

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

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C.G., Appellant )

and )

DEPARTMENT OF COMMERCE, U.S. )  
CENSUS BUREAU, Dallas, TX, Employer )

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**Docket No. 13-36  
Issued: April 9, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 29, 2012 appellant filed a timely appeal from an April 18, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her claim for an attendant's allowance. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant established that her claim should be accepted for permanent heartburn due to the accepted July 13, 2010 employment injury; and (2) whether OWCP properly denied appellant an attendant allowance pursuant to 5 U.S.C. § 8111 and 5 U.S.C. § 8103.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 2, 2010 appellant, then a 58-year-old census enumerator, filed a traumatic injury claim alleging that on July 13, 2010 she bruised both her knees when she tripped and fell in the performance of duty. She stopped work on July 14, 2010. OWCP accepted appellant's claim for neck, back and knee sprain, bilateral internal knee derangement, left knee medial meniscus tear and left knee Baker's cyst. Appellant was placed on the periodic rolls.<sup>2</sup>

In a December 10, 2011 statement, appellant expressed her frustrations with the workers' compensation process. She stated that it had taken over a year to schedule knee surgery and that the postponement caused other health conditions, such as permanent heart burn, from her daily medications. Appellant also requested an attendant's allowance due to her health and the fact that she lived by herself. She resubmitted pay slips, pay rate information and statements regarding her inability to return to work due to her health conditions.

In work capacity evaluation forms dated from September to November 2011, Dr. Jairo D. Libreros-Cupido, a neurologist, related appellant's complaint of neck, low back and bilateral knee pain. Appellant was unable to sit or stand and he authorized her to return to work from one to two hours a day with restrictions of no twisting or bending, one hour of sitting, walking and standing and 15 minutes of operating a motor vehicle.

On December 28, 2011 appellant underwent left knee surgery.

In a letter dated December 10, 2011 to OWCP, appellant requested an attendance allowance due to the fact she lives alone and her current health conditions.

By letter dated January 11, 2012, OWCP advised appellant of the need to submit additional evidence to establish that attendant's services were necessary. It requested a detailed explanation regarding why she needed an attendant and describing those services with which she needed assistance. OWCP also requested a physician's opinion on which medical conditions required an attendant, what services the attendant would perform and for how long an attendant was needed.

In a letter dated January 12, 2012, OWCP advised appellant that additional evidence was needed to establish whether she sustained permanent heartburn as a result of the accepted July 13, 2010 employment incident.

In a March 8, 2009 report, Dr. Ishwari Prasad, a Board-certified internist who specializes in gastroenterology, listed appellant's complaint of indigestion, constipation and pain in her left flank area. He noted that an April 9, 2008 esophagoscopy gastroscopy duodenoscopy revealed mild antral gastritis but no ulcer. Dr. Prasad reported that a computerized tomography scan of

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<sup>2</sup> In a July 21, 2011 work capacity evaluation, Dr. H. Wesley Dykes, a family practitioner, authorized appellant to return to work with restrictions of no bending, squatting, stooping or kneeling. Appellant returned to work on August 15, 2011 but stopped again alleging that she was unable to perform her work duties due to deep and unbearable pain in her hip and knees. She did not return to work.

the abdomen and pelvic area revealed a gallbladder stone but no other significant findings. He recommended Metamucil with water daily and other prescribed medication.

In a January 6, 2012 work capacity evaluation form, Dr. Grant Garlick, a Board-certified orthopedic surgeon, authorized appellant to return to work with restrictions of no walking, standing, twisting, bending, stooping, pulling or lifting and operating of a motor vehicle at work or to and from work.

