



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as previously set forth are incorporated herein by reference. The relevant facts are as follows.

Appellant, a 50-year-old claims examiner, filed a claim for an occupational disease (Form CA-2) on May 21, 2001, claiming that he developed degenerative disc disease and a herniated nucleus pulposus causally related to factors of his federal employment. OWCP accepted his claim for degenerative disc disease and L4-5 hemilaminotomy with discectomy, major depressive disorder, recurrent and lumbar laminectomy, and herniated nucleus pulposus at L4-5. Appellant stopped work on April 9, 2001 due to his accepted lower back conditions and returned to light duty for four hours per day on August 4, 2001. OWCP accepted that he sustained a recurrence of his work-related disability on December 5, 2001.

In a report dated June 28, 2002, Dr. Arnold A. Zeal, Board-certified in neurosurgery, advised that he had performed a June 22, 2001 L4-5 laminectomy and discectomy on appellant, noting that his symptoms were presently extremely vague and unspecific. He further advised that he arises with minimal difficulty and walks well in a normal fashion. Dr. Zeal reported that appellant was able to walk on his toes heels without any paresis.

Appellant submitted an August 1, 2002 Form EN-1090 reimbursement questionnaire, completed by Dr. Manual Portalatin, a Board-certified orthopedic surgeon, who advised that appellant required assistance driving short distances, dressing himself, bathing himself, getting out of bed for two to three hours per day, and exiting doors. Dr. Portalatin stated that appellant was able to stand or walk on his own for only 10 to 20 seconds, was unable to sit for more than 20 seconds, and spent most of his day lying down. He further stated that appellant's wife, who performed the duties of a personal attendant, helped appellant dress, shave, walk, and perform toilet functions.

By letter dated August 8, 2002, appellant requested reimbursement for expenses and for attendant allowance, retroactive to the date of his recurrence of his temporary total disability.<sup>3</sup>

By decision dated March 6, 2003, OWCP denied appellant's request for reimbursement for the services of an attendant as of November 2001.

Appellant appealed to the Board. By decision dated March 30, 2005,<sup>4</sup> the Board affirmed OWCP's March 6, 2003 decision. The Board found that the evidence of record did not establish that appellant's wife met the regulatory requirements to qualify as an attendant and did not establish that she was a home health aide, licensed nurse, or similarly trained individual.<sup>5</sup> The

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<sup>2</sup> Docket No. 03-0727 (issued February 10, 2003); Docket No. 03-1005 (issued March 30, 2005); Docket No. 09-1779 (issued June 15, 2010).

<sup>3</sup> The record reflects that appellant's date of recurrence was December 1, 2001.

<sup>4</sup> *Supra* note 2.

<sup>5</sup> 20 C.F.R. § 10.314.

Board further found that the evidence submitted by appellant showed that his wife did not fulfill the statutory requirements of an attendant subsequent to his surgery. Appellant performed domestic and housekeeping chores such as cooking, cleaning, doing the laundry, or providing transportation services which are generally accepted by Board precedent. The Board determined that he did not establish that his wife was assisting him in maintaining his daily existence; *i.e.*, helping him walk, eat meals, bathe, and dress, pursuant to medical requirements. The Board further found that appellant failed to provide medical evidence sufficient to support the necessity of a personal attendant.

On December 7, 2004 OWCP determined that appellant's actual earnings as a part-time driver for the Hertz Rental Car company fairly and reasonably represented his wage-earning capacity.

In a report dated December 16, 2012, Dr. Portalatin advised that he had been treating appellant for approximately 17 years. He reported that appellant had degenerative disc disease, an accepted condition, and was also experiencing cervical pain and left upper extremity radiculopathy at the C7 level, which he considered a progression of his degenerative disc disease. Dr. Portalatin noted that degenerative disc disease is a progressive condition involving the cervical, thoracic, lumbar, and sacral coccygeal areas of the spine. He opined that appellant needed an evaluation of his left upper extremity as soon as possible, as a previous delay had resulted in a permanent atrophy of his lower extremity muscles.

