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

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| **J.G., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1497** |
| | ) | **Issued: May 18, 2010** |
| **DEPARTMENT OF THE NAVY, NAVAL AIR WEAPONS STATION, China Lake, CA, Employer** | ) | |

*Appearances:*
*Pamela S. Grazer*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On May 27, 2009 appellant filed a timely appeal from a December 19, 2008 decision of the Office of Workers' Compensation Programs affirming the denial of his request for an attendant's allowance. He also appealed a March 20, 2009 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.[1]

### ***ISSUES***

The issues are: (1) whether the Office properly denied appellant's request for an attendant's allowance from 1994 to May 29, 2008; and (2) whether the Office properly denied his request for reconsideration under section 8128(a).

[1] The Board notes that appellant filed a separate claim for an emotional condition, File No. xxxxxx616, which was denied by the Office and appealed to the Board in Docket No. 09-1499. It will be adjudicated under that docket number.

## ***FACTUAL HISTORY***

This case has previously been before the Board. In a July 26, 2006 decision, the Board affirmed an October 11, 2005 Office decision which found appellant's reconsideration request as untimely and failed to establish clear evidence of error. The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.[2]

On February 27, 2006 appellant filed a Form CA-1086 requesting a full-time attendant due to his accepted paranoid schizophrenia condition. He requested that his wife be his attendant as she currently cared for him and was unable to work outside the home. Appellant requested that the attendant allowance be retroactive to 1994 when his wife first started taking care of him full time. In support of his claim, he submitted a February 24, 2006 attendant form from Lawrence J. Coates, Ph.D, a licensed clinical psychologist, who noted that appellant was moderately to severely paranoid with irrational thought processes. Dr. Coates advised that appellant was not able to travel out of town without assistance but he could walk locally, feed himself and dress himself unassisted. He advised that appellant did not eat regularly, change his clothes or bathe himself and an attendant could assist him in goal-directed activities and decrease the probability of his condition deteriorating. Dr. Coates noted that, although appellant was able to ambulate and go out doors, he had difficulty initiating and maintaining activities of daily life and would not bathe or socialize without the assistance of his wife.

In a March 26, 2006 decision, the Office denied an attendant's allowance on the grounds that appellant's wife, who was his caregiver since 1994, was not qualified to act as an attendant or receive attendant allowance.

Appellant requested an oral hearing that was held on July 26, 2006. In a May 17, 1994 report, Dr. Coates diagnosed paranoid schizophrenia and noted that appellant was permanently incapacitated. He noted with a checkmark that appellant was disabled from his job and required someone at home to care for him. On August 2, 2006 Dr. Coates stated that he treated appellant since 1991 for paranoid schizophrenia and because he refused to take medication for his condition, he was unable to sustain goal-directed activity. He noted that appellant's wife was unable to work outside the home as she attended to his needs. Dr. Coates requested that appellant be provided an attendant's allowance due to his ongoing paranoia and inability to function in simple activities of daily living without the care and direction of his spouse. In a November 13, 1995 report, Dr. Franklin Drucker, a Board-certified psychiatrist, indicated that appellant's work-related cervical condition had indirectly aggravated his paranoid schizophrenia. In a July 11, 2002 report, Dr. Kent L.M. Herbert, a clinical psychologist, treated appellant for the past decade and diagnosed paranoid schizophrenia with post-traumatic stress disorder. Appellant's family reported that he bathed and changed clothes maybe twice a month and ate with a spoon. Dr. Herbert advised that appellant was severely disabled.

[2] Docket No. 06-201 (issued July 26, 2006). The Office accepted appellant's claim for neck strain, herniated disc at C5-6 and later accepted a permanent aggravation of paranoid schizophrenia. It authorized a cervical laminectomy fusion which was performed on February 17, 1984. Appellant was granted disability retirement on February 28, 1985. He later elected to receive benefits under the Federal Employees' Compensation Act.

In a November 13, 2006 decision, the Office hearing representative affirmed the March 28, 2006 decision.

