

**United States Department of Labor  
Employees' Compensation Appeals Board**

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MARY C. BROZ, Appellant )  
and ) Docket No. 03-2021  
DEPARTMENT OF THE NAVY, NAVAL AIR ) Issued: January 9, 2004  
STATION, Pensacola, FL, Employer )  
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)

*Appearances:*  
*Mary C. Broz, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member

**JURISDICTION**

On July 23, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated April 4, 2003. Under 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office abused its discretion in refusing to authorize payment for a home pool.

**FACTUAL HISTORY**

On August 22, 1991 appellant, then a 43-year-old construction representative, filed a claim alleging that on August 21, 1991 she injured her back lifting a freight elevator gate. On November 27, 1991 the Office accepted appellant's claim for herniated nucleus pulposus at L2 and L3-4, lumbosacral strain and dysthmic pain disorder and subsequently expanded its acceptance to include anal fissure and left leg thrombosis. She underwent lumbar decompression on January 15, 1992, decompressive laminectomy at L5-S1 with fusion from L4-S1 on October 20, 1992 and

sphincterotomy and fissuromy in November 1992. Each surgery was authorized by the Office. In addition to her employment-related conditions, appellant also has preexisting nonemployment-related degenerative disc disease and degenerative joint disease of the lumbar spine. She stopped work on August 30, 1991 and has not returned. The Office has paid all appropriate compensation benefits for wage-loss compensation and medical treatment.

On October 25, 1993 Dr. William E. Smith, appellant's treating Board-certified orthopedic surgeon, prescribed aquatic therapy. In a letter dated November 8, 1993, he explained his recommendation that appellant receive swimming pool therapy, stating that he hoped that this therapy would diminish her pain to the point where she could return to the workforce. Dr. Smith further stated that there was no other viable alternative to pool therapy as appellant had not tolerated general exercise or walking very well. On December 2, 1993 she submitted a request for pool or spa membership, together with a list of facilities offering pool therapy and their associated costs. In addition, for comparison, appellant submitted sample costs from three companies for the installation of a home pool.

On March 29, 1995 appellant's husband, her authorized representative, (Mr. Broz), telephoned the Office to ask whether they could have a pool installed at their home. He asserted that this would alleviate the need for appellant to attend pool therapy and would also reduce their mileage and car maintenance costs. The telephone memorandum indicates that an Office representative told Mr. Broz to get a letter of medical justification and start getting price quotes for consideration by the Office.

Appellant's treating physicians continued to recommend pool therapy for her and provided medical rationale for this recommendation. Based on the opinion of an Office medical consultant, who opined that pool therapy could benefit appellant, the Office continued to authorize swimming pool therapy.

On January 21, 1997 Mr. Broz again contacted the Office to inquire as to whether the Office would authorize the installation of a home swimming pool. The Office informed him that installation of a home pool had not been authorized and that in order to obtain authorization, appellant needed to submit a letter of medical justification and three cost estimates for consideration by the Office.

On July 1, 1998 Dr. Thomas Lampone, appellant's treating Board-certified internist prescribed pool therapy every day for one year. In an accompanying note also dated July 1, 1998, he stated that appellant must be in a pool every day to be able to walk and added "suggest pool installation." In a third note dated July 1, 1998, Dr. Lampone stated that appellant must be in a whirlpool every day and added "suggest whirlpool installation."

On June 15, 1999 Mr. Broz telephoned the Office to request reimbursement for an inground home pool, which had been installed. He stated that he had sent the Office the prescription for the pool, together with estimates for its installation and had been told by the Office to go ahead and have the pool installed and send the Office the bill. Mr. Broz stated that he sent the Office the bill on May 14, 1999, but had not received reimbursement. The Office explained to him that the proper procedure was for the Office to send out a written authorization, together with a

description of the exact item authorized for purchase. The Office also informed Mr. Broz that the pool installation bill was not in the file and asked him to resubmit it for review.