Dr. Portalatin opined that, due to the progression of his degenerative disc disease, appellant needed immediate assistance for his daily living activities. He advised that he had been dependent on his wife to help him bathe and dress on a daily basis since January 2009 and requested that his wife be authorized as his assistant for activities of daily living.

By letter dated January 7, 2013, OWCP advised appellant that it required additional information from him and his treating physician in order to determine whether it could authorize payment for services of an attendant. It noted 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 services must be rendered by a home health aide, licensed practical nurse or similarly trained individual. It attached a Form CA-1090 for appellant's treating physician to complete and submit so that he could explain and support, with medical reasons, the necessity for an attendant.

On January 11, 2013 appellant completed OWCP's questionnaire and noted that his wife had retired from the Veterans Administration on May 31, 2008, as a licensed practical nurse, and had the skill sets necessary to be an attendant.

In handwritten responses to OWCP's questionnaire dated January 14, 2013, Dr. Portalatin asserted on the Form CA-1090 that appellant required the services of an attendant on a daily basis from 8:00 a.m. to 8:00 p.m. He advised that appellant's activities of daily living were getting more difficult to accomplish due to poor balance, stamina, and ambulation.

By decision dated March 29, 2013, OWCP denied appellant's request for attendant's services. It found that the evidence he submitted did not clearly indicate his inability to take care

of his basic, personal needs and personal care services for assistance in feeding, bathing and/or using the toilet; did not clearly explain how and why an attendant was needed; and did not indicate the need for an attendant was specifically due to his accepted conditions of lumbar degenerative disc disease at L4-5 and/or major depressive disorder, current.

By letter dated August 1, 2013, appellant requested reconsideration of the March 29, 2013 decision.

In a June 19, 2013 report, received by OWCP on August 5, 2013, Dr. Portalatin advised that he was amending his attendant's allowance form, indicating that appellant required an attendant because he was severely limited in ambulation due to his numerous, accepted medical problems. He noted that he had recently contracted an additional condition, a complex medication schedule affecting appellant's sensorium, which contributed to his disability. In the attached June 19, 2013 Form CA-1090, Dr. Portalatin advised that appellant required assistance with traveling, walking, feeding, dressing, bathing, and getting in and out of a bathtub.

In a July 4, 2013 report, Dr. Portalatin noted that appellant had undergone several material changes to accepted conditions of lumbar degenerative disc disease and depressive disorder. He advised that appellant had experienced a progression of his disease, both objectively and subjectively, with a history of stiffness, antalgic gait poor balance, and pain with ambulation during the past eight months. Dr. Portalatin reported that a review of his magnetic resonance imaging (MRI) scans showed material changes between the MRI scan he underwent on May 5, 2009 and one he underwent on July 30, 2010. He noted that the July 30, 2010 MRI scan showed minimal posterior bulging of the disc material without significant stenosis and mild hypertrophic changes of the facet; and minimal posterior bulging of the L5-S1 disc, with mild narrowing of the neural foramina, bilaterally, due to hypertrophic changes of the facets. Dr. Portalatin advised that appellant had objective decrease sensation below the knees as well as decrease on his right knee and ankle reflexes. He noted that these findings, coupled with unsteady antalgic gait and a positive Romberg test, suggested a progression of his proprioception. In addition, Dr. Portalatin noted psychiatric evidence, which indicated that his depression was decompensating.

By decision dated August 27, 2013, OWCP denied modification of the March 29, 2013 decision. It advised that Dr. Portalatin did not provide a clear opinion based on objective examination findings which explained how and why appellant required an attendant, specifically due to the accepted conditions of lumbar degenerative disc disease at L4-5 and major depression. OWCP noted Dr. Portalatin's assertion that the effects of medication had become a contributing factor, but found that he provided no further explanation as to what types of medication appellant was taking, for what condition it was prescribed and whether it was required as a result of the work injury or another nonwork-related medical condition.

