U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH L. HELMS, JR. and DEPARTMENT OF THE NAVY, SECURITY DEPARTMENT, Ingleside, TX

Docket No. 02-1156; Submitted on the Record;
Issued April 8, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant's entitlement to an attendant allowance should be paid for the period November 19 to December 19, 1992 and March 21, 1993 to October 7, 2001.

This case is before the Board for the second time. Previously, the Board found that the Office of Workers' Compensation Programs erred in finding the evidence insufficient to warrant a merit review and remanded for further consideration of whether his post-traumatic stress disorder was causally related to his accepted November 12, 1992 employment injury.[1] The Board noted the Office, in the last merit decision dated August 15, 1995, denied appellant's request for an attendant allowance, a schedule award, a request for a hot tub as well as denying that his post-traumatic stress disorder was causally related to his accepted November 12, 1992 employment injury. The facts and history of the prior appeal are incorporated by reference.

Appellant requested the Office to reconsider the August 15, 1995 denial of his request for an attendant allowance by letter dated January 24, 2000.

By decision dated July 24, 2000, the Office denied appellant's request for an attendant allowance on the basis that his wife failed to provide medical credentials as required pursuant to 20 C.F.R. § 10.314.

In a letter dated June 6, 2001, appellant requested that his attendant allowance be made retroactive to November 19, 1992, the date of his employment injury.[2]

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[1] Docket No, 97-1942 (issued January 5, 2000). The Board notes that on remand the Office accepted depression as a consequential injury of his accepted November 19, 1992 employment injury.

[2] Appellant had been paid an attendant allowance by the Office for the period December 20, 1992 through March 20, 1993.

By decision dated October 5, 2001, the Office denied appellant's reconsideration request on the basis that 5 U.S.C. § 8111 does not allow for payment of a retroactive attendant allowance. The Office noted appellant's wife had completed a certified nurses aide course and an attendant allowance had been granted effective October 8, 2001.

The Board finds that this case is not in posture for a decision.

Section 8111(a) of the Federal Employees' Compensation Act provides:

> "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."[3]

The current implementing regulation at 20 C.F.R. § 10.314 provides:

> "[The Office] 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 the Act, and medical bills for these services will be considered under section 10.801."

The regulations require that, in order to qualify as an attendant under the Act, that the individual be qualified as "a home health aid, licensed practical nurse, or similarly trained individual."[4]

Prior to January 4, 1999, the controlling regulation regarding an attendant allowance at 20 C.F.R. § 10.305[5] did not require personal care services to be provided by a licensed practical nurse, home health aid or similarly trained individual.

Under section 8111(a), the Office may pay an attendant's allowance upon a finding that a claimant is so helpless that he is in need of constant care. Section 8111(a) contains no language prohibiting the retroactive payment for an attendant's allowance. The only requirement to obtain payment for an attending allowance is that appellant be so disabled from his employment injury to require the services of an attendant. Contrary to the Office's finding, there is nothing in section 8111(a) which prohibits the retroactive payment of attendant fees. As the Act does not

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[3] 5 U.S.C. § 8111(a).

[4] 20 C.F.R. § 10.314(a).

[5] 20 C.F.R. § 10.305.

prohibit the payment of attendant fees retroactively, the Office erred in denying appellant's request on this basis.[6] However, the Office was correct in denying appellant payment for attendant fees subsequent to January 4, 1999 as the new regulation required the attendant to be a qualified health care provider. The Office properly denied appellant's request for attendant fees subsequent to January 4, 1999 until she became qualified on the basis that his wife did not have the qualifications for a health care provider as required by 20 C.F.R. § 10.314.

The issue then is whether the medical evidence is sufficient to establish that appellant was entitled to attendant fees under section 8111(a) and 20 C.F.R. § 10.305 for the period November 19 to December 19, 1992[7] and March 21, 1993 to January 3, 1999.

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. He 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 his personal needs such as dressing, bathing or using the toilet.[8] Additionally, a claimant bears the burden of proof to establish by competent medical evidence that he requires attendant care within the meaning of the Act.[9] An attendant's allowance is not granted simply upon the request of a disabled employee or upon request of his physicians. The need for attendant care must be established by rationalized medical opinion evidence.

The record contains reports from a number of physicians regarding the issue of whether appellant required the assistance of his wife as an attendant. All the physicians agreed that appellant required the assistance of his wife as an attendant. Dr. Carlos R. Estrada, however, was the only physician who provided an opinion that appellant was so helpless as to require constant attendance. In his February 15, 1994 report, Dr. Estrada opined that appellant was "so disabled and depressed that he has required the assistance of another adult around-the-clock in order to help him" with medication, daily living functions and "provide emotional support and supervision to prevent psychiatric hospitalization." Dr. Estrada, in his October 12, 1994 report, opined that appellant required the services of his wife as an attendant as he requires her assistance to dress, get out of bed, to eat, take his medication, drive him to his appointments and "to take care of his personal hygiene."

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[6] *C.f. Grant S. Pfeiffer*, 42 ECAB 647 (1991) (the Board found the Office was only required to pay an attendant as much as it found reasonable and necessary and that it did not did not err in authorizing payment of $250.00 per month for four hours of care per day retroactively for the period April 1, 1976 until December 21, 1989); *Earl N. Mostad*, 38 ECAB 172 (1986) (the Office denied appellant's request for payment of an attendant's allowance retroactive to 1979 on the basis that appellant failed to establish that he was so helpless as to require an attendant); *James B. Throneberry*, 36 ECAB 548 (1985); *George L. Littleton*, 33 ECAB 904 (1982).

[7] The Office authorized payment of an attendant allowance for the period December 20, 1992 to March 20, 1993.

[8] *Grant S. Pfeiffer*, *supra* note 6.

[9] *See Cynthia S. Snipes*, 33 ECAB 379 (1981).

Dr. Estrada's report lacks sufficient detailed rationale to establish that appellant's need for an attendant's allowance is causally related to the effects of the employment injury. His reports, however, are not contradicted by any other medical evidence of record. Dr. Estrada's reports therefore are sufficient to require further development of the record by the Office.[10] The case, therefore, will be remanded for such development. On remand, the Office should request a more detailed explanation from Dr. Estrada on how the effects of the employment injury placed appellant in need of assistance in his personal matters of care for the period November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999. After further development as it may find necessary, the Office should issue a *de novo* decision.

The October 5, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed in part, set aside in part and the case remanded for further consideration consistent with the above opinion.

Dated, Washington, DC
April 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] *John J. Carlone*, 41 ECAB 354 (1989).