On June 29, 1999 appellant telephoned the Office and inquired as to the status of the pool installation reimbursement. By letter dated July 9, 1999, the Office informed her that prior authorization must be obtained from the Office concerning the purchase and installation of a pool and noted that the record did not contain a written recommendation from appellant's treating physician prescribing a home pool for therapeutic reasons. The Office stated that if appellant wished the Office to consider her request, she should submit a detailed narrative medical report from her treating physician which contained: a full, specific description of the basic equipment needed to treat effects of her job-related condition; an explanation of how the item would address the effects of the employment injury and an opinion as to the anticipated effectiveness of the item; the anticipated duration of the need for the pool; a suggested supplier, if any; and an opinion on why a home inground pool was necessary, as opposed to regular aquatic therapy from a bath tub pool or sessions at a health club. Finally appellant was instructed to submit the names and addresses of two or three suppliers together with signed statements from these suppliers outlining the basic costs of the equipment specified by the physician. The Office stated that after the requested material was submitted, a decision would be issued regarding authorization for inground pool installation.

In response, appellant submitted a report dated July 29, 1999, from Dr. Lampone, who explained why she needed to continue participating in pool therapy. He did not address, however, the issue of whether she required a home pool. In a letter dated September 17, 1999, appellant informed the Office that she got in the pool two to four times a day and stated that compared to the cost of supervised pool therapy, the Office could have saved money had they authorized the pool in 1994, when she first inquired about it. In a separate undated letter, appellant indicated that therapist supervised pool therapy at the approved center had cost the Office \$14,820.00, including mileage costs and submitted a bill from All Pool Affairs dated May 18, 1999, in the amount of \$16,299.15, for an installed inground pool at appellant's address, with spa and swim jets. The bill was initialed and marked "paid in full."

On January 26, 2000 Mr. Broz telephoned the Office and asserted that he had obtained verbal preapproval from "Mark" in the telephone bank to install a home pool. He stated that he did not have the last name of the person he spoke with, but did have a record of the dates of his conversations. The Office informed Mr. Broz that the matter would be reviewed by an Office medical adviser and considered by the Office.

Appellant submitted a letter from Dr. Lampone dated March 22, 2000, in which he stated that water aerobics and pool therapy were a necessary part of her multiple adjunctive therapy regimen.<sup>1</sup> Dr. Lampone did not address the need for a home pool.

On April 17, 2000 the Office asked its medical adviser to state whether he concurred with appellant's treating physicians' recommendations for, among other things, pool therapy. The

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<sup>1</sup> In addition to pool therapy, Dr. Lampone recommended that appellant receive neuromuscular massage therapy, which was subsequently approved by the Office.

Office did not ask the Office medical adviser to address the necessity for a home pool. In a response dated April 19, 2000, the Office medical adviser recommended that the Office approve pool therapy, two to three times a week, for one year. By letter dated April 20, 2000, the Office approved pool therapy for one year, but emphasized that purchase of a home, inground pool was not authorized. The Office stated that there was no evidence in the record that a pool had been authorized prior to its purchase by appellant.

On August 18, 2000 Mr. Broz telephoned the Office and again requested authorization for home pool installation. He asserted that the Office was already paying \$150.00 a month for appellant's authorized pool therapy, that the trips to the pool facility put a lot of miles on their car and that appellant often had to rely on him or others to drive her. The Office informed Mr. Broz that as a rule, pool or spa installation was not usually approved by the Office, but he could submit estimates, together with his cost savings arguments, to the Office for consideration.

By letter dated December 5, 2000, appellant stated that the Office had verbally preauthorized the installation of a home pool and that installation had been completed in April 1998. In a telephone call dated December 18, 2000, Mr. Broz informed the Office that appellant had not been attending her authorized pool therapy, because she had been using her home pool instead.

By letter dated January 8, 2001, the Office received a letter of inquiry from appellant's congressman, whom she had contacted for assistance. In a letter of reply dated January 30, 2001, the Office informed the Congressman that payment for purchase of the swimming pool would not be issued, as appellant had not obtained prior authorization and had not submitted the necessary medical justification for the purchase. The Office stated that her claim would be denied in a formal decision, after which appellant could follow her appeal rights.

