

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

W.J., Appellant

and

**FEDERAL JUDICIARY, U.S. PROBATION
OFFICE, Tampa, FL, Employer**

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**Docket No. 14-376
Issued: May 15, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 4, 2013 appellant filed a timely appeal from a July 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 by denying appellant an attendant's allowance pursuant to 5 U.S.C. § 8111 and 5 U.S.C. § 8103.

FACTUAL HISTORY

On June 16, 2008 appellant, a 47-year-old probation officer, injured his ribs, right shoulder, back and neck when the vehicle he was driving was struck by another motor vehicle. He filed a claim for benefits on June 19, 2008, which OWCP accepted for a fracture of the right

¹ 5 U.S.C. § 8101 *et seq.*

humerus. The claim was subsequently accepted for adhesive capsulitis of the right shoulder; other affections of the right shoulder region not elsewhere classified; and a closed fracture of fourth posterior rib on the right. Appellant did not return to work.

In a letter to OWCP dated October 29, 2010, appellant indicated that his wife had been providing personal care for him as an attendant. He was unable to care for himself due to his June 2008 work injury. Appellant stated that he had been unsuccessfully requesting information regarding reimbursement or payment by OWCP for his wife's services. He asked OWCP to provide him with the necessary documentation to obtain such reimbursement.

By letter dated December 10, 2010, OWCP advised appellant that it required additional information from him and his treating physician in order to determine whether he was eligible for payment of an attendant's allowance. It stated that 20 C.F.R. § 10.314 allowed payment for services of an attendant where medical documentation supported that he required assistance to care for basic personal care needs. OWCP advised that there was no provision for payment of tasks, such as cooking, laundry, housekeeping, shopping or yard work. On review of the medical records, it did not appear that appellant was unable to drive or to care for himself the majority of the time. Further, if such services were approved, payment for such services was limited to \$1,500.00 per month by regulation. OWCP advised that such services must be rendered by a home health aide, licensed practical nurse or similarly trained individual. It attached a form for appellant's treating physician to complete and address the necessity for an attendant.

In a December 22, 2010 letter, appellant requested reimbursement for the services of a personal attendant, his wife, for various periods from June 16, 2008 to September 27, 2010. He contended that he could not perform the basic activities of daily living as a result of the June 2008 work injury. Appellant stated that his injuries and the subsequent treatment rendered him incapable of driving or getting in and out of his car without his wife's assistance. He asserted that he was unable to go to the bathroom, bathe, shave, prepare meals, take medication, dress himself or perform other aspects of personal hygiene without his wife's assistance. Appellant stated that his wife was qualified to serve as an attendant because she had served as a candy striper at a hospital, volunteered in the geriatric unit at a local hospital, volunteered with the Red Cross and was a child care teacher's assistant. His wife's educational experience included being a nursing major at Georgia College & State University, nursing pharmacology and a semester of nursing practicum at a local convalescence facility. Appellant stated that his wife held an associate degree in education, a B.S. in human services with a concentration in counseling and victim services. He noted that she had begun coursework in pursuit of her master's degree in social work.

By letter dated April 12, 2011, Dr. Mark E. Farmer advised OWCP that he had initially declined to complete the reimbursement form because appellant did not need any current home care. After speaking with appellant, such care was needed at the time he underwent surgery in 2008 and for the immediate aftermath of the surgery; although this was not consistent with the dates indicated on the form. Dr. Farmer asked OWCP to send another form so that he could complete and submit it with the proper dates supporting the necessity for an attendant.

By decision dated September 1, 2011, OWCP denied appellant's request for an attendant's allowance for the period June 16, 2008 to September 27, 2010 under sections 8103

and 8111. Although the records he submitted indicated that his wife drove him to and from medical appointments, this did not meet the statutory criteria for having her reimbursed as an attendant. While appellant's wife submitted extensive transcripts and school records, which purported to show that she had a medical background and training; she failed to establish that she was certified or had a business license as required to be paid as a qualified attendant. It also determined that she failed to submit any actual work history in the field.

On February 10, 2012 appellant requested reconsideration of the September 1, 2011 decision.

On November 14, 2011 Dr. Farmer completed the reimbursement form. He had most recently examined appellant on April 27, 2010 and found a limited range of motion in the right shoulder with mild tenderness. When asked to explain why appellant's condition warranted the services of an attendant, Dr. Farmer stated that, as of July 11, 2008, the date he performed right shoulder surgery and for the postsurgery period, appellant was unable to use his right arm as expected. This necessitated additional surgery, which was performed on April 20, 2010. Appellant was again unable to use his right arm. Dr. Farmer stated that appellant required the services of an attendant as of July 7, 2008, the date of the initial consultation and preoperative period of July 11, 2008 to April 19, 2010, a period of 21 months. From April 10 to June 7, 2010, the second preoperative period which lasted eight weeks, appellant also required an attendant. Dr. Farmer stated that the actual duties of appellant's wife, his attendant, included basic nursing duties, assisting with activities of daily living, dressing, grooming, personal hygiene, transferring, providing physical therapy due to surgery, providing assistance due to precautions required by taking prescription narcotics and driving appellant to and from the hospital and physical therapy appointments.

