

FACTUAL HISTORY

On November 3, 1987 appellant, a 46-year-old supervisory internal revenue agent, sustained a traumatic injury in the performance of duty when he slipped and fell. OWCP ultimately accepted his claim for left shoulder pain, bilateral rotator cuff sprain, a closed fracture of the ulnar oleocranon process, and a closed fracture of the middle or proximal phalanx of the left fifth digit.

In 1988 appellant underwent left shoulder surgery. OWCP paid an attendant allowance from October 1988 through February 1989.² Appellant received a schedule award for a 43 percent impairment of his left upper extremity.³

In 1998 appellant underwent right shoulder surgery. OWCP paid an attendant allowance from January 1998 to May 1998. Appellant received a schedule award for a 27 percent impairment of his right upper extremity.⁴

Appellant claimed compensation for leave buyback from 1988 to 1998. He also claimed an attendant allowance for his wife's services beginning in April 2003. When OWCP explained that an attendant allowance was not payable for his wife's services after regulations were revised in January 1999, but that an allowance paid prior to that time would continue to be paid until the need for the attendant ceased, appellant claimed the attendant allowance beginning in June 1998, attempting to extend the period of attendance previously authorized. OWCP later reviewed its bill-payment database and found that appellant had filed for an attendant allowance from July 1992 through May 2010 in the amount of \$327,850.00.

OWCP reviewed appellant's record and matched the dates of leave buyback claimed against file documents and billing and compensation payments. Of the 1,853 hours claimed, it was able to confirm 984 payable and 869 not payable. On July 28, 2011 OWCP notified appellant that it had approved his leave buyback claim in part. It gave him 30 days to provide information to support disability for the dates not approved.

On September 12, 2011 OWCP notified appellant that the documentation received to date was insufficient to support his claim for an additional attendant allowance after his 1988 and 1998 surgeries. It explained that the medical evidence did not support that he was totally incapacitated requiring attendant services. OWCP added that appellant was returned to work after each surgery, eventually using a wheelchair, until his retirement in 1999. It also added that a February 16, 1990 medical report, which stated that his left upper extremity impairment would adversely affect mobility as well as self-care status, did not address the issue of disability for work or the need for attendant services.

² In February 1989 OWCP telephoned the surgeon's office to find out if appellant still needed an attendant. The surgeon replied that appellant needed an attendant through February 28, 1989 and would return to work on March 6, 1989.

³ The period of the award was February 19, 1990 through September 15, 1992.

⁴ The period of the award was January 31, 1998 through September 12, 1999.

OWCP asked appellant to submit supportive medical evidence contemporaneous with the periods for which he was claiming total disability for work and the need for full-time attendant services. It also asked him to provide his current physician's review of the case record and well-reasoned opinion, based on objective findings from the record, that he was totally disabled for work and required the full-time services of an attendant. "This report should specifically outline why the services were needed, and for which medical conditions the services were for at the time and should be well reasoned."

On August 4, 2011 appellant corrected one date of examination and explained that he needed more than four hours for a certain medical appointment.

On October 14, 2011 Dr. Martin B. Wice, a Board-certified physiatrist, related appellant's history and findings on examination. He offered the following assessment:

"In summary, [appellant] has persistent late effects of his polio. He has further compromise from his rotator cuff tears and C8 to T1 radiculopathies. [Appellant] now has quadriplegia with no functional leg control. He is not a functional ambulator. [Appellant] needs an electric wheelchair because of his compromised arms and legs. He needs to drive with hand controls. [Appellant] also needs assistance with his transfers and lower body dressing. His wife has been his attendant on a progressive basis since 1992 and will need to continue in this role. As noted in my February 19, 1990 report, [appellant's] loss of upper extremity function has adversely affected his mobility and self-care status."⁵

In a March 14, 2012 decision, OWCP denied appellant's leave buyback claim for 864 hours. It approved an additional five hours of leave buyback based on the corrected date of one examination and on appellant's explanation that he needed more than four hours for a certain medical appointment. OWCP denied leave buyback for 16 hours for meetings with doctors and counsel as part of his third-party settlement. It also denied leave buyback for periods covered by schedule awards. OWCP explained that appellant could not receive compensation for disability during the period of a schedule award regardless of any offset to absorb a third-party surplus.

OWCP also denied appellant's claim for an additional attendant allowance. It found that the file was devoid of any evidence that ongoing attendant services were necessary after recovery from appellant's 1988 left shoulder surgery until his right shoulder surgery in 1998. OWCP noted that appellant recovered from his right shoulder surgery such that he reached maximum medical improvement on July 31, 1998. It found that the file was devoid of any evidence that ongoing attendant allowances were necessary after that date.

OWCP added that there was no evidence that these services were necessary on a full-time basis or that appellant paid his wife \$327,850.00 for such services. It advised appellant that if attendant services were required for some period after January 1999, they could be authorized, when appropriate, and expenses paid directly to the provider but not to his spouse.

