

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

R.C., Appellant

and

**DEPARTMENT OF DEFENSE, NAVY PUBLIC
WORKS CENTER, Oakland, CA, Employer**

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**Docket No. 12-1788
Issued: April 8, 2013**

Appearances:
Hank Royal, 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 August 23, 2012 appellant, through his representative, filed a timely appeal from the February 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied an attendant allowance. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP abused its discretion in denying appellant's request for an attendant allowance.

FACTUAL HISTORY

In 1995 appellant, a 55-year-old crane operator, filed an occupational disease claim alleging that his trigger thumb was a result of repeatedly pushing a button to make the crane go

¹ 5 U.S.C. § 8101 *et seq.*

faster. OWCP accepted his claim for right trigger thumb and right carpal tunnel syndrome. Appellant received compensation for temporary total disability on the periodic rolls. He also received a schedule award for a 31 percent permanent impairment of his right upper extremity due to median nerve sensory deficit or pain.²

On January 4, 2010 Dr. David Wren, Jr., an attending orthopedic surgeon, indicated that appellant would not have surgery until January 15, 2010 and would need in-home health care. OWCP provided information about payments for such services and asked Dr. Wren to complete a questionnaire.

Appellant informed OWCP that he could use only one hand and therefore needed assistance bathing, dressing, driving, cooking, cleaning dishes, tying shoes and cleaning his house. He estimated that he would need an in-home health care provider for four to six weeks. Appellant added that he had hired someone beginning January 12, 2010.

Dr. Wren responded that appellant had a good recovery from his right carpal tunnel surgery. He believed that appellant's condition warranted the services of an attendant because he was right-hand dominant and poorly coordinated with his left hand. Dr. Wren noted that appellant needed assistance traveling, feeding, dressing and bathing. He advised that appellant required an attendant from January 12 through March 15, 2010. Dr. Wren added that appellant's attendant performed the following duties: "cooks, cleans, helps feed, dress and driving." Appellant submitted an itemization of the attendant services rendered.

In an August 18, 2011 decision, OWCP denied appellant's claim for an attendant allowance. It found that Dr. Wren failed to establish the need for the services of an attendant five to eight hours a day following right carpal tunnel surgery. OWCP explained that the law made no provision for reimbursing appellant for such tasks as cooking, laundry, housekeeping, shopping or yard work. Further, it found that he was not entitled to reimbursement unless he was totally blind, had lost the use of both hands or both feet, was paralyzed and unable to walk or had other disability resulting from his injury that made him so helpless as to require constant attendance for personal needs, such as feeding, dressing or bathing.

In a February 29, 2012 decision, an OWCP hearing representative affirmed the denial of an attendant allowance. He explained that the medical evidence did not sufficiently support that appellant was so incapacitated as to require the need for attendant care: Dr. Wren failed to provide any rationale for his opinion and there was no evidence that appellant could not use his left upper extremity. The hearing representative found that appellant failed to supply sufficient medical evidence to establish that he was unable to feed, dress or bathe himself during the period in question.

² Appellant's grade 2 peripheral nerve disorder was described as decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility) with abnormal sensations or moderate pain that may prevent some activity. American Medical Association, *Guides to the Evaluation of Permanent Impairment* 482 (5th ed. 2001) (Table 16-10).

On appeal, appellant's representative contends that appellant followed instructions but was not informed of the type of care that was reimbursable. Appellant seeks reimbursement only for the services OWCP deems necessary.

LEGAL PRECEDENT

Section 8103(a) of FECA 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.³ OWCP has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.⁴ The only limitation on OWCP's discretionary authority is that of reasonableness.⁵ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken that 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.⁶

Section 8111 of FECA 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 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

OWCP will pay for the services of an attendant up to a maximum of \$1,500.00 a month when 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 FECA and medical bills for these services will be considered under 20 C.F.R. § 10.801. The Director has based this decision on the following factors:

“(a) The additional payments authorized under section 8111(a) should not be necessary since OWCP 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

³ 5 U.S.C. § 8103(a).

