

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

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)	
K.H., Appellant)	
)	
and)	Docket No. 06-832
)	Issued: November 30, 2006
)	
DEPARTMENT OF THE NAVY, SECURITY)	
DEPARTMENT, Ingleside, TX, Employer)	
_____)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 3, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated February 2, 2006 denying modification of its denial of retroactive reimbursement for attendant's allowance for the periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits.

ISSUE

The issue is whether the Office properly rescinded payment of an attendant's allowance for the periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999.

FACTUAL HISTORY

This is the third appeal before the Board. In the first appeal, the Board found that the Office 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 In the second appeal, the Board affirmed the Office's denial of appellant's request for an attendant's allowance subsequent to January 4, 1999 until his wife became qualified as health care provider as required by 20 C.F.R. § 10.314.² However, the Board remanded the case to the Office to determine whether the medical evidence was sufficient to establish that appellant was entitled to an attendant's allowance under 5 U.S.C. § 8111(a) and 20 C.F.R. § 10.305 for the periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999. The facts and the history of the prior appeals are incorporated by reference.

On remand appellant submitted a report dated May 1, 2003 by Dr. Carlos R. Estrada, a treating Board-certified psychiatrist, who attributed appellant's depression to his employment injury and heart attack on December 7, 1992. Dr. Estrada opined that "[t]he constant pain, fear from death and disability triggered the depression."

On June 13, 2003 pursuant to the Board's decision, the Office requested a more detailed explanation from Dr. Estrada regarding appellant's need for an attendant due to his accepted employment injury for the period November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999.

In a report dated July 30, 2003, an Office medical adviser reviewed a July 21, 2003 statement of accepted facts and the May 1, 2003 report by Dr. Estrada and concluded that the medical evidence was insufficient "to support approval of an attendant allowance for the stated dates." The Office medical adviser noted that Dr. Estrada opined that appellant's "depression was triggered by the job accepted conditions."

By decision dated August 7, 2003, the Office denied appellant's request for a retroactive attendant's allowance for the period November 19 to December 19, 2002 and March 21, 1993 to January 3, 1999. In denying appellant's request for a retroactive attendant's allowance, the Office relied upon the July 30, 2003 report by the Office medical adviser.

In a letter dated September 11, 2003, the Office requested further clarification from Dr. Estrada regarding appellant's accepted depression condition.

On September 17, 2003 the Office received appellant's August 21, 2003 request for an oral hearing on the denial of his request for a retroactive attendant's allowance and a hearing was held on May 26, 2004.

¹ Docket No. 97-1942 (issued January 5, 2000). On November 20, 1992 appellant, then a 49-year-old patrolman, filed a traumatic injury claim (Form CA-1) alleging that he injured his neck, back and pelvis on November 19, 1992 when he slipped on some spilled paint, fell and hit his head on the floor. The Office accepted the claim for contusions; cervical, lumbar and thoracic strains; brief concussion and aggravation of coronary artery disease and quadruple bypass. Appellant was placed on the periodic rolls for temporary total disability by letter dated May 4, 1993. The Board notes that, on remand from the January 5, 2000 Board decision, the Office accepted depression as a consequential injury of his accepted November 19, 1992 employment injury. The Board noted that the Office, in the last merit decision dated August 15, 1995, denied appellant's request for an attendant's 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.

² Docket No. 02-1156 (issued April 8, 2003).

In a report dated July 6, 2004, Dr. Estrada opined that, “[d]ue to the present danger of self-mutilating and suicide and episodes of self-neglect, his wife had to resign her position as a correctional officer to stay at home to take care of him.”

By decision dated August 18, 2004, the Office hearing representative affirmed the August 7, 2003 decision. In support of this conclusion, the Office hearing representative found Dr. Estrada’s July 6, 2004 report failed to show how appellant’s “depression precludes him from physically tending to his personal needs.”

In a report dated January 5, 2005, Sally E. Guerra, a registered nurse, opined that appellant’s spouse “provides the services of an attendant that [e]nsure his basic physical needs are met and that emotion stability is continually monitored.” She noted that appellant has required the services of an attendant since 1992.

