

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

R.C., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY FIELD
ARTILLARY CENTER, Fort Sill, OK, Employer**

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**Docket No. 15-1373
Issued: December 22, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 5, 2015 appellant filed a timely appeal of a May 18, 2015 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 in denying appellant's request for an attendant allowance.

FACTUAL HISTORY

This case has previously been before the Board. On March 11, 1994 appellant, then a 35-year-old engineering equipment operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his neck on March 10, 1994 when he was involved in a motor vehicle accident.

¹ 5 U.S.C. § 8101 *et seq.*

On February 9, 1995 OWCP accepted the claim for cervical and thoracic strains, aggravation of preexisting spondylitic spondylolisthesis and authorized L4-5 fusion surgery. It subsequently expanded appellant's claim to include temporary aggravation of major depressive disorder and chronic urinary retention. Appellant stopped work on March 10, 1994 and OWCP subsequently placed him on the periodic rolls for total disability, effective September 18, 1994.

By decision dated July 6, 2005, the Board affirmed a November 10, 2004 OWCP decision reducing appellant's compensation based on its determination that the constructed position of hotel clerk represented his wage-earning capacity.² The facts and circumstances surrounding the prior appeals are incorporated by reference.

In a February 28, 2013 memorandum of call appellant inquired as to whether his wife could serve as his attendant and be compensated for that service. The memorandum revealed that appellant was experiencing difficulty due to a bladder condition resulting from his recent back surgery. OWCP noted that it was developing the issue of whether his bladder condition was causally related to the March 10, 1994 employment injury.

In a letter dated March 15, 2013, OWCP advised appellant that prior to issuing a decision on whether payment for attendant services could be authorized, additional information was required from both him and his treating physician.

In a March 15, 2013 memorandum of call, appellant asked what was required for his wife to be considered and compensated for attendant services.

In a November 26, 2013 OWCP received appellant's July 2, 2013 response to questions regarding his request for services of an attendant. Appellant stated that he needed help with his range of motion, personal grooming, and transportation to medical appointments. In addition, he related that someone was needed to carry his catheter supplies. The attendant's services would be for eight hours per day barring any medical appointments. The attendant would be his wife and her qualification was that she has taken care of him since March 10, 1994. In concluding, appellant stated that his wife was his attendant and a fair and reasonable payment would be \$720.00 per week or \$2,880.00 per month.

On November 26, 2013 form report, Dr. John W. Ellis, a treating Board-certified family practitioner, indicated that appellant was examined that day. Examination findings showed that his back condition had worsened, he struggled with daily chores/activities, and was seen for a consequential depression injury. Dr. Ellis opined that the services of an attendant would be required for the rest of appellant's life and that he is currently living at home. At present, appellant has the attendant services of his wife. Dr. Ellis checked that appellant needs assistance with travel, walking bathing himself, dressing himself, getting out of bed, taking exercise, and getting out of doors.

On March 11, 2014 OWCP advised appellant of an April 1, 2014 appointment it had scheduled on his behalf with Dr. Sameer Abdullah Mohammed, a second opinion Board-certified psychiatrist. In an April 1, 2014 report, Dr. Mohammed diagnosed recurrence major depressive

² Docket No. 05-0370 (issued July 6, 2005).

disorder, generalized anxiety, chronic back pain, bilateral L4-S1 spinal nerve root impairment, spondylolisthesis, left hand carpal tunnel, spondylitis, left shoulder traumatic arthritis, migraine headaches, diabetes mellitus, neurological bladder dysfunction, and sexual dysfunction. He opined that appellant was totally disabled due to the psychological disorder, but “should be able to return to work with appropriate treatment” in two to three years.

On April 24, 2014 OWCP expanded appellant’s accepted conditions to include temporary aggravation of major depressive disorder and retention of urine.

