United States Department of Labor
Employees' Compensation Appeals Board

RICHARD E. SIMPSON, Appellant	)	
and	)	**Docket No. 05-1642**
	)	**Issued: July 12, 2006**
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL STATION, Long Beach, CA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 1, 2005 appellant, through his attorney, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated January 24 and June 1, 2005, denying his request for an attendant's allowance. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for an attendant's allowance for the period October 1, 1990 to July 12, 1998.

FACTUAL HISTORY

This case is before the Board for the third time. On appeal for the first time, the Board reversed the Office's August 23, 1994 decision terminating compensation effective May 30, 1993 on the grounds that appellant had no further employment-related disability.[1] In the second

[1] *Richard E. Simpson*, Docket No. 95-2844 (issued April 3, 1998).

appeal, the Board affirmed the Office's denial of his request for an attendant's allowance for the period July 17, 1983 through October 1, 1990.[2] However, the Board set aside, the Office's denial of appellant's request for an attendant's allowance for the period October 1, 1990 to July 12, 1998. The Board noted that, "although his diabetes is not an accepted condition, his accepted dementia may prevent [him] from attending to his required medication."[3] The Board remanded the case for the Office to further develop the issue of whether appellant required assistance with his personal needs, including monitoring his blood sugar and receiving insulin injections due to his accepted conditions of cerebral concussion, dementia, cervical strain, lumbar strain, hemorrhagic gastritis, hypothyroidism and hearing loss. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

In a report dated September 7, 2004, Dr. Steve O. Marzicola, a Board-certified psychiatrist, responded to an Office telephonic inquiry. He had treated appellant beginning in January 1996 and noted that appellant's wife had been his "full-time caretaker" during this period. Based on the information provided by his wife, Dr. Marzicola opined that she provided care and attendance from October 1, 1990 through July 13, 1998.

On September 27, 2004 the Office requested that Dr. Marzicola and Dr. Kevin Kurriss, an internist, address whether appellant required an attendant from October 1, 1990 to July 13, 1998 and enclosed form reports for completion.[4]

By letter dated October 1, 2004, appellant's attorney requested that the Office ask his physicians whether he required assistance administering his medicines and checking his blood sugar levels during the period in question.

In a response received on October 6, 2004, Dr. Marzicola opined that, for the period October 1, 1990 to July 13, 1998, appellant required full-time assistance with the activities of daily living, including managing his medicine, keeping appointments, shopping and managing his finances. He indicated that he needed assistance traveling, dressing, bathing and, to a moderate extent, getting out of doors and exercising.

On October 14, 2004 the Office requested that Dr. Marzicola and Dr. Kurriss state whether appellant could administer his prescription medication "alone, with assistance or not at all" from October 1, 1990 to July 13, 1998.

In a report dated November 2, 2004, Dr. Kurriss indicated that he treated appellant from 1996 until June 2004, stating, "[he] was always accompanied by his wife since he was unable to remember the names and dosages of his medications. [He] is definitely unable to administer his prescribed medications by himself."

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[2] *Richard E. Simpson*, 55 ECAB ___ (Docket No. 04-14, issued May 3, 2004).

[3] *Id*.

[4] The Office additionally requested information from a physician's assistant; however, a physician's assistant's reports are of no probative value as a physician's assistant is not considered a physician under the Federal Employees' Compensation Act. 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357 (2000).

By decision dated January 24, 2005, the Office denied appellant's claim for an attendant's allowance for the period October 1, 1990 to July 12, 1998 on the grounds that the medical evidence was insufficient to show that he required an attendant for personal needs during this period. The Office determined that, as appellant's need for insulin injections was not work related, it did not constitute a covered personal service.

By letter dated March 1, 2005, appellant, through his attorney, requested reconsideration. Counsel argued that the Office disregarded the Board's instructions that, if he required help managing his diabetes due to his accepted condition, it would be a covered personal service even if the diabetes was not employment related.