In a January 12, 2012 report, Dr. Libreros-Cupido related appellant's complaints of neck pain radiating to the shoulder and down to the hand, constant aching in the mid-back radiating to the left hip and down to the foot and constant sharp left shoulder pain. He noted her medications. Upon examination, Dr. Libreros-Cupido observed tenderness and muscle spasms in the cervical and lumbar paraspinal muscles, sacroiliac and upper trapezius and thoracic paraspinal muscles. Straight leg raise testing was positive at approximately 60 degrees on the left. Dr. Libreros-Cupido diagnosed lumbar radiculopathy secondary to disc bulge, cervical radiculopathy and bilateral knee sprain. Based on appellant's history and physical findings, there was a sufficient cause-effect mechanism of injury connected between her subjective complaints/physical examination and the July 13, 2010 accident. Dr. Libreros-Cupido restricted appellant from lifting or carrying more than 10 pounds and from performing any repetitive or heavy exertion with the upper extremities.<sup>3</sup>

In a February 4, 2012 letter to OWCP, appellant enclosed a disclosure invoice from Jamie L. Robicheaux to demonstrate that she was duly licensed to care for appellant's physical needs. She stated that, following surgery, she was in very bad shape due to her cervical spine and had difficulty walking and needed someone to help her walk to physician's visits. Regarding her heart burn, appellant noted that she submitted a medical report from Dr. Prasad but he did not mention any "heart burn condition."

In March 8 and April 6, 2012 reports, Dr. Libreros-Cupido noted appellant's claim for neck, low back and bilateral knee pain. He stated that she was unable to sit or stand for prolonged periods of time and authorized her to return to work with restrictions.

Appellant submitted a massage therapist license for Ms. Robicheaux. She also submitted a bill from Ms. Robicheaux for postoperative care and transportation. Appellant submitted various physical therapy evaluation reports.

By decision dated April 18, 2012, OWCP denied appellant's request for an attendant's allowance and her request to have permanent heartburn as an accepted condition. It found that the medical evidence did not establish that attendant's services were required. OWCP also found that the medical evidence did not establish that appellant sustained permanent heartburn as a result of the accepted injury or her medications.

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<sup>3</sup> Appellant submitted additional reports dated February 9, March 8 and April 6, 2012 by Dr. Libreros-Cupido that were basically identical to his January 12, 2012 report.

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

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including that any condition not accepted or approved by OWCP was causally related to the employment injury.<sup>5</sup> To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.<sup>6</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>8</sup>

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

OWCP accepted that on July 13, 2010 appellant sustained neck, back and knee sprain, bilateral internal knee derangement and left knee medial meniscus tear and Baker's cyst. Appellant stopped work and was placed on the periodic rolls. She now contends that she suffers from permanent heartburn as a result of the daily medication she is prescribed for her accepted conditions. The Board finds that appellant has not established that she has permanent heartburn causally related to her accepted injury.

The only medical evidence describing appellant's digestive symptoms is Dr. Prasad's March 8, 2009 report. He related her complaints of indigestion and constipation and noted that diagnostic studies revealed mild antral gastritis and gallbladder stone, but no other significant findings. Although Dr. Prasad provided a diagnosis for appellant's digestive condition, he does not offer any opinion on the cause of her current conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>9</sup> Dr. Prasad's report fails to establish that appellant's current condition was causally related to the accepted July 13, 2010 employment injury.

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>6</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>7</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

<sup>8</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>9</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

The remaining medical evidence refers only to treatment for appellant's neck, back and bilateral knee conditions. None of the physicians describe any digestive symptoms or complaints of heartburn or relate how her digestive condition was causally related to the July 13, 2010 work injury. Thus, the Board finds that appellant failed to submit sufficient medical evidence to establish that she sustained permanent heartburn as a result of the accepted July 13, 2010 work injury.

On appeal, appellant relates that after her July 13, 2010 injury she was forced her to take pills due to her daily pain and that she continues to take medication due to her conditions. She noted that she takes 780 pills monthly, which have 450 stomach side effects. Despite appellant's allegations, however, an award of compensation may not be based on surmise, conjecture, speculation or upon her own belief that there was a causal relationship between her claimed condition and her employment.<sup>10</sup> Causal relationship is a medical issue that can only be shown by reasoned medical opinion evidence that is supported by medical rationale.<sup>11</sup> Appellant has not provided such evidence in this case.

Appellant also alleged that an enclosed medical report from Dr. Libreros-Cupido clearly stated that she suffered from heartburn due to medication. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision. Since this evidence was submitted after OWCP's April 18, 2012 merit decision, the Board may not consider this evidence for the first time on appeal.<sup>12</sup> Appellant may submit that evidence to OWCP along with a request for reconsideration.

