U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS LEE COX and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Wichita, KS

Docket No. 02-1286; Submitted on the Record;
Issued March 26, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying authorization for a computer and internet access; and (2) whether the Office properly denied appellant's claim for an attendant's allowance.

Appellant's occupational disease claim filed on May 14, 1999 was accepted for binaural hearing loss[1] based on the February 1, 2000 report of Dr. Thomas C. Kryzer, a Board-certified otolaryngologist and Office referral physician. On February 10, 2001 appellant requested compensation for the services of a lip-reading interpreter, driver and attendant. He filed an application for a schedule award (Form CA-7) on February 15, 2000, which was granted for 100 percent binaural hearing loss.[2]

By letter dated February 16, 2000, appellant noted that he relied solely on electronic mail (email) to communicate at work and asked if the Office would pay for a computer and internet hook-up at home. In response to an Office inquiry, appellant submitted a letter from a clinical audiologist stating that appellant communicated with the outside world exclusively through email and would find the use of an amplified telephone "extremely difficult, if not impossible."

On March 23, 2001 the Office denied appellant's request for a computer and internet access, based on the opinion of an Office medical adviser. Appellant requested an oral hearing, but later agreed to a review of the written record.

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[1] Appellant has a preexisting, service-related hearing loss, which was rated as 10 percent in 1975. Prior to beginning his federal employment in 1986, the service-related hearing loss was increased to 40 percent. On March 10, 1999 the Department of Veterans Affairs increased the hearing loss to 90 percent. Appellant elected wage-loss benefits on April 2, 2001.

[2] The period of the award began January 1, 2001 to run through November 23, 2003.

By decision dated January 9, 2002 and finalized January 10, 2002, an Office hearing representative denied appellant's request for a computer and internet access on the grounds that these services were not necessary to treat the effects of the work-related injury because such equipment was not an extension of medical treatment designed to cure, give relief or reduce the degree of disability.

On March 11, 2002 the Office denied appellant's claim for an attendant's allowance on the grounds that his wife, who had been providing lip-reading and driving services, did not have a medical background and, therefore, was not qualified to act as an attendant. The Office noted that reimbursement for lip-reading or sign language classes or a telephonic enhancement system would be provided.

The Board finds that the Office acted within its discretion in denying appellant's request for a computer and internet access.

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part:

> "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 the monthly compensation."[3]

The Office's obligation to pay for medical treatment under this section extends only to treatment of employment-related conditions and appellant has the burden of establishing that the treatment is for the effects of an employment injury.[4] However, the right to medical benefits for an accepted condition is not limited to the period of entitlement to disability compensation.[5]

In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act.[6] 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 and, therefore, must exercise its administrative discretion in choosing the means to achieve this goal.[7]

The only limitation on the Office's authority is that of reasonableness.[8] 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

[3] 5 U.S.C. § 8103(a).

[4] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[5] *Marlene G. Owens*, 39 ECAB 1320, 1331 (1988).

[6] *Yvonne R. McGinnis*, 50 ECAB 272, 274 (1999).

[7] *David Spearman*, 49 ECAB 445, 449 (1998).

[8] *James R. Bell*, 49 ECAB 642, 644 (1998).

established facts.[9] Abuse of discretion is not established merely by showing that the evidence could be construed so as to produce a contrary factual conclusion.[10]

In this case, the Office accepted appellant's binaural hearing loss as work related. Appellant retired from the employing establishment on medical disability and received a schedule award.

In a February 14, 2001 report, an Office medical adviser noted that, while most of appellant's hearing loss predated his federal employment, appellant claimed that email communication facilitated his work. The Office medical adviser concluded that the Office could not authorize purchase of a computer or payment of an internet access fee because the equipment would not achieve the objectives of 5 U.S.C. § 8103(a), "likely to cure, give relief, reduce the period of disability or aid in lessening the amount of monthly compensation." The Office medical adviser stated that appellant used a computer and email while working and added: "Obviously, the period of disability is irrelevant. He is not, if working, receiving compensation."

As noted above medical care is not limited to a period of disability under the Act. Nonmedical equipment may be authorized if recommended by a claimant's treating physician and if the Office finds that such an item is likely to cure, give relief and reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.