⁵ In his 1990 report, Dr. Wice noted that appellant's left shoulder pain prevented him from carrying heavy suitcases and crutch-walking more than one and a half blocks. He found that appellant had a 3.25 percent impairment of his left upper extremity due to pain and a 7 percent impairment due to loss of motion.

On appeal, appellant argues that his schedule award in 2000 did not begin on the proper date. He disagrees with the disallowance of 16 hours of leave buyback for travel and examination conducted in association with his third-party settlement. Appellant argues that OWCP should have allowed him to elect between schedule award compensation and compensation for disability. He argues that the third-party settlement effectively meant that OWCP did not pay his schedule awards. Appellant argues that his employer approved the 1,829 hours of sick leave claimed.

Appellant adds that his arms were his means of ambulation and allowed him to be functionally independent but were both impaired by his employment injuries. He suggested that his use of a wheelchair coupled with the impairment of his upper extremities was well within the criteria for granting the attendant allowance. Appellant again argues Dr. Wice's statement that his upper extremity impairment would adversely affect self-care status, and that his wife had been his attendant since 1992 and would continue in that role. He notes the testimony of Dr. Jacquelin Perry, a Board-certified orthopedic surgeon.⁶ Appellant adds that being able to return to work did not preclude the need for attendant services. He suggests that he has been in continuous need of his wife's attendant services since 1992, and therefore the change of regulations in January 1999 did not apply to his case.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁷ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁸

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁹ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.¹⁰

⁶ In her 1993 deposition, Dr. Perry indicated that the appropriate guidelines for management of rotator cuff tears in crutch-ambulatory polio patients was to operate on their rotator cuffs and leave them nonambulatory for one year in the hope that they heal enough to take the stress of supporting body weight again. She noted that appellant's left shoulder surgery "didn't totally solve the problem," he still had pain when she first saw him in October 1992, but he was ambulatory and he could use his left upper extremity. Dr. Perry explained that raising the arm would cause pain, "so you keep it low." It was her opinion that the bilateral rotator cuff tears would eventually require appellant to give up his crutches and use a wheelchair. Dr. Perry noted that he currently used a wheelchair some, but she did not know for what purposes. She recommended that he use a wheelchair immediately to save his shoulders: "[Appellant] can walk a little around the house, into the bathroom or if he got in a restaurant where his wheelchair wouldn't fit, he could walk up to the table or something like that." Dr. Perry stated that by using a wheelchair, appellant's arms could get better by not pushing and pulling all the time.

⁷ 5 U.S.C. § 8102(a).

⁸ 20 C.F.R. § 10.5(f).

⁹ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

¹⁰ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

The claimant must submit a rationalized medical opinion that supports a causal connection between the claimed disability for work and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury, and must explain from a medical perspective how the claimed disability for work is related to the injury.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹²

Under 5 U.S.C. § 8132 a claimant is obligated to reimburse the United States out of any third-party recovery for any disbursements made by the United States to the claimant or on the claimant's behalf, except for continuation of pay. Where there is a recovery surplus, all expenses incurred by the claimant as a result of his injury must be set against that surplus, such that he would not be entitled to any workers' compensation benefits until the surplus was exhausted.¹³

ANALYSIS -- ISSUE 1

OWCP denied wage-loss compensation for 864 hours claimed from 1988 to 1998. As OWCP explained, the medical evidence must establish that appellant was disabled from his position as a supervisory internal revenue agent on the particular dates claimed, and must also establish that this disability was due to the accepted employment injuries and not some other medical condition. Having been advised of his burden of proof, the Board finds that appellant did not submit sufficient rationalized medical opinion evidence necessary to establish the element of causal relationship.

OWCP has well explained that travel expenses and time missed from work for meetings with doctors and counsel as part of appellant's third-party settlement should have been covered by the settlement agreement. The Board can find no legal authority that would permit appellant to receive a schedule award or compensation for wage loss until his third-party surplus was exhausted. Indeed, section 8132 makes clear that appellant, having received money in satisfaction of third-party liability for his injury, shall refund to the United States the amount of compensation paid and shall credit any surplus on future payments of compensation payable to him for the same injury. This section makes no distinction between compensation for permanent impairment and compensation for wage loss. Appellant could receive neither until the surplus was exhausted. The fact that the employer authorized sick leave is immaterial. A claimant may use leave, of course, to cover his absence from work during the period of a schedule award or the period covered by a third-party recovery surplus. He may not receive compensation for wage-loss during those same periods.

¹¹ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

¹² *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ *Larry S. Hedgepath*, Docket No. 97-2064 (issued April 21, 1999).

The Board finds that appellant has not met his burden to establish that his accepted employment injuries caused the 864 hours of disability claimed. The Board will therefore affirm OWCP's March 14, 2012 decision on that issue.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ OWCP has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.¹⁵ The only limitation on OWCP's discretionary authority is that of reasonableness.¹⁶ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which 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.¹⁷

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 so helpless as to require constant attendance.¹⁸

OWCP 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 FECA, and medical bills for these services will be considered under 20 C.F.R. § 10.801. 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

¹⁴ 5 U.S.C. § 8103(a).

