

<sup>2</sup> The Board notes that, following the issuance of the October 13, 2010 OWCP decision, appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a formal written request for reconsideration to OWCP, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

### **FACTUAL HISTORY**

On September 9, 1992 appellant, then a 39-year-old distribution window clerk, filed a claim for occupational disease, alleging that she had sustained an injury due to factors of her employment. On October 2, 1992 OWCP accepted her claim for low back strain. It subsequently expanded the claim on May 18, 1994 and accepted “herniated disc L4-5” as causally related to the injury. A statement of accepted facts dated August 20, 2010 indicates that appellant’s claim was further accepted for intervertebral disc disorder, chronic pain syndrome and adjustment disorder with mixed anxiety and depressed mood.

On March 19, 2009 appellant contacted OWCP and inquired about assistance with housework and cooking. OWCP requested that she and her treating physician, Dr. Eddie Sassoon, Board-certified in physical medicine and rehabilitation, provide additional information. It advised Dr. Sassoon that under FECA there was no provision for payment of an attendant allowance for the performance of tasks such as cooking, laundry, housekeeping, shopping or yard work.

Several reports from Dr. Sassoon were thereafter submitted to the record. In a February 25, 2009 report, he stated that appellant suffered from C5-6 disc herniation, lumbar disc fusion with failed back syndrome and chronic intractable pain. Dr. Sassoon explained that she had significant loss of range of motion throughout the cervical and lumbar spine with range of motion deficits by 30 to 40 degrees in all pivots, antalgic stiff gait, and that she required a back brace as well as a cane for support.

In response to OWCP’s inquiry regarding appellant’s need for an attendant, on March 31, 2009 Dr. Sassoon explained that appellant was in need of the services of an attendant because she was unable to perform household activities. He further noted that she would require services of attendant for approximately one to three months in the following activities: traveling, walking, dressing herself, bathing, getting out of bed, getting out of doors and exercising. In a progress report dated March 31, 2009, Dr. Sassoon explained that appellant’s back discomfort had been progressing, and that she had failed back syndrome and hardware pain; her C5-6 disc herniation restricted her mobility in all pivots. He thereafter continued to submit monthly progress reports.

On April 8, 2009 appellant responded to OWCP’s request for further information. She explained that she lived alone and was not currently in receipt of attendant services. Appellant noted that she believed she required attendant care for four to six hours a day, seven days a week. She stated that she wished that her friend of 25 years provide the care. Appellant did not indicate whether her friend had credentials which qualified her to be an attendant under FECA.

In a report dated August 5, 2009, Dr. Sassoon stated that appellant had been involved in a motor vehicle accident on June 23, 2009 and that her car had been submerged in water. He noted that she had symptoms of concussion, and that she had been examined, treated and released by a hospital emergency room.

On September 29, 2009 Dr. Sassoon reported that appellant was performing home exercises including stretching modalities as well as aquatic activities, and that appellant was very compliant with her care.

Appellant wrote to OWCP on February 19, 2010 advising that since the death of her husband and her son she had no family. She noted that she had been paying a woman \$15.00 an hour for help, two to three hours, three days a week. Appellant stated that she needed further help with house cleaning chores. In a letter to OWCP dated April 12, 2010, she stated that “[m]ost of the time I order food and have someone clean, help me bathe, wash clothes, make my bed. It’s so embarrassing. If I could only get a little help I might not have to take so much medication.”

On July 19, 2010 Dr. Sassoon reported that the combination of physical therapy, medications and home exercises had been helpful. He noted that appellant had residual swelling in her lower extremities, as well as chronic intractable lower back pain.

On August 20, 2010 OWCP referred appellant for a second opinion examination, noting that the case file showed evidence of an improvement, and that there was no current medical evidence showing or describing the need for an attendant.

Appellant attended the OWCP directed second opinion with a Board-certified orthopedic specialist, Dr. Melvyn Drucker, a Board-certified orthopedic surgeon. In a report dated September 21, 2010, to the question “[i]s the claimant capable of taking care of her basic personal needs?” Dr. Drucker responded as follows: “Yes. The patient is capable of taking care of her basic personal needs, although she does note some difficulty with activities of daily living.... Her basic personal needs of hygiene and independent eating and personal care, I feel she is capable of performing.”