On April 20, 2015 appellant submitted a March 5, 2015 emergency room report from Duncan Regional Hospital stating that appellant was seen for back pain. Under mode of discharge, the report noted “ambulated” and accompanied by family member. In a functional assessment, it stated that appellant was independent for daily living activities.

In a May 12, 2015 report, an OWCP medical adviser reviewed the medical evidence of record, including the questionnaire completed by Dr. Ellis requesting attendant services, a March 5, 2015 emergency room report, and an April 1, 2014 report by Dr. Mohammed. The medical adviser opined that the medical evidence did not show that appellant qualified for attendant services under FECA.

In a May 18, 2015 decision, OWCP denied appellant’s request for attendant allowance as the medical evidence “lacks documentation which supports that the claimant requires constant care and attendance within the meaning of FECA.”

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

³ 5 U.S.C. § 8103(a).

⁴ *L.D.*, 59 ECAB 648 (2008); *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 *Joseph P. Hofmann*, 57 ECAB 456 (2006).

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.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 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

⁷ 5 U.S.C. § 8111(a).

⁸ 20 C.F.R. § 10.314; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.6(d) (May 2012).

on the request of a claimant or physician. The need for attendant care must be established by rationalized medical opinion evidence.⁹

ANALYSIS

FECA provides that 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. Ellis, an attending Board-certified family practitioner, submitted a form report in which he concluded that the services of an attendant required for the rest of appellant's life and that he is currently living at home. He checked that appellant needs assistance with travel, walking, bathing himself, dressing himself, getting out of bed, taking exercise, and getting out of doors. However, Dr. Ellis failed to explain why appellant needed help in personal needs such as dressing, walking, getting out of bed, exercising, going outdoors, or bathing on a constant basis.¹⁰

The second opinion referral physician, Dr. Mohammed, a Board-certified psychiatrist, concluded that appellant was disabled due to an employment-related temporary aggravation of major depressive disorder and retention of urine. He did not address whether appellant required an attendant.

An OWCP medical adviser reviewed the questionnaire completed by Dr. Ellis, a March 5, 2015 Duncan Regional Hospital Emergency Room report and an April 1, 2014 report by Dr. Mohammed, a second opinion Board-certified psychiatrist, and opined that the medical adviser did not establish that the services of an attendant was necessary. Based on the probative medical evidence, the Board finds that it was reasonable for OWCP to deny authorization of attendant's allowance.

Section 8111(a) pertains to the issue of an attendant allowance. If a claimant 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 assistant attendance, OWCP has discretion to pay an allowance. Dr. Ellis did not adequately explain how appellant's cervical and thoracic strains, aggravation of preexisting spondylitic spondylolisthesis, temporary aggravation of major depressive disorder, and chronic urinary retention left him so helpless as to require constant attendance for his personal needs.¹¹

⁹ *M.C.*, Docket No. 09-2314 (issued August 20, 2010); *L.D.*, *supra* note 6; *Thomas Lee Cox*, 54 ECAB 509 (2003).

¹⁰ *Nowling D. Ward*, 50 ECAB 496 (1999).

¹¹ *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).

Moreover, OWCP's medical adviser concluded that, based on an emergency room report which stated that appellant was ambulatory at the time of discharge and independent for daily life services and Dr. Mohammad's April 1, 2014 second opinion report, the medical evidence of record does not support that appellant qualifies for an attendant.

It is not enough that a claimant faces difficulty with some activities of daily living.¹² The claimant must demonstrate a sufficient level of helplessness with his personal care. In the case, of *M.C.*,¹³ 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. When asked to explain his need for an attendant, appellant stated that he needed help with his range of motion, personal grooming, and transportation to medical appointments as well as requiring someone to carry his catheter supplies. The evidence of record does not demonstrate that he was so helpless that he required constant care.

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 May 18, 2015 decision.

Appellant may submit new evidence or argument as part of a formal 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 attendant allowance.

¹² *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).

¹³ Docket No. 09-2314 (issued August 20, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2015 is affirmed.

Issued: December 22, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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