received attendant care services since August 30, 2007. Appellant claimed that her sister helped her and that she wanted her housemate and his family as her live-in attendants. She indicated that her sister had assisted their terminally-ill father until he passed away in August 2006. Appellant advised that her housemate had prior experience assisting his incapacitated elderly parents; her housemate's wife had prior experience assisting others with daily activities when she was a medic in the Israeli Army; and her housemate's son had prior experience in tending to the elderly. She paid her sister $2,000.00 to care for her and purchased her plane ticket from Aruba to Los Angeles in the amount of $930.00. Appellant paid her housemate's family $3,000.00 a month for the first five months and continued to pay them by check for their services.

On a questionnaire signed June 24, 2008, Dr. Rubanenko advised that he examined appellant on June 24, 2008 and that she had left arm Erbs Palsy with paralysis and an inability to use her right arm due to: chronic pain in the neck with radiation of pain into the right shoulder; numbness and tingling down right arm and hand; degenerative disc disease at C3-4, C4-5 and C5-6; spinal stenosis at C3-4 and contour abnormality of the cervical cord; spondylosis and radiculitis of cervical spine; right shoulder and neck strain; surgically repaired right rotator cuff tear; lateral epicondylitis in right elbow; tendinitis of right wrist; and right hand carpal tunnel syndrome with positive Tinel's and Phalen's test. He advised that she needed ongoing assistance with activities of daily living. Dr. Rubanenko explained that appellant had difficulty performing such activities as: preparing meals, doing laundry; folding clothes; grocery shopping; cleaning the house; and dressing or bathing without the assistance of an attendant. He advised that she required an attendant since August 30, 2007 and would continue to require future services. Prior to May 2006 when appellant's husband passed away, appellant relied heavily on him to perform

such activities. After his death she had no other family members to assist her with those activities.

In an August 19, 2008 note, Dr. Rubanenko advised that appellant was in need of transportation services. On October 7, 2008 he found her permanent and stationary and provided work restrictions. Dr. Rubanenko advised that future medical care was appropriate and appellant was a candidate for several surgeries. On December 17, 2008 he saw her for an injury to her left hand while at home in August 2008. Dr. Rubankenko diagnosed left hand strain/possible facture, compensatory to industrial injury; exacerbation of cervical sprain and spondylitis; and exacerbation right carpal tunnel syndrome pain. He found that appellant could continue to perform modified duties at the employing establishment and recommended ergonomic accommodations. Dr. Rubankenko noted that she required transportation to all appointments.

In a January 6, 2009 decision, the Office denied appellant's request for reimbursement of expenses for home health attendant care. It found that the medical evidence failed to establish that she used an approved health care provider.

On January 9, 2009 appellant requested a telephonic hearing, which was held May 12, 2009. At the hearing, appellant's attorney contended that she required an attendant as her left hand was completely paralyzed due to a preexisting condition and the right shoulder surgery precluded use of her right arm. While appellant did not obtain attendant care in the proper manner, the Office was put on notice that an attendant would be needed when her physician requested such care. She testified that she knew she would require assistance following surgery, but never received any correspondence regarding the need for an attendant until after she requested reimbursement. Appellant stated that an Office rehabilitation nurse, Gregg Lewis, never told her what was needed for an attendant and she never saw him during her recuperation from surgery. She advised that she could dress herself three months postsurgery and drive five months postsurgery.

Following the hearing, appellant submitted reports from Dr. Rubanenko dated December 17, 2008 through May 27, 2009. Dr. Rubanenko reiterated that, due to her condition, appellant required transportation to all her appointments.

In a July 14, 2009 decision, an Office hearing representative affirmed the January 6, 2009 decision, finding that appellant was not entitled to the services of an attendant beginning August 30, 2007. While appellant submitted medical evidence supporting the need for an attendant, she did not obtain assistance from a home health aide, licensed practical nurse or similarly trained individual.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees' Compensation Act 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 that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or

aid in lessening the amount of any monthly compensation.[3] The Office has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in the Act.[4] The only limitation on the Office's discretionary authority is that of reasonableness. 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.[5]

Section 8111 of the Act provides that 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 both feet or is paralyzed and unable to walk or because of other disability resulting from the injury making him or her so helpless as to require constant attendance.[6]

Office regulations provide that the Office will pay for the services of an attendant:

> "[U]p to a maximum of $1,500.00 per month, where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. § 8111(a), the Director has determined that, except where payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act and medical bills for these services will be considered under section 10.801. This decision is based on the following factors --
>
> > (a) The additional payments authorized under section 8111(a) should not be necessary since [the Office] will authorize payment for personal care services under 5 U.S.C. § 8103, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse or similarly trained individual.
> >
> > (b) A home health aide, licensed practical nurse or similarly trained individual is better able to provide quality personal care services, including assistance in feeding, bathing and using the toilet. In the past, provision of supplemental compensation directly to injured employees may have encouraged family members to take on these responsibilities even though they may not have been trained to provide such services. By

[3] 5 U.S.C. § 8103(a).

[4] *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).

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

[6] 5 U.S.C. § 8111(a).

> paying for the services under section 8103, [the Office] can better determine whether the services provided are necessary and/or adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to [the Office], where the amount billed will be subject to [the Office s] fee schedule, will result in greater fiscal accountability."[7]

A claimant bears the burden of proof in establishing by competent medical evidence that he or she requires attendant care within the meaning of the Act. The claimant is not required to need around-the-clock care, but need only demonstrate a continually recurring need for assistance in personal matters. The attendant allowance is not intended to pay for the performance of 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. An attendant allowance is not granted simply on the request of a disabled claimant or his or her physicians. The need for attendant care must be established by rationalized medical opinion evidence.[8]

ANALYSIS

The Board finds that the Office did not abuse its discretion in denying appellant's request to reimburse her for attendant services beginning August 30, 2007. The Act does not state that the Office shall pay for the service of an attendant.[9] The Act provides that the Office may pay for the service of an attendant. It is for the Office to decide whether or not to pay an allowance. The Board will not disturb that decision in the absence of proof of manifest error, clearly unreasonable judgment or actions that are contrary to both logic and probable deductions from established facts.[10]

An attendant allowance is not granted simply on the request of a disabled claimant or his or her physicians. Appellant must establish by competent medical evidence that the service of an attendant is necessary constantly within the meaning of section 8111 of the Act and that payment must be made to authorized providers only. She submitted competent rationalized medical evidence to establish her need for attendant care after surgery to assist with bathing, dressing and household chores. As appellant's left arm was paralyzed due to Erbs Palsy and she would have limited use of her right upper extremity Dr. Rubanenko stated that attendant care would be required for five months following surgery.

---

[7] 20 C.F.R. § 10.314; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.9 (June 2003) (an attendant allowance paid directly to the claimant prior to January 1999 will continue to be paid to the claimant until the need for the attendant ceases and any future period of attendant services for the claimant will be paid under the revised procedures).

[8] *Thomas Lee Cox*, 54 ECAB 509 (2003).

[9] The Act does not mandate a payment of $1,500.00 a month. *L.D.*, 59 ECAB ___ (Docket No. 08-966, issued July 17, 2008).

[10] *See Perea, supra* 5.

The Office implementing federal regulations address who may provide personal care services. It limits reimbursement to a home health aide, licensed practical nurse or similarly trained individual. Having provided service to the elderly or treating elderly parents does not establish that appellant's sister or housemate and his family are experienced professionals or trained as a home health aide or a licensed practical nurse. While the housemate's wife was a medic in the Israeli Army, there is no evidence of record to establish any training similar to a home health aide or a licensed practical nurse or that she was appellant's sole attendant during the five months following surgery. Office regulations explain that professionals are better able than family members or housemates to provide quality personal care services, including assistance in feeding, bathing and using the toilet. Under the regulations, the Director has exercised his discretion to limit services to those trained in home health care or as a nurse. As appellant's caregivers do not satisfy this training requirement, the Office properly denied her request for reimbursement.

The Board finds that the Office did not abuse its discretion in denying appellant's request for attendant services. The Office is precluded by regulation from paying her directly to cover such services. Additionally, any personal care services must be provided by a home health aide, licensed practical nurse or similarly trained individual. The Office properly exercised its discretion to deny such payment. The Board will affirm the hearing representative's July 14, 2009 decision.

CONCLUSION

The Board finds that the Office did not abuse its discretion by denying appellant's request for an attendant allowance.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation decision dated July 14, 2009 is affirmed.

Issued: August 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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