The Office procedure manual discusses requests for equipment not commonly obtainable from medical supply sources or prescribed for treatment; such as waterbeds, weight-lifting sets, saunas, tape decks, vibrating chairs and exercise bicycles.[11] The Office must evaluate the pertinent information received from the claimant and his physician and determine whether the equipment is necessary to treat the effects of the work-related injury and that its use will be consistent with the claimant's restrictions and safety.[12]

The evidence does not establish that a computer and internet access is likely to cure, relieve or reduce the degree of appellant's hearing loss. Dr. Kryzer, to whom the Office referred appellant, stated on February 22, 2000 that other than a lip-reading interpreter, there was no way that appellant could communicate outside of written methods.

In its March 23, 2001 decision, the Office found that appellant's request for a computer and internet service did not meet the requirements of section 8103. The hearing representative subsequently explained that the Office must ensure that the requested equipment, "essentially an extension of medical treatment," is necessary to treat the effects of the work-related injury. He concluded that in "no sense" could a computer be considered equipment to "treat" a work-related disabling condition. The hearing representative added that, even if appellant had filed a wage-

[9] *Gustavo H. Mazon*, 49 ECAB 156, 161 (1997).

[10] *Manny Korn*, 1 ECAB 78 (1947).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.15.b. (July 2000).

[12] *Id.*

loss claim,[13] the only contingency under which the Office might pay for a computer would be in conjunction with a rehabilitation program designed to reduce the degree or period of disability or aid in lessening the amount of monthly compensation.

In *Richard D. Ritter*,[14] the Office authorized a 34-year-old pilot to purchase a personal computer recommended by his surgeon, to assist him in his cognitive rehabilitation. The medical evidence in that case established that programmed stimulation in specified areas of the employee's brain improved his mental functioning to the point where he returned to work and almost achieved his goal of being able to fly again.

In this case, however, appellant has not submitted medical evidence that a home computer or internet access will achieve any of the objectives of section 8103. Appellant's audiologist stated that internet/email capability was "essential for him to maintain communication with the outside world." However, an audiologist is not defined as a "physician" under section 8101(2) of the Act.[15] This opinion cannot be considered a recommendation by a qualified physician.

Dr. Kryzer, to whom the Office referred appellant, found that appellant had a total binaural hearing loss and recommended cochlear implantation. He offered no opinion that a computer or internet access would cure or relieve appellant's condition or reduce his degree of disability. His only recommendation was that appellant might be a candidate for an implant. Further, the record contains no evidence that internet computer access would aid in lessening the amount of disability compensation that appellant receives.

While the Office has paid for nonmedical equipment recommended by physicians, the equipment must be necessary to treat the effects of the work-related injury. For example, a waterbed may relieve the painful effects of a back injury or an exercise bicycle may strengthen an injured leg. However, even if a computer could be considered a piece of equipment necessary to treat the work-related effects of appellant's total hearing loss, such a contrary conclusion is insufficient to establish that the Office abused its discretion in denying his request.[16] The Office based its decision on the insufficiency of medical evidence showing that a computer and internet access would achieve any of the objectives of section 8103. The Board finds that this determination was not an unreasonable exercise of discretion.

The Board also finds that the Office acted within its discretion in denying appellant's request for an attendant's allowance.

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[13] Appellant is receiving compensation under a schedule award for total hearing loss, which runs until November 23, 2003.

[14] 40 ECAB 134, 135 (1988).

[15] 5 U.S.C. § 8101(2). *See Irwin J. Schumacher*, 39 ECAB 798, 811 n.2 (1988) (stating that an audiologist is not a physician within the meaning of the Act and his opinion has no probative value).

[16] *See James R. Bell*, 49 ECAB 642, 646 (1998) (finding that while the facts supported a contrary factual conclusion that alone did not establish that the Office abused its decision-making discretion); *see also James R. Bell*, 52 ECAB ___ (Docket No. 99-2133, issued July 2, 2001.

Section 8111(a)[17] of the Act provides that an injured employee who has been awarded compensation may be entitled to an attendant's allowance, if the services of an attendant are required constantly because the employee is totally blind, has lost the use of both hands or both feet, is paralyzed and unable to walk or has other disability resulting from the injury which makes the employee so helpless as to require constant attendance for personal needs, such as feeding, dressing or bathing.