⁴ *Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of FECA and must exercise that discretion to achieve the objectives of section 8103).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁶ *Id.*

⁷ 5 U.S.C. § 8111(a).

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, OWCP can better determine whether the services provided are necessary and adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to OWCP, where the amount billed will be subject to OWCP’s fee schedule, will result in greater fiscal accountability.”⁸

A claimant bears the burden of proof to establish by competent medical evidence that he or she requires attendant care within the meaning of FECA. The claimant is not required to need around-the-clock care, but need demonstrate only 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 claimant or physician. The need for attendant care must be established by rationalized medical opinion evidence.⁹

ANALYSIS

FECA does not provide that OWCP shall pay for the service of an attendant; rather, OWCP may pay for the service of an attendant when based on probative medical evidence. OWCP has broad discretion in the matter and the Board will not disturb its decision in the absence of proof that OWCP abused its discretion.

Dr. Wren, the attending orthopedic surgeon, stated generally that appellant’s condition warranted the services of an attendant because he was right-hand dominant and poorly coordinated with his left hand. But this did not adequately explain why appellant constantly needed an attendant for such personal care needs as dressing, bathing or going to the toilet. Dr. Wren did not describe appellant’s incapacity in sufficient detail for the adjudicator to visualize its character and degree.

Section 8111 describes some situations that might permit an attendant allowance. If a claimant is totally blind or has lost both hands or has lost both feet or is paralyzed and unable to

⁸ 20 C.F.R. § 10.314; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.7 (March 2010) (any attendant allowance approved prior to January 1999 will continue to be paid to the claimant until the need for the attendant ceases).

⁹ *Thomas Lee Cox*, 54 ECAB 509 (2003).

walk and the service of an attendant is necessary constantly, OWCP has discretion to pay an allowance. Dr. Wren did not adequately explain how appellant's right carpal tunnel surgery left him so helpless as to require constant attendance for his personal needs.¹⁰

It is not enough that a claimant faces difficulty with some activities of daily living.¹¹ The claimant must demonstrate a sufficient level of helplessness with his personal care. In the case, of *M.C.*,¹² the Board found that the claimant had submitted competent rationalized medical evidence to establish her need for attendant care. She would have only limited use of her right upper extremity following surgery and her left upper extremity was totally paralyzed due to Erbs Palsy, a condition with which she was born. The Board affirmed the denial of an attendant allowance on other grounds -- services must be provided by a home health aide, licensed practical nurse or similarly trained individual -- but the need for attendant services was established because the claimant's injury-related surgery had effectively left her without the use of both hands.

The medical opinion evidence in this case does not establish such helplessness. Asked to explain his need for an attendant, appellant noted that he could use his left hand. Although Dr. Wren added that appellant was poorly coordinated with that hand, the evidence does not demonstrate that this circumstance left him incapable of eating or dressing or using the toilet without the help of an attendant.

In the absence of a well-rationalized medical opinion, the Board finds that OWCP properly exercised its discretion in denying appellant's request for an attendant allowance. Accordingly, the Board will affirm OWCP's February 29, 2012 decision.

Appellant's representative reasonably argued that appellant sought reimbursement only for the services deemed necessary. But he must establish through medical opinion evidence that he belongs to the class of employees section 8111 was meant to benefit. The evidence does not establish that OWCP abused its discretion in denying his claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁰ See *E.L.*, Docket No. 12-791 (issued August 29, 2012) (although the attending physician indicated that the claimant would have need for attendant services two to four weeks after surgery, he did not discuss the claimant's condition or explain how the claimant needed recurring help with personal needs such as dressing or bathing). *Cf.* *K.H.*, Docket No. 06-832 (issued November 30, 2006) (reversing the denial of an attendant allowance where the opinions of an OWCP medical adviser and treating physician were well rationalized and uncontradicted by other evidence).

¹¹ *M.T.*, Docket No. 11-1121 (issued November 17, 2011) (a referral physician indicated that, while the claimant did have difficulty with some activities of daily living, she was capable of performing her basic personal needs of hygiene, independent eating and personal care).

¹² Docket No. 09-2314 (issued August 20, 2010).

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying appellant's request for an attendant allowance.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2013
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