United States Department of Labor
Employees' Compensation Appeals Board

IRMA JEAN LEWIS, Appellant	)	
and	)	**Docket No. 05-1890**
	)	**Issued: March 7, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Irma Jean Lewis, pro se
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 September 8, 2005 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Program dated November 24, 2004 which denied her request for an attendant allowance. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUE

The issue is whether the Office properly denied appellant's claim for attendant's allowance.

FACTUAL HISTORY

On May 18, 1988 appellant, then a 53-year-old clerk, filed an occupational disease claim alleging that in 1984 she injured her lower back and had been on limited duty since that time. She noted that in October 1987 the pain to her low back became severe. By letter dated April 17, 1989, the Office accepted appellant's claim for aggravation of degenerative disc disease and

lumbar vertebrae. Appellant was granted a schedule award for 14 percent impairment to each leg due to this injury.[1]

In a medical report dated April 23, 2002, Dr. William A. Jackson Ross, Sr., an orthopedic surgeon, indicated that appellant had been a patient of his since 1980. He discussed her numerous orthopedic conditions, including progressive problems in both upper and lower extremities with her neck, chronic cervical strain with degenerative disc disease and radiculopathy to both shoulders and hands, multilevel spondylitic changes of the cervical spine and numbness and tingling in her legs. Dr. Ross opined that appellant was totally disabled and unable to engage in any work activity. He requested that she have a home health aide "for assistance and aide in activities of daily living, grooming, showering, *etc*., as well as in food preparation." In a response to an Office inquiry, on May 31, 2002 Dr. Ross stated:

> "I think it is obvious from the medical report that [appellant] has significant objective findings from an orthopedic point of view in regards to her neck and back that have resulted in decreased grip strength. There is weakness in her lower extremities. [Appellant] has objective findings on x-rays and [magnetic resonance imaging] MRI [scans] that are consistent with the orthopedic objective findings and are the reason for her home health aid request. Her nonindustrial conditions of being overweight and having high blood pressure and diabetes are not a factor and have no bearing on her orthopedic condition."

By letter dated October 25, 2002, the Office referred appellant to Dr. Jerrold Sherman, a Board-certified orthopedic surgeon, for a second opinion. He noted that she had a history of at least four separate lifting episodes that occurred during the course of her work activity for which appellant has been treated intermittently with physical therapy and medication. Dr. Sherman diagnosed insulin-dependent diabetes with generalized weakness and peripheral atherosclerosis in addition to peripheral diabetic neuropathy, generalized osteoarthritis involving the cervical, thoracic and lumbar spine with persistent pain and limited motion and resolved strains of the lumbar spine. He opined that appellant required in-home health care due to her generalized debility, but that her debility was not related to any employment-related injuries. Dr. Sherman noted that the strains involving the lumbar spine which appellant sustained during the course of her work activity would not have any effect on her current conditions. He opined that her limited ability to stand and walk were due to appellant's diabetes and arthritis of the spine neither of which were related to her work activity. Dr. Sherman declared, "[appellant] requires access to a physician for care regarding her spine arthritis, diabetes and generalized debility but not on the basis of any industrial-related injury."

[1] Appellant has filed other claims for injuries sustained while working at the employing establishment. The record indicates that she sustained injuries dated June 2, 1966, August 23, 1967, September 10, 1968 and September 2, 1969. However, records for these injuries are not available. An April 27, 1970 claim was accepted for low back strain. Claims dated May 31, 1974 and January 16, 1976 were accepted for lumbosacral strains. A December 12, 1978 claim was accepted for right foot contusion. A claim filed on July 22, 1984 was accepted for low back and left hip strain. The Office accepted appellant's May 1986 claim for bilateral tenosynovitis of both hands, wrists and arms.

By decision dated January 15, 2003, the Office denied appellant's claim for home health care.

In a report dated February 14, 2003, Dr. Ross stated:

> "[Appellant] ongoing symptoms are partly related to her original work-related problem and its subsequent sequelae and that is why the condition can be continuing and why it can deteriorate, because of its subsequent sequelae partly related to the contributing factor of the work-related injury."

Appellant initially requested an oral hearing, but changed this to a request for review of the written record.

By decision dated October 17, 2003, the hearing representative found that an unresolved conflict existed between the opinions of Dr. Sherman and Dr. Ross with regard to whether appellant's need for home health care was work related. Accordingly, the case was remanded for referral to an impartial medical specialist.