In a medical report dated April 5, 2001, Dr. Lampone explained why appellant would continue to benefit from pool therapy, but did not address the issue of a home pool. In a report dated April 10, 2001, Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon and Office second opinion physician, stated that he agreed that appellant's treatment should include aquatic therapy, as prescribed by her treating physicians, but he did not address the issue of a home pool.<sup>2</sup>

On June 15, 2001 the Office referred the case file to the Office medical adviser and asked for opinions as to whether appellant had benefited from aqua therapy and whether the Office should authorize reimbursement for a home swimming pool. The Office noted that supervised therapy had been authorized, but was not being utilized and that the pool had already been installed. The Office stated that it was looking at the overall cost of the pool versus the cost of appellant attending supervised therapy. In a response dated June 15, 2001, an Office medical adviser stated that there was "no convincing evidence that [appellant's] pool is effective in relieving her symptoms. She is more likely to benefit from therapy at a supervised facility."

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<sup>2</sup> The Board notes that the Office did not ask Dr. Fletcher to address the issue of whether appellant required a home pool.

Following Dr. Lampone's retirement, appellant began treating with Dr. Edward Schnitzer, a Board-certified physiatrist. In his initial report of record dated September 17, 2001, Dr. Schnitzer reviewed appellant's history of injury and treatment, listed his findings on physical examination and opined that she should continue her present therapy programs. He did not discuss the need for a home pool. In a report dated February 4, 2002, Dr. Schnitzer stated that he was in agreement with the recommendation of Dr. Lampone that the installation of a home pool would be beneficial to appellant for ongoing treatment of her chronic back pain.

In a report dated February 15, 2002, Dr. Smith recommended that appellant continue her pool therapy at home.

In a decision dated March 8, 2002, the Office denied appellant's request for reimbursement for home pool installation on the grounds that the medical evidence of record did not establish that the pool claimed for reimbursement was indicated in treating her accepted conditions. In a separate letter dated March 8, 2002, the Office informed her that her request for procurement of a whirlpool was still under consideration and asked that she submit the names of several suppliers together with descriptions of the units proposed.

On April 5, 2002 appellant requested an oral hearing before an Office representative. In further support of her claim, she submitted additional factual and medical evidence, including two reports dated January 13, 2002 from Dr. Smith. In one report, he stated that appellant has "benefited primarily from aquatic therapy in a heated pool, which she has done religiously since 1994." Dr. Smith stated that pool therapy was "her most effective treatment of all" and that appellant suffered a setback if she missed even one or two days of therapy. In a separate note also dated January 13, 2003, Dr. Smith stated that appellant continued to "need aquatic therapy at home in her heated pool. It is her most effective form of therapy for her unusual condition. There are no changes in her medical condition to indicate that she does not need to continue her pool therapy indefinitely." Appellant also submitted a medical report from Dr. Kurt A. Krueger, a Board-certified anesthesiologist, to whom she was referred by Dr. Smith in April 2002. In his treatment note dated May 15, 2002, Dr. Krueger noted that appellant's therapy, including her aquatherapy, had been very helpful. On February 11, 2003 she submitted some additional pool installation estimates she had obtained prior to having her pool installed.

Following the oral hearing, held on February 11, 2003, appellant submitted treatment notes from her physical therapist, describing the benefits of pool therapy and an additional report from Dr. Smith dated February 27, 2003, in which he stated:

"Previous letters have been written regarding [appellant's] need for aquatic therapy. It has been well outlined that she desperately needs this to keep her functioning. [Appellant] has intense muscle spasms and pain and is unable to work out in a gravity situation. An inground pool for easy access with ladders and steps to help safely get her in and out of the pool is necessary. A shallow end is necessary to acclimate to the water. Water that is too cool intensifies or precipitates severe spasms in multiple muscle groups. The deep end allows her to exercise more easily and more thoroughly using upper extremities as well. This is a lifelong situation not expected to change. The cost of this pool, rarely ordered

by me, has saved [appellant] three-day-a-week trips to organized aquatics classes and has been cost effective in its treatment.”

