

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA S. LYNCH and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 99-653; Submitted on the Record;
Issued November 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an attendant's allowance.

This case is before the Board for the second time. In the first appeal, the Board determined that the case was not in posture for decision on the issue of whether appellant had sustained an emotional condition casually related to factors of her federal employment. The Board found that appellant had established compensable factors of employment and remanded the case for the Office to consider whether the medical evidence showed that she had sustained an emotional condition arising from the compensable factors of employment.¹

On remand, the Office accepted appellant's claim for anxiety neurosis, aggravation of irritable bowel syndrome and aggravation of spasmodic breathing disorder.

By decision dated September 22, 1997, the Office denied appellant's request for an attendant's allowance. The Office noted that appellant's attending physician, Dr. Joe G. Savage, a psychiatrist, attributed her need for an attendant to her seizure disorder, which the Office had not accepted as an employment-related condition.

By letter dated November 12, 1997, appellant requested reconsideration and submitted additional evidence. Following further development of the case record, in a decision dated September 21, 1998, the Office denied modification of its prior decision.

The Board has duly reviewed the case record and finds that the case is not in posture for decision due to a conflict in medical opinion.

¹ Donna S. Lynch, Docket No. 99-653 (issued March 19, 1996).

The Federal Employees' Compensation Act provides for an attendant's allowance under section 8111(a), which states:

“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 so helpless as to require constant attendance.”²

Under this provision, the Office may pay an attendant's allowance upon a finding that a claimant is so helpless that she is in need of constant care. The claimant is not required to need around-the-clock care. She has only to have a continually recurring need for assistance in personal matters. The attendant's allowance, however, is not intended to pay an attendant for 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 a claimant in her personal needs such as dressing, bathing or using the toilet.³ Additionally, a claimant bears the burden of proof to establish by competent medical evidence that she requires attendant care within the meaning of the Act.⁴ An attendant's allowance is not granted simply upon the request of a disabled employee or upon request of her physicians. The need for attendant care must be established by rationalized medical opinion evidence.⁵

Dr. Savage completed an EN-1090 form report dated December 18, 1996, on which he noted that appellant had seizures and required assistance traveling and bathing. He related that appellant could not safely drive her car or take a bath because of her seizures. Dr. Savage stated, “When [appellant] is ill in bed [her attendant] attends to all basic needs.”

In a report dated September 8, 1997, Dr. Savage related that appellant was hospitalized under his care from August 12 to 29, 1997. He stated:

“[Appellant] was admitted due to a severe anxiety condition, not otherwise specified, with a seizure disorder; etiology unknown, spasmodic breathing aggravated by her anxiety, an irritable bowel syndrome and pain to her left knee, which she states started after her last seizure. Also, [appellant's] failing health has frightened her, because she has to live alone and she is afraid that she will not be able to be safe alone; if she should have a seizure or if someone should come to the house and decide to accost her, [etc.]”

² 5 U.S.C. § 8111(a).

³ *Grant S. Pfeiffer*, 42 ECAB 647 (1991).

⁴ *See Cynthia S. Snipes (Edward S. Snipes)*, 33 ECAB 379, 383 (1981).

⁵ *See Kenneth Williams*, 32 ECAB 1829, 1832 (1981).

Dr. Savage noted that while hospitalized appellant had an abnormal electroencephalogram (EMG), which supported a finding of seizures. He related:

“[Appellant] is not able to travel unassisted. In fact, I think that she should not be driving at all, based on her medical and emotional state. Her custodial care is also a concern for her. She needs assistance in preparing her meals, watching her eat, bathing and dressing. Her exercise, such as walking, caring for her home, yard and animals, is also a concern.”

* * *

“It is my opinion, based on [appellant’s] medical and mental condition and functioning, that she needs a caretaker 24 hours a day.”