By letter dated November 7, 2003, the Office referred appellant to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical opinion as to whether her need for home health care was related to appellant's employment injuries. After reviewing her employment and medical history, he concluded that appellant's conditions "have long since stabilized orthopedically." Dr. Auerbach noted that she "continued to have diffuse degenerative disc disease and spondylosis of the lumbar spine, with probable neurogenic claudication secondary to spinal stenosis of the back into either lower extremity." He noted that appellant had nonindustrial problems that have complicated and aggravated her impairment and disability, including "cervical degenerative disc disease and spondylosis and probably cervical myelopathy, probable thoracic degenerative disc disease and myelopathy and chronic diabetic peripheral neuropathy." He concluded:

> "Thus, it appears orthopedically that [appellant] would not have required home health services as a result of her accepted work-related conditions only.
>
> "The combination of [appellant's] work-related conditions and her nonindustrial problems in the neck and her diabetic condition in both the upper and lower extremities has pushed [appellant] over to the point that she most probably would need home health care due to her nonindustrial arthritis and diabetes, not accepted claims."

In a letter dated February 24, 2004, the Office asked Dr. Auerbach to state whether absent the work-related aggravation of degenerative disc disease of the lumbar spine, appellant would need home health care for her various nonindustrial conditions alone. On February 25, 2004 he responded:

> "In my medical opinion, absent the work-related aggravation of degenerative disc disease of the lumbar spine, [appellant] would not need home health care for her various nonindustrial conditions alone. In other words, had [appellant] not suffered the accepted work-related injury, she would need health care anyway."

By decision dated March 29, 2004, the Office denied appellant's request for home health care because the weight of the evidence rested with the opinion of the impartial medical examiner who concluded that her need for such services is independent from her accepted work injuries.

On May 12, 2004 appellant requested a review of the written record. She submitted additional evidence, including a June 9, 2004 hospital discharge note which indicated that she was treated for spinal stenosis and cord compression and would need a hospital bed and services of a health nurse upon discharge. In an August 11, 2004 note, a physician whose signature is illegible indicated that she required home health care for severe spinal stenosis.

By decision dated November 24, 2004, the hearing representative affirmed the March 29, 2004 decision.

LEGAL PRECEDENT

Section 8111(a)[2] of the Federal Employees' Compensation 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 of 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.[3] The claimant is not required to need around-the-clock care, but need only demonstrate a continually recurring need for assistance in personal matters.[4] 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.[5]

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 her physicians. The need for attendant care must be established by rationalized medical evidence. Medical conclusions unsupported by medical rationale are of diminished probative value.[6]

[2] 5 U.S.C. § 8111(a).

[3] *Thomas Lee Cox*, 54 ECAB 509 (2003).

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

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

[6] *Albert C. Brown*, 52 ECAB 152 (2000).

Where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[7]

ANALYSIS

In the instant case, Dr. Ross, Dr. Sherman and Dr. Auerbach all agree that appellant needs attendant care. However, Dr. Ross found that her work-related orthopedic injuries resulted in her need for home health care and that appellant's nonindustrial conditions of being overweight and having high blood pressure and diabetes were not a factor. Dr. Sherman disagreed. He opined that appellant required in-home health care due to her generalized disabling conditions which were not related to any employment-related injuries. In order to resolve the conflict in the medical evidence as to whether her need for an attendant was related to her accepted work injuries, the Office referred her to an impartial medical specialist, Dr. Auerbach. He explained that appellant's accepted employment conditions had stabilized orthopedically and would not have required "home health services" due to her employment-related conditions only. Dr. Auerbach explained that a combination of her employment-related conditions and nonemployment-related neck problems and diabetes in the upper and lower extremities "pushed her to the point" that she required health care. In the supplemental opinion dated February 25, 2004, he clarified his report by concluding that appellant would need an attendant even if she did not have the orthopedic injuries due to her nonindustrial arthritis and diabetes. The Board finds that the opinion of Dr. Auerbach was based on a proper factual background and, accordingly, must be given special weight.[8] Accordingly, the Office properly denied appellant's request for attendant care.

CONCLUSION

The Office properly denied appellant's claim for attendant's allowance.

[7] *Leanne E. Maynard*, 43 ECAB 482 (1992).

[8] *David W. Pickett*, 54 ECAB 272, 275 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 24, 2004 is affirmed.

Issued: March 7, 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