Dr. Portalatin submitted reports dated September 27 and October 21, 2013, September 15, 2014, and January 5, 2015, in which he stated findings on examination and indicated that appellant was experiencing low back pain, had diabetes, and was having trouble managing his moods and medication intake.

In an amended CA-1090 form report dated February 14, 2014, Dr. Portalatin made the following annotations. He noted “when on medication” beside the checked box indicating that appellant could travel assisted; stated “use of a cane” beside the checked box indicating that appellant could walk assisted; checked a box indicating that appellant could not feed himself at all; stated “pants, shirt and socks” beside the checked box indicating that appellant could dress himself assisted; and stated “getting in and out of tub” beside the checked box indicating that appellant could bathe himself assisted. In addition, Dr. Portalatin amended the number of hours out of bed from eight hours to one hour; added four hours per day for getting out of doors unassisted; and wrote “no exercise due to job[-]related accepted physical condition.” He also advised that appellant was not able to feed himself due to adequate dexterity. Dr. Portalatin reported that appellant was unable to do activities of daily living if not taking pain medications. He also advised that appellant required the services of an attendant seven days a week from 8:00 a.m. to 8:00 p.m.

By letter dated March 21, 2014, received by OWCP on March 26, 2014, appellant requested reconsideration of the March 29, 2013 decision.

In a nonmerit decision dated May 5, 2014, OWCP denied reconsideration.

By letter dated June 2, 2014, received by OWCP on June 6, 2014, appellant requested reconsideration.

In a nonmerit decision dated July 2, 2014, OWCP denied reconsideration.

By letter dated July 17, 2014, received by OWCP on July 21, 2014, appellant requested reconsideration.

In a nonmerit decision dated October 8, 2014, OWCP denied reconsideration.

In an October 30, 2014 memorandum, an OWCP claims examiner advised that he had spoken with appellant on the telephone. Appellant asserted that OWCP had not addressed Dr. Portalatin’s February 14, 2014 form report in any of the recent reconsideration decisions. The claims examiner informed appellant that his file would be reviewed.

By letter dated November 21, 2014, OWCP advised appellant that it was reopening his claim for an attendant’s allowance for a review of the merits including a review of Dr. Portalatin’s February 14, 2014 amended report. Although it had denied his prior requests for reconsideration by nonmerit decisions dated May 5, July 2, and October 8, 2014, OWCP determined that Dr. Portalatin’s new report constituted evidence which was substantially different from his original report. OWCP therefore informed appellant that it would proceed with a merit review of his request for reconsideration.

In a merit decision dated April 15, 2015, OWCP reiterated that Dr. Portalatin’s February 14, 2014 amended Form CA-1090 constituted new, relevant medical evidence which warranted a merit review. It found, however, that this report was not sufficient to establish appellant’s entitlement to an attendant. OWCP noted that Dr. Portalatin had submitted numerous handwritten statements on the amended Form CA-1090, which described appellant’s ability, or lack thereof, to perform various tasks. It, however, denied appellant’s request for an attendant’s

allowance, finding that Dr. Portalatin provided no objective findings or medical rationale to support these statements.

### **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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</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>9</sup>

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.<sup>10</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>11</sup> An attendant's allowance is not

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<sup>6</sup> 5 U.S.C. § 8111(a).

<sup>7</sup> *Id.* at § 8103(a).

<sup>8</sup> *Dale E. Jones*, 48 ECAB 648, 649 (1997).

<sup>9</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>10</sup> *Nowling D. Ward*, 50 ECAB 496 (1999).

<sup>11</sup> *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

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.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP did not abuse its discretion by denying appellant's request for an attendant's allowance in its merit decision dated April 15, 2015.