In a report dated October 13, 1997, Dr. Savage stated while appellant’s seizure disorder was of unknown etiology it could be aggravated by stress, anxiety and hyperventilation. He related:

“It is my opinion, that it is more likely than not, that her seizures are aggravated by the [a]nxiety [d]isorder, which she suffers and which has been accepted by the [w]orkers’ [c]ompensation as compensatory. Her [a]nxiety [d]isorder also aggravates her irritable bowel and colon dysfunction. It also causes [appellant] to have a severe breathing disorder; where she gasps for breathes, spasmodically and out of her control. [Appellant] also has constant vomiting, shortness of breath and weakness. During those periods she becomes bedridden. She also will occasionally have a los[s] of bowel function with diarrhea. This also is caused by, or aggravated by, anxiety.

“[Appellant] is a very sick woman, both physically and psychologically. Her physical disabilities are of such a nature that all of them can be aggravated and are aggravated, by her anxiety condition. Therefore, it appears to me, that beside[s] the conditions that have been accepted by the United States Department of Labor, that [appellant’s] seizure disorder should also be covered, since it is aggravated by anxiety; which has been accepted.

“I am still of the opinion that [appellant] needs to have an attendant with her at all times. She needs someone to help her with her preparation of her meals. [Appellant] needs someone to be with her when she bathes. She should have someone with her when she eats, in case she should seizure and aspirate food, blocking her airway. [Appellant] certainly should not be driving. An attendant should be driving for her.”

Dr. Savage discussed the results of objective tests performed on appellant in the hospital and stated:

“What these studies indicate are that she does in fact have a[n] abnormal electroencephalogram, which predisposes her to having a [s]eizure [d]isorder, but that the etiology is not clear. However, it is well known that anxiety aggravates seizures. Since her anxiety condition derived from factors of employment, while she was working at [the employing establishment] [] and has been accepted as such ... then the aggravation of the [s]eizure [d]isorder should also be accepted.”

On June 11, 1998 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Donald L. Landstrom, a Board-certified neurologist, for a second opinion evaluation. In a report dated July 15, 1998, he discussed appellant’s history of seizures beginning in 1992 or 1993. Dr. Landstrom noted respiratory tics upon examination “consisting of repetitive spasmodic inhalation.” He further related:

“An EEG was carried out on July 7, 1998. It was interpreted as follows: ‘The record contains irregularities most pronounced as regards the temporal areas bilaterally. At times these have somewhat of a sharp appearance but the changes seen are not sufficiently pronounced to be regarded as definitely epileptiform.’

“It may be extremely difficult to distinguish a true epileptic seizure disorder from psuedoseizures. It is very possible that the two may coexist. In [appellant’s] case, some of the descriptions given of her recurrent spells are suspicious for seizure activity but, on the other hand, other episodes, for example that experienced in the St. Anthony’s Hospital emergency room in early 1995, are more suspicious for psuedoseizures. Although I certainly can[not] completely exclude the possibility that she is suffering from a true seizure disorder, I do [not] think that diagnosis has been firmly established at present.”

Dr. Landstrom suggested that more extensive EEG testing might resolve the question of whether appellant had a seizure disorder. He stated:

“If it is given for the sake of the discussion that she indeed is suffering from a true seizure disorder, I do not think that this could be caused from anxiety arising from factors of her past [f]ederal employment. Anxiety in and of itself does not act as a sole cause of epilepsy although it may temporarily aggravate seizure frequency and/or intensity in an individual with a predisposition to epilepsy. However, I would expect such aggravation to be only temporary and to disappear when the anxiety generating factors are no longer operating. For this reason, I do not feel that any possible aggravation of a putative seizure disorder would extend past the time that she left her previous [f]ederal position.”

The Board finds that a conflict exists in the medical opinion evidence between appellant’s attending physician, Dr. Savage, who opined that appellant required the services of an attendant due to a seizure disorder, which he found was aggravated by her accepted condition of anxiety disorder and the opinion of the Office referral physician, Dr. Landstrom, who found

that appellant either did not have a seizure disorder or that it was not currently aggravated by her anxiety disorder.

Section 8123(a) of the Act provides in pertinent part: “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.”

On remand, the Office should refer appellant, together with a statement of accepted facts, questions to be addressed and the entire case record to an impartial medical specialist to determine whether appellant requires the services of an attendant due to an employment-related condition. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers’ Compensation Programs dated September 21, 1998 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
November 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member