

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE H. CARTER and SMALL BUSINESS ADMINISTRATION,
DISASTER ASSISTANCE AREA 3, Fort Worth, TX

*Docket No. 98-2144; Submitted on the Record;
Issued May 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying authorization for a hot tub.

In a clinical note dated August 21, 1997, appellant's attending neurosurgeon, Dr. Howard Morgan, reported that a hot tub helped appellant "quite a bit as far as his low back is concerned." He expressed his willingness to prescribe a hot tub and noted that the hot tub had helped appellant's pain considerably.

On February 3, 1998 the Office received copies of receipts pertaining to the installation of appellant's hot tub. The Office requested that appellant provide a physician's prescription for the type of hot tub installed before any consideration could be given for reimbursement. On February 20, 1998 the Office received a note from Dr. Morgan prescribing a hot tub "based on my note and recommendation of August 21, 1997."

On March 4, 1998 an Office medical adviser reviewed the record. He noted that appellant had accepted conditions of cervical and thoracic strain, right knee strain, right knee sensory nerve contusion, aggravation of cervical degenerative disc disease and C6 radiculopathy. He also noted that Dr. Morgan recommended the purchase of a hot tub for the relief of appellant's low back pain.¹ The Office medical adviser reported that a hot tub was no more therapeutic than a simple bathtub with water of the same temperature. He explained that the therapeutic benefit of a hot tub was in the delivery of moist heat to a large area of the body. The agitation of the water provided a superficial massage and felt good but was of doubtful therapeutic value.

¹ The record also indicates that the Office accepted lumbar strain and right medial meniscal tear with chondromalacia.

In a decision dated May 1, 1998, the Office denied authorization for a hot tub. Noting that appellant's physician had provided no medical rationale to support the need for a hot tub and that the Office medical adviser had reported that the same goal could be achieved by soaking in a tub of warm water, the Office found that the medical evidence failed to establish that a hot tub was the most cost effective measure and the only alternative to helping appellant achieve the goals set by Dr. Morgan.

On May 13, 1998 appellant disagreed with the Office's decision. He stated that the hot tub was a replacement of his bathtub with a similar type equipped with jets, one specially designed for the lower back and with an in-line heater. Appellant stated: "I receive a great measure of short-term relief in my lower back, which, allows me to reduce my intake of pain medication. This is the only method of therapy I have experienced, which, does not cause pain to my lower back. I also believe it to be cost advantageous in lieu of outside therapy."

In a decision dated May 19, 1998, the Office denied appellant's request for reconsideration. The Office found that appellant's argument was irrelevant or immaterial as the Office based its prior decision on a medical issue and not an issue of personal convenience or opinion.

The Board finds that the Office did not abuse its discretion in denying authorization for a hot tub.

Section 8103 of the Federal Employees' Compensation Act provides for the furnishing of "services, appliances and supplies prescribed or recommended by a qualified physician," which the Office, under authority delegated by the Secretary, "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."²

Although appellant's attending physician, Dr. Morgan, indicated that he prescribed a hot tub because a hot tub had helped appellant's pain considerably, he failed to adequately explain how a hot tub was more therapeutic than a simple bathtub with water of the same temperature. The Office medical adviser explained that the therapeutic benefit of a hot tub was in the delivery of moist heat to a large area of the body. In his opinion, the agitation of the water provided a superficial massage that felt good but was of doubtful therapeutic value. Dr. Morgan did not address these issues.

The weight of the medical opinion evidence rests with the Office medical adviser, who provided a reasoned opinion that a hot tub was no more therapeutic than a simple bathtub with water of the same temperature. The Board, therefore, finds that the Office did not abuse its discretion in denying authorization for a hot tub.

The Board also finds that the Office properly denied appellant's request for reconsideration.

² 5 U.S.C. § 8103(a); see 20 C.F.R. § 10.401(a); *Linda Holbrook*, 38 ECAB 229 (1986).

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.³

In support of his May 13, 1998 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he submit relevant and pertinent evidence not previously considered by the Office. He is, therefore, not entitled to a merit review of his claim under the first or third criterion above. Instead, appellant advanced a fact. He argued that he received a great measure of short-term relief in his lower back, which allowed him to reduce his intake of pain medication. He stated that this was the only method of therapy he had experienced that did not cause pain to his lower back. Appellant also stated that he believed that the hot tub provided cost advantages to outside therapy. The Office properly determined that the issue in this case is a medical issue, one that should be addressed by appellant's attending neurosurgeon, Dr. Morgan. Appellant's own statements are immaterial to whether, from a medical standpoint, a hot tub is more therapeutic than a bathtub with water of the same temperature. As his request for reconsideration advances a fact that is immaterial to the issue raised by the Office medical adviser, appellant is not entitled to a merit review of his claim under the second criterion above.

Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three criteria above, the Office will deny the application without reviewing the merits of the claim.⁴ For this reason, the Board finds that the Office properly denied appellant's request for reconsideration.

³ 20 C.F.R. § 10.138(b)(1).

⁴ *Id.* § 10.138(b)(2).

The May 19 and May 1, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 12, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member