¹⁵ See *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).

¹⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁷ *Id.*

¹⁸ 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/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.”¹⁹

A claimant bears the burden of proof in establishing 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 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 physician. The need for attendant care must be established by rationalized medical opinion evidence.²⁰

ANALYSIS -- ISSUE 2

FECA does not state that OWCP shall pay for the service of an attendant. It states that OWCP may pay for the service of an attendant. It is for OWCP to decide. The Board will not disturb that decision in the absence of proof that OWCP abused its discretion.

Following appellant’s left shoulder surgery in 1988, OWCP paid an attendant allowance from October 1988 through February 1989. It does not appear from the contemporaneous evidence that appellant needed further attendance following his recovery from that surgery. Indeed, the surgeon indicated that appellant did not need an attendant after February 28, 1989. And in 1993 Dr. Perry, the orthopedic surgeon, testified that appellant was ambulatory and could use his left upper extremity, though he would keep it low to avoid pain. The Board finds no further claim for an attendant allowance until after appellant’s right shoulder surgery in 1998. OWCP paid an attendant allowance from January 1998 to May 1998. Again, it does not appear that appellant sought authorization for further attendance until he requested an allowance beginning in April 2003.

¹⁹ 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).

²⁰ *Thomas Lee Cox*, 54 ECAB 509 (2003).

By that time, regulations no longer permitted an allowance for services provided by appellant's wife. Once appellant understood how the law had changed, he claimed an allowance for his wife's services continuing, unbroken, from the services authorized in 1998, which, if established, would permit him to avoid the change in the law.

But the need for those continuing services was not established. Appellant emphasized the statement of Dr. Wice, the physiatrist, that loss of upper extremity function would adversely affect his self-care status. Dr. Wice made that observation in 1990 as a final note to appellant's impairment rating. He did not elaborate on the nature and extent of self-care affected and did not address whether appellant needed an attendant.

In 2011 Dr. Wice stated that appellant currently needed assistance with his transfers and lower body dressing. He attributed this not only to persistent late effects of appellant's polio and compromise from his rotator cuff tears, but to C8 to T1 radiculopathies and quadriparesis with no functional leg control. OWCP did not accept appellant's claim for polio or C8-T1 radiculopathies or quadriparesis. Dr. Wice did not discuss whether it was the compromise from rotator cuff tears or these other noninjury-related medical conditions that were the operative factor affecting appellant's current self-care status. He did not report that appellant's upper extremity impairments had worsened. Dr. Wice did not report that the 1987 work injury had rendered appellant so helpless that he required his wife's constant attendance to assist in personal needs.

Dr. Wice noted that appellant's wife had been his attendant since 1992, but again he did not elaborate. He did not describe with any specificity what assistance the wife provided in 1992, or from 1992 to 1998, or from 1998 to 2003. Dr. Wice did not explain the progression or how the need for assistance was the result of the accepted work injury. Dr. Perry indicated in 1993 that appellant was ambulatory and could use his left upper extremity. She advised that he could walk a little around the house, into the bathroom or to the table in a restaurant if his wheelchair would not fit. Dr. Wice did not review this evidence and did not explain how the functionality that Dr. Perry described was consistent with the notion that appellant's work injury had rendered him so helpless in 1992 that he required his wife's constant attendance to make transfers and dress his lower body.

Dr. Wice's opinion on the need for an attendant is vague. It does not appear that he did anything more than briefly repeat what appellant had told him. Given the absence of a well-reasoned medical opinion, the Board finds that OWCP did not abuse its discretion in denying appellant's request for an additional attendant allowance. The Board will affirm OWCP's March 14, 2012 decision on that issue.

Appellant argues that his arms were his means of ambulation and allowed him to function independently, but both were impaired by his employment injuries. The record shows this to be the case, but the issue to be resolved is more specific than that. The issue is whether the accepted work injuries rendered him so helpless that he could not transfer or dress his lower body beginning in July 1992, or from 1992 to 1998, or from 1998 and continuing. The issue is whether any need for an attendant after the 1999 change in the regulations was the direct and natural consequence of the accepted upper extremity impairments or rather was occasioned by the other medical conditions Dr. Wice noted in his 2011 report. Appellant offers his opinion:

the impairments coupled with the wheelchair should be sufficient. As the Board explained earlier, an attendant allowance is not granted simply on the request of a disabled claimant or his physician. The need for attendant care must be established by rationalized medical opinion evidence and the medical opinion evidence is such that the Board can find no abuse of OWCP's broad discretion in the matter.

Appellant takes issue with the schedule award he received in 2000, specifically, with the date of maximum medical improvement. That issue is not before the Board on this appeal. If appellant disagrees with that OWCP's January 25, 2000 decision, he may follow the appeal rights attached thereto.

Appellant may submit new evidence 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.

CONCLUSION

The Board finds that OWCP properly denied compensation for 864 hours of claimed disability for work. The Board also finds that OWCP did not abuse its discretion in denying an additional attendant allowance.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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