By decision dated April 9, 2012, OWCP denied modification of the September 1, 2011 decision. It found that appellant did not submit sufficient medical evidence to establish that the service of an attendant was necessary constantly within the meaning of section 8111 or factual evidence that the attendant providing these services had the requisite qualifications. OWCP found that Dr. Farmer's November 14, 2011 report did not adequately demonstrate that appellant required the services of an attendant on a constant basis in accordance with the statutory criteria. Further, it found that appellant's wife did not establish that she met the criteria for having the medical or vocational background to be considered as a home health aide, licensed practical nurse or similarly trained individual.

By letter dated March 31, 2013, appellant requested reconsideration. He submitted literature regarding nursing programs at John Hopkins University, Valdosta State University and Georgia College.

By decision dated July 18, 2013, OWCP denied modification of the April 9, 2012 decision.

LEGAL PRECEDENT

FECA provides for an attendant's allowance under section 8111(a). OWCP may pay an employee who has been awarded compensation an additional sum of not more than \$1,500.00 a

month when it 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.”²

According to 20 C.F.R. § 10.314, in the exercise of discretion afforded by 5 U.S.C. § 8111, the cost of providing attendant’s services will be paid by OWCP under 5 U.S.C. § 8103, for personal care services that have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse or similarly trained individual. 5 U.S.C. § 8103(a) 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 the amount of monthly compensation.³ In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.⁴ OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on its authority is that of reasonableness.⁵

The Board has held that OWCP may pay an attendant’s allowance upon a finding that a claimant has established the need of constant care. 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 personal needs such as dressing, bathing or using the toilet.⁶

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.⁷ An attendant’s allowance is not granted simply upon the request of a disabled employee or upon the request of his or her physicians. The need for attendant care must be established by rationalized medical opinion evidence.⁸

² 5 U.S.C. § 8111(a).

³ *Id.* at § 8103(a).

⁴ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁵ *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).

⁶ *Nowling D. Ward*, 50 ECAB 496 (1999).

⁷ *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

⁸ *Id.*

ANALYSIS

OWCP accepted appellant's claim for fracture of the right humerus, adhesive capsulitis of right shoulder; other affections of shoulder region not elsewhere classified, right; and closed fracture of fourth posterior rib on the right. Appellant asserted that he was entitled to reimbursement for the services of a personal attendant, his wife, from June 16, 2008 to September 27, 2010, due to the fact that he could not perform the basic activities of daily living as a result of his June 2008 work injury.

In an April 12, 2011 letter, Dr. Farmer noted that he initially declined appellant's request to support the claim for reimbursement for an attendant's allowance because he did not believe that appellant required any home care. He reconsidered the matter after appellant told him that he needed such care at the time he underwent surgery in 2008 and for the immediate aftermath of said surgery. Dr. Farmer subsequently submitted an attendant's allowance form on November 14, 2011. As of April 27, 2010, the date of his most recent examination, appellant's condition warranted the services of an attendant from July 11, 2008 through June 7, 2010 because he was unable to use his right arm as expected following right shoulder surgery. Dr. Farmer described the duties of appellant's wife as an attendant, which included basic nursing duties, assisting with activities of daily living, dressing, grooming, personal hygiene, transferring, providing physical therapy due to surgery, providing assistance due to precautions required by taking prescription narcotics and driving appellant to and from the hospital and physical therapy appointments. He did not provide any additional explanation or detail. Dr. Farmer did not discuss appellant's condition in the weeks following surgery or support why he was so helpless that he needed constant, recurring assistance for such personal needs as dressing, bathing or going to the bathroom in accordance with the statutory criteria. He did not adequately address why such personal care was required for a period of almost two years.

The Board finds that the medical evidence is not sufficient to establish that attendant's services were medically necessary. Based on the probative medical evidence of record, OWCP did not abuse its discretion by denying appellant's claim for an attendant's allowance.

Appellant has submitted letters which generally described his wife's duties as an attendant and her purported qualifications to serve as such. OWCP properly found that the evidence was not sufficient to meet the requisite statutory requirements outlined above. In *M.C.*,⁹ the Board found that having provided service to the elderly or treating elderly parents did not establish that the employee's sister, housemate or his family were experienced professionals or trained as home health aides or a licensed practical nurse. While the housemate's wife was a medic in the Israeli Army, the Board also found that there was no evidence of record to establish any training similar to a home health aide or a licensed practical nurse. In this case, appellant contended that his wife had nursing training. He failed to submit sufficient evidence to establish that his wife's training was equivalent to that of a home health aide or a licensed practical nurse.

The Board has reviewed the evidence of record and finds, for the reasons stated, that OWCP did not abuse its discretion by denying appellant's request for an attendant's allowance.

⁹ Docket No. 09-2314 (issued August 20, 2010).

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.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying appellant's request for an attendant's allowance.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2014
Washington, DC

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

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

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