In a joint report dated February 24, 2005, received on March 4, 2005, Dr. Marzicola and Dr. Kurriss opined that appellant's "dementia did cause him to require assistance in receiving insulin injections and blood sugar monitoring between October 1, 1990 and July 13, 1998." In support of their findings, they cited to medical records from 1995 and 1996 noting findings of forgetfulness beginning in 1983 and a history of cognitive decline, delusions and circumstantial thought process subsequent to appellant's 1983 closed-head injury. Dr. Marzicola and Dr. Kurriss stated:

> "In conclusion, it is [our] professional opinion that [appellant] has been unable, due to the effects of his work[-]related injury, to administer his insulin injections and monitor his blood sugar between October 1, 1990 and July 13, 1998 (and indeed, through the present), because of his memory difficulties, hearing difficulties, thought disorganization and because of the quite complicated nature of his medication regimen."

By decision dated June 1, 2005, the Office denied modification of its prior decision.

LEGAL PRECEDENT

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

> "The Secretary to 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."[5]

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

[5] 5 U.S.C. § 8111(a).

Under this provision, 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. 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.[6] 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.[7] 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.[8]

ANALYSIS

On a prior appeal, the Board found that appellant had submitted sufficient evidence to warrant development of the issue of whether he required an attendant for the period October 1, 1990 to July 12, 1998.[9] An attendant's allowance is provided to pay for an attendant to assist a claimant in his personal needs such as dressing, bathing or using the toilet.[10] The Board noted that, if appellant required assistance managing his diabetes due to the effects of his employment injury, this would be a covered personal need under the Act even though his diabetes was not an accepted condition.

On remand the Office requested further information from appellant's attending physicians regarding his need for an attendant during the period in question. In a report dated September 7, 2004, Dr. Marzicola related that appellant's wife indicated that she provided care and attendance from October 1, 1990 through July 13, 1998.

In a report dated October 6, 2004, Dr. Marzicola opined that, for the period October 1, 1990 and July 13, 1998, appellant required full-time assistance with the activities of daily living, including managing his medicine, keeping appointments, shopping and managing his finances. He additionally found that he needed assistance traveling, dressing, bathing and, to a moderate extent, getting out of doors and exercising.

In a joint report dated February 24, 2005, received by the Office on March 4, 2005, Dr. Marzicola and Dr. Kurriss found that appellant required assistance with blood sugar monitoring and injecting insulin from October 1, 1990 to July 13, 1998 due to his dementia. They provided as rationale the fact that medical records noted findings of forgetfulness,

[6] *Nowling D. Ward*, 50 ECAB 496 (1999).

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

[8] *Id*.

[9] The Board notes that for the period October 1, 1990 to July 12, 1998, the new regulations, which require that the personal care services be provided by a home health aide, licensed practical nurse or similarly trained individual were not yet in effect. *See* 20 C.F.R. § 10.314.

[10] *See Nowling D. Ward*, *supra* note 6.

cognitive decline, delusions and circumstantial thought process beginning after his 1983 closed-head injury. Dr. Marzicola and Dr. Kurriss concluded that appellant "has been unable, due to the effects of his work[-]related injury, to administer his insulin injections and monitor his blood sugar between October 1, 1990 and July 13, 1998 (and indeed, through the present), because of his memory difficulties, hearing difficulties, thought disorganization and because of the quite complicated nature of his medication regimen."

The Board finds that the opinions of Dr. Marzicola and Dr. Kurriss are supportive of appellant's claim that he required an attendant's allowance, well rationalized and uncontradicted by any other evidence of record. He, consequently, has met his burden to submit rationalized medical evidence documenting his need for attendant care.[11] The Office, thus, improperly found that appellant had not established his need for an attendant for the period October 1, 1990 to July 12, 1998.

The Office may pay up to $1,500.00 per month for full-time services of an attendant. The Office, however, is not required to pay the maximum amount if not found to be necessary. It need only pay as much as it finds under the particular facts of a case necessary and reasonable for an attendant's services.[12] As the Office denied appellant's request for an attendant's allowance, it did not develop this aspect of the claim. The case will be remanded for the Office to determine the amount necessary and reasonable for the attendant's services during the period October 1, 1990 to July 12, 1998.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for an attendant's allowance for the period October 1, 1990 to July 12, 1998. The case is remanded for the Office to determine the amount necessary and reasonable time for the attendant's services during the period in question.

[11] *See Kenneth Williams*, 32 ECAB 1829 (1981).

[12] *See William F. Gay*, 50 ECAB 276 (1999); *Grant S. Pfeiffer*, 42 ECAB 647 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 1 and January 24, 2005 are reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees,'Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board