

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. GANARD and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Philadelphia, PA

*Docket No. 98-1358; Oral Argument Held May 13, 1999;
Issued September 24, 1999*

Appearances: *Thomas C. Lowry, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for purchase of a whirlpool spa tub.

In the present case, the Office has accepted that on January 12, 1989 appellant, a tractor/trailer operator, sustained a dorsolumbar contusion and herniated disc at L3-4, requiring laminectomy, discectomy and fusion of the lumbar spine. In a decision dated February 28, 1997, the Office denied appellant's request for purchase of a whirlpool spa tub on the grounds that the evidence failed to support the medical necessity of such spa tub. The decision noted that on November 4, 1996 the Office had authorized payment for a portable whirlpool unit costing approximately \$500.00. An Office hearing representative affirmed the Office's February 28, 1997 decision on March 9, 1998.

Section 8103(a) of the Federal Employees' Compensation Act,¹ 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 or the period of disability, or aid in lessening the amount of monthly compensation.

In interpreting section 8103 of the Act, the Board has explained in the case of *Daniel J. Perea*,² that the Office, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services, appliances and supplies provided under the Act. As

¹ 5 U.S.C. § 8103(a).

² 42 ECAB 214 (1990)

the Office has the general objective of ensuring that an employee recovers from his 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. 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. The only limitation on the Office's authority is that of reasonableness.

In the present case, appellant's treating physicians have recommended the purchase of a whirlpool spa tub to give relief to appellant's low back symptoms, which are residuals of his accepted employment injury. In this regard, on March 20, 1996 appellant's treating physician, Dr. Richard A. Balderston, a Board-certified orthopedic surgeon, reported that appellant continued under his medical care following lumbar spine fusion. He explained that appellant had been hospitalized twice for severe muscle spasms and continued to be treated with nonoperative modalities to decrease his pain and increase his functional ability. Dr. Balderston specifically recommended that as appellant had experienced improvement of his pain through use of a whirlpool, that appellant obtain a whirlpool for his home "for relief of his back pain." He also signed a prescription note dated March 20, 1996, wherein he prescribed "whirlpool tub for home use."

On July 18, 1996 Dr. Matthew T. Kline, a Board-certified anesthesiologist, reported that on physical examination appellant had a lot of paravertebral tenderness and that he had injected three deep paravertebral levels with lidocaine for significant pain reduction. Dr. Kline also stated that he had prescribed a whirlpool for appellant so that appellant could obtain muscle relaxation at home. On August 6, 1996 Dr. Kline clarified that he had prescribed a Jacuzzi type whirlpool unit to help treat appellant muscle spasm in his lumbar region, which was associated with his mechanical back problem. Dr. Kline explained that such a device would benefit appellant by producing muscle relaxation and decreasing pain.

In a report dated August 22, 1997, Dr. Balderston noted that appellant had continued difficulty with severe muscle spasms, which were aggravated by any prolonged activities as well as exercise and any spontaneous movement. He indicated that appellant had been an extremely compliant patient during the duration of his care. Dr. Balderston, thereafter, emphasized that it had been recommended that appellant obtain a whirlpool spa, which had provided him with improvement of his symptoms and, therefore, increased his functional ability. He concluded that he did believe it was medically necessary for appellant to have a whirlpool spa tub for his use.

On October 31, 1996 an Office medical adviser reviewed the case record and opined that if appellant had a bathtub, a portable whirlpool unit costing around \$500.00 would be appropriate rather than an installed Jacuzzi which would cost \$6,200.00. On December 5, 1996 the Office referred appellant to Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Sgarlat was requested to address whether an "in ground whirlpool spa" would lessen appellant's level of impairment, or was medically necessary. In his report dated January 2, 1997, Dr. Sgarlat reported that on physical examination appellant had complaints of pain extending from his low back into the upper back to his shoulders. However, he noted that appellant had no muscle spasm present in the muscles of his back or buttocks, no areas of localized tenderness in his back, nor any muscle atrophy in his back muscles.

Dr. Sgarlat concluded that appellant's fusion appeared to have progressed quite well and that appellant had a good result from his operative procedure to the low back. He opined that further surgery would not be helpful. Regarding the issue of an in ground whirlpool spa, Dr. Sgarlat stated that it was not medically necessary.

The Board finds that a conflict exists in the medical opinion evidence, therefore, the Office's decisions denying appellant's request for a whirlpool spa tub were unreasonable.³

A conflict exists in the medical evidence between appellant's treating physicians, Dr. Kline and Dr. Balderston, who have prescribed purchase of a whirlpool spa tub for treatment of appellant's muscle spasms and the Office's second opinion physician, Dr. Sgarlat, who has opined that appellant had good recovery from his surgical treatment and does not require whirlpool treatment of any kind. Appellant's treating physicians have explained that appellant's continuing muscle spasms require treatment by muscle relaxation and that use of the whirlpool spa would increase appellant's functional capacity.

Although the Office did authorize appellant's purchase of a portable whirlpool unit for his bathtub, it is clear that appellant's treating physicians actually prescribed a Jacuzzi whirlpool spa tub, not a portable whirlpool device for use in appellant's bathtub. As elicited by appellant's testimony at the Office hearing held on September 18, 1997 the portable bathtub unit does not allow appellant to immerse his entire back in the bathtub, with directed jet spray towards his back. Appellant has testified that the Jacuzzi whirlpool spa tub did provide pulsating water stream directly unto appellant's back, which provided relief for his muscle spasms.

5 U.S.C. § 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. The present case, differs factually from cases such as *Eileen R. Kates*,⁴ wherein there was no conflict in the medical opinion evidence and the Board determined that the medical evidence of record did not substantiate the medical necessity for a whirlpool spa tub.

On remand, the Office shall refer appellant to an impartial medical specialist. The impartial medical specialist shall be requested to address whether a whirlpool spa tub is medically

³ See generally *Elizabeth J. Davis-Wright*, 39 ECAB 1232 (1988).

⁴ Docket No. 96-1303 (issued February 18, 1999).

necessary to provide relief or cure of appellant's accepted conditions. After such further development of the evidence as necessary, the Office shall issue an appropriate decision.⁵

The decision of the Office of Workers' Compensation Programs dated March 9, 1998 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
September 24, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁵ The Board also notes that while the Office hearing representative instructed the Office to further develop the case regarding the issue of appellant's entitlement to trigger point therapy and to issue a *de novo* decision, the record does not reflect that the Office has issued a final decision regarding this matter.