In a decision dated April 4, 2003, an Office hearing representative denied appellant’s request for reimbursement for her home pool installation costs. The hearing representative specifically found that while the medical evidence of record provided justification for continuing aquatic therapy, it did not provide sufficient justification for installation of a pool at appellant’s home. Therefore, the Office hearing representative found that the installation of a home pool was not medically necessary for the treatment of her accepted conditions, to the exclusion of alternative forms of therapy, such as an off-site pool.

### **LEGAL PRECEDENT**

Section 8103 of the Federal Employees’ Compensation Act<sup>3</sup> 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 Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>4</sup> The language of section 8103 contains the term “shall” in authorizing the furnishing of services, appliances and supplies, but this directive is qualified by the phrase “which the Secretary of Labor considers likely to cure, give relief, reduce the degree or period of disability or aid in lessening the amount of monthly compensation.” This phrasing underscores the intent of Congress that discretion be delegated to the Secretary and hence to the Office in determining whether to grant or reimburse an employee for prescribed services, appliances and supplies under section 8103.<sup>5</sup>

In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his or her 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. The only limitation on the Office’s authority is that of reasonableness.<sup>6</sup> 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. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>7</sup>

In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury by submitting rationalized medical evidence that supports such a connection and demonstrates

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8103(a).

<sup>5</sup> *James R. Bell*, 49 ECAB 642 (1998).

<sup>6</sup> *Dr. Mira R. Adams*, 48 ECAB 504 (1997).

<sup>7</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

that the treatment is necessary and reasonable.<sup>8</sup> The fact that the Office authorized and paid for some medical treatment does not establish that the condition for which appellant received treatment was employment related.<sup>9</sup> Furthermore, the issues of authorization of medical treatment and reimbursement of travel expense for medical treatment are separate and distinct. The Office may authorize medical treatment, but determine that the travel expense incurred for such authorized treatment was unnecessary or unreasonable.<sup>10</sup>

### **ANALYSIS**

In this case, appellant's treating physicians, Drs. Lampone, Smith and Schnitzer are in accord that appellant's condition is greatly benefited by exercise and that she requires the weightless environment of a swimming pool in order to perform her exercises. The medical evidence also supports a finding that she requires aqua therapy at least three days a week and will continue to require this therapy indefinitely. The Office has approved a membership at a pool facility recommended by appellant's physician as likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation. There is no medical evidence to support that the installation of an inground pool at appellant's residence is likely to better accomplish the above-stated purpose of section 8103 of the Act.<sup>11</sup> While Drs. Lampone and Schnitzer suggested that she install an inground pool at her home and Dr. Smith stated that appellant continued to need aquatic therapy "at home in her heated pool" there is no indication in their medical reports that this recommendation was made for anything other than convenience. Despite several requests from the Office, none of the physicians of record offered a rationalized medical opinion which explains why appellant could not derive equal benefit from aquatic therapy at a private facility, such as had been authorized by the Office. In addition, while Dr. Smith discussed the need for her to exercise in a heated inground pool, equipped with steps and ladders and both a deep and shallow end, he did not discuss why swim jets and spa jets, such as were installed in appellant's pool, were medically necessary. Generally, an abuse of discretion is 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.<sup>12</sup> It cannot be found that the Office abused its discretion in denying medical benefits for the installation of an inground pool at appellant's home.

### **CONCLUSION**

The Board finds that the Office did not abuse its discretion in refusing to authorize payment for the installation of an inground pool at appellant's home.

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<sup>8</sup> See *Debra S. King*, 44 ECAB 203 (1992).

<sup>9</sup> *Dales E. Jones*, 48 ECAB 648 (1997); *James F. Aue*, 25 ECAB 151 (1974).

<sup>10</sup> *Dr. Mira R. Adams*, *supra* note 6.

<sup>11</sup> See *Leonard E. Fritz*, 39 ECAB 170 (1987).

<sup>12</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 4, 2003 is affirmed.

Issued: January 9, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member