On February 2, 2005 the Office received appellant’s January 7, 2005³ request for reconsideration and an October 28, 2004 report by Dr. Estrada, who opined that appellant required assistance from his spouse to prevent him from harming himself, assisting him with his daily personal care and “to supervise him from leaving the house or barricading himself when he become[s] frightened with flashbacks and hallucinations of the woman he sent to prison for drugs, who assaulted him and put a curse on him.”

By decision dated April 5, 2005, the Office denied appellant’s request for modification.

In a report dated May 20, 2005, Dr. Estrada opined that appellant required “the daily assistance of his wife since his accident on November 19, 1992.”

In a letter dated May 26, 2005, appellant requested reconsideration.

On June 3, 2005 the Office received a May 2, 2005 report by Ms. Guerra who opined that appellant required a personal care attendant.

In a report dated June 17, 2005, the Office medical adviser opined that the report of Dr. Estrada supported the need of an attendant in the past as Dr. Estrada’s May 10, 2003 report established that appellant needed assistance with daily living activities, including bathing, shaving, dressing and eating since the 1992 employment injury.

By decision dated June 27, 2005, the Office reversed the prior decisions denying appellant’s attendant’s allowance request.

By decision dated August 10, 2005, the Office rescinded the June 27, 2005 decision. The Office denied appellant’s request for an attendant allowance for the period 1992 to 1999. In support of the denial of an attendant’s allowance for this period, the Office noted that appellant’s wife was not qualified as a nurse’s aid at the time and had not been in receipt of payment for an

³ The Board notes a typographical error in the request for reconsideration. The year is noted as “2006” when it should be “2005.”

attendant's allowance prior to the publication of the new regulations, which became effective January 4, 1999.

On September 26, 2005 appellant requested reconsideration.

By decision dated February 2, 2006, the Office denied appellant's request for modification.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴ It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁶

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

“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.”⁷

Prior to January 4, 1999, the controlling regulation regarding an attendant's 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.⁸

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

⁴ *Andrew Wolfgang-Masters*, 56 ECAB ____ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

⁵ *Jorge E. Stotmayor*, 52 ECAB 105 (2000).

⁶ *Andrew Wolfgang-Masters*, *supra* note 4.

⁷ 5 U.S.C. § 8111(a).

⁸ *Richard E. Simpson*, 57 ECAB ____ (Docket No. 05-1642, issued July 12, 2006).

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.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

In order to rescind acceptance of appellant's claim for retroactive reimbursement for an attendant's allowance for the periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999, the Office must establish that appellant was not entitled to an attendant's allowance for these periods.

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 periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999.¹² 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.¹³

On remand the Office requested further information from appellant's attending physician regarding his need for an attendant during the periods in question. In a May 1, 2003 report, Dr. Estrada attributed appellant's depression to his employment injury and heart attack on December 7, 1992. He opined that "[t]he constant pain, fear from death and disability triggered the depression." Dr. Estrada, in an October 28, 2004 report, opined that appellant required assistance from his spouse to prevent him from harming himself, assisting him with his daily personal care and "to supervise him from leaving the house or barricading himself when he becomes frightened with flashbacks and hallucinations of the woman he sent to prison for drugs, who assaulted him and put a curse on him." In a report dated May 20, 2005, Dr. Estrada opined that appellant required "the daily assistance of his wife since his accident on November 19, 1992."

In a July 17, 2005 report, the Office medical adviser opined that Dr. Estrada's May 10, 2003 report supported the need of an attendant for appellant in the past. The Office medical

⁹ *Nowling D. Ward*, 50 ECAB 496 (1999).

¹⁰ *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

¹¹ *Richard E. Simpson*, *supra* note 8.

¹² The Board notes that for the November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999, 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.

¹³ *See Nowling D. Ward*, *supra* note 9.

adviser explained that, since the 1992 employment injury, appellant required assistance in performance daily living activities, such as eating, bathing and dressing.

The Board finds that the opinions of Dr. Estrada and the Office medical adviser are supportive of appellant's claim that he required an attendant's allowance, well rationalized and uncontradicted by any other evidence of record. Thus, the Office has not met its burden of proving that appellant was not entitled to an attendant's allowance for the period November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999.

CONCLUSION

The Board finds that the Office improperly rescinded its acceptance of an attendant's allowance for the periods November 19 to December 19, 1992 and March 21, 1993 to January 3, 1999.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2006 is reversed.

Issued: November 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board