Based on Dr. Drucker’s medical opinion, in an October 13, 2010 decision, OWCP denied appellant’s request for attendant allowance on the grounds that the medical evidence failed to substantiate that attendant services was necessary or that she needed constant assistance. The decision went on to state that the medical evidence showed that appellant was capable of taking care of her personal needs.

### **LEGAL PRECEDENT**

Section 8103(a) of FECA 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.<sup>3</sup> OWCP has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.<sup>4</sup> The

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<sup>3</sup> 5 U.S.C. § 8103(a).

<sup>4</sup> See *Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

only limitation on OWCP's discretionary authority is that of reasonableness.<sup>5</sup> 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.<sup>6</sup>

Section 8111 of FECA 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.<sup>7</sup>

OWCP's regulations, interpreting FECA provides at 20 C.F.R. § 10.314 as follows:

"OWCP will pay for the services of an attendant up 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 FECA, 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 [OWCP] 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 paying for the services under section 8103, [OWCP] 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

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<sup>5</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8111(a).

personal care provider to submit a bill to [OWCP], where the amount billed will be subject to [OWCP's] fee schedule, will result in greater fiscal accountability.”<sup>8</sup>

A claimant bears the burden of proof in establishing by competent medical evidence that he or she requires attendant care within the meaning of FECA. 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.<sup>9</sup>

### ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying appellant's request for an attendant allowance. FECA does not state that OWCP shall pay for the service of an attendant.<sup>10</sup> It provides that OWCP may pay for the service of an attendant. It is for OWCP 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.<sup>11</sup>

An attendant allowance is not granted simply on the request of a disabled claimant or her physician. The claimant must establish by competent medical evidence that the service of an attendant is necessary constantly within the meaning of section 8111 of FECA and that payment must be made to authorized providers only.

Appellant requested the attendant allowance in March 2009, and the medical report from her attending physician, Dr. Sassoon, indicated that she would require attendant services for one to three months for assistance with activities including traveling, walking, dressing herself, bathing, getting out of bed, getting out of doors and exercising. However, she explained on April 8, 2009 that she was currently not in receipt of attendant services, but that she wished her friend of 25 years to provide care. OWCP implementing regulations address who may provide personal care services. It limits reimbursement to a home health aide, licensed practical nurse or similarly trained individual. While appellant did initially submit medical evidence in March 2009 substantiating her need for an attendant, she did not provide evidence that she was

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<sup>8</sup> *Id.* at § 10.314 (1999); 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).

<sup>9</sup> *Thomas Lee Cox*, 54 ECAB 509 (2003).

<sup>10</sup> *M.C.*, Docket No. 09-2314 (issued August 20, 2010).

<sup>11</sup> *Id.*

seeking authorization for a qualified attendant. She did not establish that her friend would be entitled to reimbursement for services as a home health aide, licensed practical nurse or similarly trained individual.

Appellant wrote to OWCP again on February 19, 2010 advising that, since the death of her husband and her son, she had no family to help her. She noted that she had been paying a woman for help, two to three hours a day, three days a week, but she needed further help with house cleaning chores. Appellant did not clarify in this letter whether she required assistance with personal care services, nor did she establish that the person in her employ was qualified as a home health aide, licensed practical nurse or other similarly trained individual. In her April 12, 2010 letter, she clarified that she had someone who helped her perform household chores and bathe, but again, she did not establish that the individual assisting with her personal care was properly qualified.

OWCP subsequently requested a second opinion evaluation to determine appellant's current disability status. Dr. Drucker performed a second opinion examination on September 21, 2010. He noted that appellant did have difficulty with some activities of daily living; however, he stated that she was capable of performing her basic personal needs of hygiene, independent eating and personal care. As the evidence does not establish that appellant ever obtained care from a qualified attendant and the evidence establishes that by September 21, 2010 she no longer required personal care services, OWCP did not abuse its discretion in denying an attendant allowance.

Appellant may submit new evidence with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated October 13, 2010 be affirmed.

Issued: November 17, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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