Under this provision, the Office may pay an attendant's allowance upon finding that a claimant is so helpless that he is in need of constant care.[18] The claimant is not required to need around-the-clock care, but need only demonstrate a continually recurring need for assistance in personal matters.[19] The attendant's allowance, however, 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 a claimant in personal needs such as dressing, bathing or using the toilet.[20]

The Office's implementing regulation notes that personal care services, which have been determined to be necessary medically, must be provided by a home health aide, licensed practical nurse or similarly trained individual.[21] Exercising its discretion under section 8111(a), the Office will no longer pay a claimant directly for such services.[22] The Office explained that, in the past, supplemental payments directly to injured claimants may have encouraged family members to take on personal care without any training and that trained personnel would be better able to provide quality services.[23]

A claimant bears the burden of proof in establishing by competent medical evidence that he requires attendant care within the meaning of the Act. An attendant's allowance is not granted simply on the request of a disabled claimant or his physicians. The need for attendant care must be established by rationalized medical opinion evidence.

The Office's procedures require that the claimant complete a Form CA-1086, a request to the employee for information to determine entitlement to an attendant's allowance and a Form CA-1090, a request to the claimant's treating physician or hospital for a report on the need for an attendant. Following receipt of this evidence, the Office medical adviser will review the record to determine whether the claimant requires the services of an attendant.[24]

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[17] 5 U.S.C. § 8111(a).

[18] *Bonnie M. Schreiber*, 46 ECAB 989, 982 (1995).

[19] *Nowling D. Ward*, 50 ECAB 496, 497 n.3 (1999), *citing Erlin J. Belue*, 13 ECAB 88 (1961).

[20] *Grant S. Pfeiffer*, 42 ECAB 647, 652 (1991).

[21] 20 C.F.R. § 10.314(a).

[22] 5 U.S.C. § 8111(a).

[23] 20 C.F.R. § 10.314(b).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.8 (July 2000).

The factors to be considered in evaluating entitlement to an attendant's allowance are:

> "[8.]a.(2) [t]he particular kinds of activities for which assistance is needed. (The assistance must be for personal needs such as bathing or dressing, not for such tasks as cooking or housekeeping.)
>
> (b) The need for daily assistance in these activities;
>
> (c) The nature of the disability;
>
> (d) Any other facts which may be relevant to the situation."[25]

In this case, appellant requested reimbursement for the services of his wife who "had to curtail her normal work" to assist him in communicating with others through lip-reading, in driving him because his work injury exacerbated his diagnosed rotational vertigo and in providing personal care when he became incapacitated by the vertigo.

Appellant submitted a February 22, 2000 report from Dr. Kryzer, who diagnosed profound bilateral hearing loss and noted recurrent episodes of rotatory vertigo. He stated that appellant would derive little or no benefit from hearing aids and relied on lip-reading for communication. Dr. Kryzer noted that most people in appellant's situation required a lip-reading interpreter to follow more than one conversation at one time. He related that appellant suffered from frequent severe attacks of vertigo, which could cause falling and significant injury. Dr. Kryzer recommended that appellant be permitted to work at home because of his hearing loss and uncontrolled episodic vertigo.

This evidence does not establish that appellant requires an attendant to care for his personal needs. Dr. Kryzer mentioned no problems in personal care caused by appellant's accepted hearing loss. The Office has not accepted the vertigo condition, but even if this diagnosis is work related, there is no medical evidence that any episode of vertigo has resulted in appellant's inability to care for himself. As stated previously, transportation services are not reimbursable through an attendant's allowance. In any event, there is insufficient medical evidence of record that appellant's accepted condition prevents him from driving.

While appellant had to wait almost two years before his request for an attendant's allowance was denied, the evidence of record establishes that the Office acted reasonably in denying the request due to the insufficiency of rationalized medical evidence. Indeed, the record contains no evidence that appellant requires any assistance in his personal daily activities.[26]

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[25] *Id.* at Chapter 2.812.8(a)(2).

[26] *See Sheila Peckenschneider*, 49 ECAB 430, 432 (1998) (finding that the Office was not required to pay for appellant's acupuncture treatments because no physician supported the need for such therapy with a rationalized medical opinion).

The decisions of the Office of Workers' Compensation Programs dated March 11, 2002 and January 9, 2002, finalized January 10, 2002 are affirmed.

Dated, Washington, DC
March 26, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member