On April 11, 2007 appellant requested reconsideration. He submitted an April 11, 2007 statement from his wife who advised that appellant currently received $1,100.00 per month in compensation. Reports from Dr. Coates dated June 3 and September 21, 1994 opined that appellant's cervical condition aggravated his psychiatric condition and that he could not work or manage himself at home. On January 9, 2007 Dr. Coates advised that appellant's wife was his caregiver because he required specific direction and assistance in activities of daily living such as eating, bathing and toileting. He stated that appellant was sufficiently incapacitated to require the assistance of an attendant to help him with his activities of daily living and, without an attendant, he would be more than likely to require hospitalization. Dr. Coates opined that appellant's incapacitation was directly related to his mental disorder. In a February 28, 2007 report, Dr. L. Janumpally, a Board-certified neurologist, treated appellant for neck pain and diagnosed paranoid schizophrenia, poor hygiene, smoking, generalized weakness, possible lung disease from smoking and anterior cervical discectomy with fusion. He noted that appellant was totally disabled but could feed, dress and bathe himself. In a February 28, 2007 attendant allowance form, Dr. Janumpally noted appellant could not travel without assistance but could walk, feed, dress, bathe, get out of bed, get outdoors and exercise without assistance. He noted that appellant's wife was his caretaker because of his schizophrenia.

In a July 13, 2007 decision, the Office denied modification of the November 13, 2006 decision.

On August 2, 2007 appellant requested reconsideration. In reports dated March 3, 2004 to December 5, 2007, Dr. Janumpally diagnosed chronic neck pain, cervical spondylosis, and a history of paranoid schizophrenia. He opined that appellant was permanently unemployable due to paranoid schizophrenia, delusions, history of smoking and neck pain. In a January 30, 2008 report, Dr. Coates noted that appellant had a history of not taking care of personal grooming or hygiene and was undernourished. He advised that appellant's mental condition was permanent based on the resistant nature of schizophrenia. Appellant was not competent to work in any capacity due to his accepted mental illness and was permanently disabled. In an undated statement received on May 16, 2008, Dr. Coates reiterated that appellant required the assistance of his wife for eating, bathing and toileting and to assist him with the activities of daily living.

On May 29, 2008 the Office approved an attendant's allowance for four hours a day, seven days per week, for one year. It noted that the services should be provided by a home health aide, licensed practical nurse or other similarly trained individual who would be paid $1,500.00 per month.[3]

On September 9, 2008 appellant requested reconsideration. In a June 4, 2008 report, Dr. Coates again recommended appellant's wife as his attendant. He noted that appellant's condition of paranoid schizophrenia manifested itself in significant suspicion of other people and

[3] The record reflects that appellant's wife was paid for providing attendant care services for the period May 29, 2008 to May 28, 2009.

his wife was the ideal caretaker because she was present in the home and knew how to attend to his activities of daily living. On June 25, 2008 Dr. Coates reported meeting appellant's wife three times for training and instruction on how to assist appellant in bathing, hygiene, eating, organized activity, dispensing medications and managing his periods of labile affect and mood. He noted that he was in telephone contact with appellant's wife and made arrangements to meet every three to four months to revise instructions as needed. On November 18, 2008 Dr. Coates requested that authorization for attendant care be retroactive to 1994, which was the onset of appellant's psychological illness. He noted that appellant was unable to function in terms of his activities of daily living without the guidance of his wife.

The employing establishment submitted an October 14, 2008 statement from Susan Haynes, an injury compensation specialist, who noted that appellant drove himself to her office when he needed assistance with his claim and was seen shopping alone at Wal-Mart.

In a December 19, 2008 decision, the Office denied modification of the May 29, 2008 decision.

On December 29, 2008 appellant requested reconsideration. He submitted a December 29, 2008 letter from his wife who noted that she drove appellant to his employer when he needed assistance with his claim and took him shopping at Wal-Mart. In a January 22, 2009 report, Dr. Janumpally reiterated appellant's diagnoses noting marijuana was prescribed to treat schizophrenia.

In a March 20, 2009 decision, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant further merit review.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8103(a) of the Act 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 that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[4] The Office has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in the Act.[5] The only limitation on the Office's discretionary authority is that of reasonableness.[6]

Section 8111 of the Act provides that 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

[4] 5 U.S.C. § 8103(a).

[5] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

[6] *Daniel J. Perea*, 42 ECAB 214 (1990).

both feet, or is paralyzed and unable to walk, or because of other disability resulting from the injury making him or her so helpless as to require constant attendance.[7]

In 1991 Office regulations implemented section 8111 of the Act with nearly identical language:

> An employee who has been awarded compensation may receive an additional sum of not more than $1,500.00 a month, as the Office considers necessary to pay for the service of an attendant, when the Office 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 any impairment resulting from the injury making the employee so helpless as to require constant attendance.[8]

Effective January 4, 1999, the Office revised the regulations:

> Section 10.314: Will [the Office] pay for the services of an attendant?
>
> Yes, [the Office] will pay for the services of an attendant up to a maximum of $1,500.00 per month, where the need for such services has been medically documented. In the exercise of the discretion afforded by 5 U.S.C. § 8111(a), the Director has determined that, except where payments were being made prior to January 4, 1999, direct payments to the claimant to cover such services will no longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under section 10.801. This decision is based on the following factors:
>
> > (a) The additional payments authorized under section 8111(a) should not be necessary since [the Office] will authorize payment for personal care services under 5 U.S.C. § 8103, whether or not such care includes medical services, so long as the personal care services have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse, or similarly trained individual.
> >
> > (b) A home health aide, licensed practical nurse, or similarly trained individual is better able to provide quality personal care services, including assistance in feeding, bathing, and using the toilet. In the past, provision of supplemental compensation directly to injured employees may have encouraged family members to take on these responsibilities even though they may not have been trained to provide such services. By paying for the services under section 8103, [the Office] can better determine whether the services provided are necessary and/or adequate to

[7] 5 U.S.C. § 8111(a).

[8] 20 C.F.R. § 10.305 (1991).

> meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to [the Office], where the amount billed will be subject to [the Office's] fee schedule, will result in greater fiscal accountability.[9]

A claimant bears the burden of proof in establishing by competent medical evidence that he or she requires attendant care within the meaning of the Act. The claimant is not required to need around-the-clock care, but need only demonstrate a continually recurring need for assistance in personal matters. The attendant allowance 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 the claimant in personal needs such as dressing, bathing or using the toilet. An attendant allowance is not granted simply on the request of a disabled claimant or his or her physicians. The need for attendant care must be established by rationalized medical opinion evidence.[10]

## ***ANALYSIS -- ISSUE 1***

The Office approved an attendant's allowance for four hours a day, seven days a week, for one year. No attendant services were authorized for any prior periods. The Board finds that the Office did not abuse its discretion in denying appellant's request for an attendant's allowance commencing in 1994. The Act states that the Office may pay for the service of an attendant. It has the discretion to decide whether or not to pay an allowance and the Board will not disturb that decision in the absence of proof of an abuse of discretion.[11] The issue is whether the Office abused its discretion by denying appellant's request for an attendant's allowance retroactive to 1994.

An attendant's allowance is not granted simply on the request of a disabled claimant or his or her physicians. Appellant must establish by competent medical evidence that the service of an attendant is necessary within the meaning of section 8111 of the Act.[12] Appellant claims an attendant's allowance for the period 1994 to January 3, 1999. The Office's regulations as applicable to that period provided that payment for services of an attendant would be made upon a finding that an attendant is necessary constantly because the employee was totally blind or lost the use of both hands or both feet, or was paralyzed and unable to walk, or because of any impairment resulting from the injury making the employee so helpless as to require constant attendance.[13] Prior to January 4, 1999, the implementing regulations did not require that

[9] *Id.* at § 10.314 (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.9 (June 2003) (an attendant allowance paid directly to the claimant prior to January 1999 will continue to be paid to the claimant until the need for the attendant ceases, and any future period of attendant services for the claimant will be paid under the revised procedures). *See L.D.*, 59 ECAB ___ (Docket No. 08-966, issued July 17, 2008).

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

[11] *See Daniel J. Perea*, *supra* note 6.

[12] *See L.D.*, *supra* note 9.

[13] 20 C.F.R. § 10.305 (1991).

personal care services be provided by a licensed practical nurse, home health aid or similarly trained individual.[14] The Board finds that the evidence of record does not include a reasoned medical opinion from a physician to support the need for an attendant prior to 1999. Appellant submitted a May 17, 1994 report from Dr. Coates who diagnosed paranoid schizophrenia and noted appellant was permanently incapacitated. Dr. Coates checked a box "yes" on a form that appellant's disability required someone to be in the home to care for him. Other reports from Dr. Coates dated June 3 and September 21, 1994 indicated that appellant was unable to manage himself at home or in the workplace. On November 18, 2008 Dr. Coates requested that authorization for attendant care be made retroactive to 1994, the onset of appellant's psychological illness. This evidence is not sufficient. Dr. Coates did not adequately explain the basis for appellant's incapacity in 1994 or the specific life activities he was unable to perform without assistance.

Dr. Drucker's November 13, 1995 report did not address the need for an attendant. The July 11, 2002 report of Dr. Herbert noted that appellant's family reported that he took a bath and changed clothes maybe twice a month and ate with a spoon but he did not specifically address whether appellant required the services of an attendant. The Board finds that there was no adequate basis for the Office to approve such a request before January 4, 1999.