Initially, the Board notes that OWCP conducted the April 15, 2015 merit review, on its own motion, more than one year following the most recent decision reviewing the merits of the case on August 27, 2013. Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>13</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>14</sup>

After appellant called OWCP on October 30, 2014 and requested that his request for attendant's allowance be reviewed again, based upon Dr. Portalatin's February 14, 2014 form report, which was previously of record, OWCP chose to reopen the August 27, 2013 merit decision.<sup>15</sup> The Board notes that appellant did not formally file a request for reconsideration; rather OWCP reopened this case for merit review on its own motion. This factual circumstance is distinguished from the Board's finding in *L.D.*<sup>16</sup> Wherein the Board found that OWCP had abused its discretion by denying an untimely formal request for reconsideration under 5 U.S.C.

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<sup>12</sup> See *W.J.*, Docket No. 14-0376 (issued May 15, 2014).

<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> The Board notes that OWCP regulations also require that a request for reconsideration be made in writing. Appellant should have been informed that his request for further review should be made in writing. See 20 C.F.R. § 10.606.

<sup>16</sup> Docket No. 15-0865 (issued October 6, 2015). As the Board explained in *L.D.*, OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The proper standard of review for an untimely reconsideration request is the clear evidence of error standard.

§ 8128(a), rather than under the clear evidence of error standard relative to untimely reconsideration requests. OWCP did not abuse its discretion by reviewing the case on its merits, as its authority to do so rests in section 8128(a).<sup>17</sup>

The Board affirms OWCP's denial of appellant's request for an attendant allowance. The Board finds that OWCP did not abuse its discretion by finding that appellant has not submitted rationalized medical evidence to support that he requires constant care. Appellant's request for an attendant's allowance was supported by several reports from his treating physician, Dr. Portalatin. In his December 16, 2012 report, Dr. Portalatin related that, due to progression of appellant's degenerative disc disease, appellant needed immediate assistance for his daily living activities. He noted that appellant had been dependent on his wife to help him bathe and dress since January 2009. In subsequent reports dated January 14 and June 19, 2013, Dr. Portalatin related that appellant had difficulty with ambulation, and had a complex medication schedule affecting his sensorium. Thereafter on July 4, 2013 Dr. Portalatin related that appellant had several material changes to his accepted conditions of lumbar degenerative disc disease and depressive disorder. He then related that appellant's July 30, 2010 MRI scan showed minimal posterior bulging of the disc material without significant stenosis and mild hypertrophic changes of the facet; and minimal posterior bulging of the L5-S1 disc, with mild narrowing of the neural foramina, bilaterally, due to hypertrophic changes of the facets. Dr. Portalatin never explained how these minimal objective findings would have caused the severe limitations in daily activities he outlined in his February 14, 2014 report, including appellant's inability to feed himself, dress unassisted, leave his bed for more than an hour at a time, or perform any exercise. The Board finds that Dr. Portalatin's reports do not provide the medical rationale necessary to establish that appellant requires constant care.<sup>18</sup>

Finally, while Dr. Portalatin explained that appellant required attendant care due to medications, he never explained, with medical rationale, how or why a specific medication would cause the limitations in daily living he listed in his February 14, 2014 report, or why appellant could not administer his medications himself.<sup>19</sup>

Dr. Portalatin did not show that appellant belonged to the same class of claimants described by section 8111 of FECA, and therefore required an attendant's constant care.<sup>20</sup>

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.

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<sup>17</sup> *Supra* note 13.

<sup>18</sup> *See E.L.*, Docket No. 12-791 (issued August 29, 2012).

<sup>19</sup> *See Richard E. Simpson*, Docket 04-04-14 (issued May 3, 2004). In the *Simpson* case the Board found an uncontroverted medical need for administration of medication due to dementia.

<sup>20</sup> *J.G.*, Docket No. 09-1497 (issued May 18, 2010). 5 U.S.C. § 8111 (a) provides that 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.

**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 April 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board