The Board finds that appellant did not meet her burden of proof to establish that she suffered from any diagnosed heartburn as a result of the accepted July 13, 2010 employment injury. Thus, OWCP properly denied her 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.

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

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening in the amount of monthly compensation.<sup>13</sup> In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the

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<sup>10</sup> *Patricia J. Glenn*, 53 ECAB 159 (2001).

<sup>11</sup> *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>12</sup> *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>13</sup> 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

shortest amount of time.<sup>14</sup> OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on its authority is that of reasonableness.<sup>15</sup>

Section 8111(a) of FECA provides for an attendant's allowance of an additional sum of not more than \$1,500.00 a month for an employee who has been awarded compensation so long as OWCP 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 injury making him or her so helpless as to require constant attendance.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> The claimant is not required to need around-the-clock care. He or she 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 or her personal needs such as dressing, bathing or using the toilet.<sup>19</sup> An

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<sup>14</sup> *Dale E. Jones*, 48 ECAB 648, 649 (1997).

<sup>15</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

<sup>16</sup> 5 U.S.C. § 8111(a).

<sup>17</sup> This decision is based 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 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/or 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. 20 C.F.R. § 10.314; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.7 (March 2010).”

<sup>18</sup> *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

<sup>19</sup> *Nowling D. Ward*, 50 ECAB 496 (1999).

attendant's allowance is not granted simply upon the request of a disabled employee or upon request of his or her physicians. The need for an attendant care must be established by rationalized medical opinion evidence.<sup>20</sup>

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

The record reveals that appellant underwent left knee surgery on December 28, 2011. She alleges that she requires attendant care under FECA due to her health conditions and the fact that she lives by herself. Appellant has the burden of proof to submit probative medical evidence establishing that attendant care is necessary for her personal needs.

Appellant submitted various work capacity evaluation forms and reports from Drs. Libreros-Cupido and Garlick, who described her complaints of neck, low back and bilateral knee pain. Both physicians authorized her to return to modified duty with restrictions of no twisting, bending, stooping, kneeling, climbing and lifting, no prolonged sitting, walking and standing and very limited operation of motor vehicles. Neither physician, however, discussed appellant's need for attendant services or what services she needed assistance with. Although appellant is restricted from doing several activities, Drs. Libreros-Cupido and Garlick fail to explain whether she needed recurring help in personal needs such as dressing or bathing.<sup>21</sup> These reports are insufficient to establish that her services were medically necessary in this case. Based on the probative medical evidence, the Board finds that it was reasonable for OWCP to deny authorization of attendant's allowance.

Appellant also submitted documents that demonstrated Ms. Robicheaux was a licensed massage therapist and various bills indicating that she assisted appellant for postoperative care and transportation. While these documents show that appellant received attendant care, they fail to establish that she was incapable of dressing or bathing herself as a result of the July 13, 2010 employment injury. As previously noted, an attendant's allowance is not granted simply upon the request of a disabled employee or upon request of his or her physicians. The need for an attendant care must be established by rationalized medical opinion evidence.<sup>22</sup>

On appeal, appellant alleges that she followed the process and completed the forms necessary to demonstrate that Ms. Robicheaux met the requirements to perform attendant services and that Ms. Robicheaux followed all the instructions provided by appellant's physician about the care she required after surgery. The qualifications of appellant's attendant, however, are not at issue here. OWCP's decision was based on the medical evidence of record, which failed to establish by competent medical evidence that appellant required attendant care within the meaning of FECA.<sup>23</sup> The Board has reviewed the medical evidence of record that was before OWCP at the time it issued its April 18, 2012 decision and finds that OWCP properly determined that she was not entitled to an attendant's allowance.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 18.

**CONCLUSION**

The Board finds that appellant failed to establish that her claim should be expanded to include permanent heartburn due to the accepted July 13, 2010 employment injury. The Board also finds that OWCP properly found that she was not entitled to an attendant's allowance under FECA.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2013  
Washington, DC

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

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

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