Regarding the period January 4, 1999 to May 29, 2008, appellant submitted a February 24, 2006 attendant questionnaire from Dr. Coates who noted that appellant was moderately to severely paranoid and indicated that appellant could walk locally, feed himself and dress himself unassisted. Dr. Coates indicated that appellant would not bathe, groom himself, socialize or attend to activities of daily life without the assistance of his wife who helped him in goal directed activities and provided structure and direction. From August 2, 2006 to May 16, 2008, he indicated that appellant refused medication for his condition and was unable to sustain goal-directed activity. Dr. Coates noted that appellant was being cared for by his wife and opined that appellant was sufficiently incapacitated to require the assistance of an attendant to help him with his activities of daily living such as eating, bathing and toileting. However, he did not provide adequate rationale in explaining why appellant was so helpless as to require constant attendance. Dr. Coates did not explain the reasons appellant was unable to attend to his personal needs. He did not show how appellant belonged to the same class of claimants described by section 8111 of the Act. Rather, Dr. Coates generally advised that appellant was able to feed and dress himself unassisted but needed structure and direction in goal-directed activities.

Dr. Coates subsequently recommended appellant's wife be his attendant because she was present in the home, knew his routine and he trusted her and opined that choosing another person as appellant's attendant would complicate appellant's clinical picture as appellant's condition of paranoid schizophrenia manifested itself in significant suspicion of other people. On June 25, 2008 Dr. Coates noted that he provided appellant's wife with training and instructions on how to best care for appellant, he was in telephonic contact with her regarding managing appellant's care and has made arrangements to meet every three to four months to revise instructions as needed. He provided, however, insufficient rationale to explain the reasons appellant was so helpless as to require constant attendance due to his work injury. Furthermore, any personal care

[14] *Richard E. Simpson*, 55 ECAB 490 (2004).

services that might have been medically necessary beginning January 4, 1999 must be provided by a home health aide, licensed practical nurse or similarly trained individual. Training and instruction from Dr. Coates on how to best care for appellant did not establish that appellant's wife received training similar to a home health aide or a licensed practical nurse. This is important, particularly with an individual with paranoid schizophrenia who has a documented history of unstable behavior. Office regulations explain that professionals are better able than family members to provide quality personal care services, including assistance in feeding, bathing and using the toilet, and for that reason the Office will not make direct payments to a claimant to cover such services.[15]

Appellant also submitted an attendance allowance questionnaire from Dr. Janumpally, a neurologist, who diagnosed a history of paranoid schizophrenia. Dr. Janumpally noted that appellant was able to feed, dress and bath himself. He advised that appellant's wife was his caretaker and he could not travel without assistance but could walk, feed, dress, bath, get out of bed, get outdoors and exercise without assistance. The Board notes that these reports do not support the need for an attendant allowance as Dr. Janumpally indicated that appellant was able to attend to his personal needs specifically stating appellant could feed, dress and bath himself without assistance.

The Board finds that the Office did not abuse its discretion in denying appellant's request for attendant services for the period 1994 to May 29, 2008. Appellants February 27, 2006 request for an attendant allowance of $1,500.00 a month is not supported by rationalized medical opinion evidence as medically necessary. The Office therefore acted properly within its discretion to deny such payment to appellant's wife during the period in question.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[19]

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[15] *See L.D., supra* note 9.

[16] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.608(b).

## ***ANALYSIS -- ISSUE 2***

Appellant's December 29, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also has not submitted relevant and pertinent new evidence not previously considered by the Office. He submitted a December 29, 2008 letter from his wife and a November 17, 1994 memorandum from the Office regarding his stress claim. However, this evidence is irrelevant as the underlying issue, appellant's request for an attendant's allowance, is medical in nature and can only be addressed by submitting medical evidence which supports appellant's request for an attendant's allowance.

Appellant submitted a January 22, 2009 report from Dr. Janumpally who saw him in follow-up for neck pain and numbness and noted diagnoses and treatment. Dr. Janumpally's report, while new, is not relevant because he did not specifically address the issue of appellant's request for an attendant allowance. Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his December 29, 2008 request for reconsideration.

On appeal appellant asserts that the Office improperly denied his claim for an attendant's allowance beginning in 1994 and failed to pay him for his stress claim and a schedule award. He also asserts that his emotional condition and traumatic injury claims should have been separated. As noted, there is insufficient medical evidence to support the need for an attendant allowance. Other matters relating to appellant's stress claim and a schedule award are not before the Board on the present appeal which pertains to the Office's denial of his claim for an attendant's allowance.

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's claim for an attendant's allowance. The Board further finds that the Office properly denied his request for reconsideration.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 20, 2009 and December 19, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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