

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONALD F. PETERS and U.S. POSTAL SERVICE,  
POST OFFICE, Baltimore, MD

*Docket No. 98-2424; Submitted on the Record;  
Issued February 16, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for payment of an attendant's allowance.

On September 20, 1995 the Office accepted that on November 1, 1992 appellant, then a 53-year-old letter carrier, sustained an aggravation of osteoarthritis of the great toes. He returned to light duty on June 1, 1993 following arthrodesis surgery of both great toes on February 2, 1993, and continued to work light duty through October 11, 1996. The arthrodesis surgery was approved by the Office on August 26, 1997.

On October 17, 1997 appellant completed a Form EN-1086 requesting reimbursement for an attendant's services for the six-week period February 2 to March 16, 1993. Appellant indicated that his sister acted as his attendant 24 hours a day, 7 days a week during that period and was paid \$100.00 per week, and noted that the reason for needing an attendant was that he was unable to get around due to foot surgery. Appellant's physician, Dr. Joseph L. Morris, a Board-certified orthopedic surgeon, completed a Form EN-1090 indicating that due to bilateral simultaneous foot surgery appellant was unable to walk alone for six weeks. The physician indicated that appellant was able to feed himself, dress himself and bathe himself unassisted, that he could travel, walk, get out of bed, and get out of doors with assistance, but could not exercise at all. He indicated that appellant would need an assistant for six weeks to assist with bathroom privileges or for ambulation.

The Office then submitted a statement of accepted facts and questions to be answered to an Office medical adviser on the issue of the necessity of an attendant. The Office further noted that appellant resided with his wife during the period he claimed need of an attendant 24 hours a day, 7 days a week. By response dated April 3, 1998, the Office orthopedic medical consultant, Dr. Willie Thompson, a Board-certified orthopedic surgeon, opined: "there is no medical need for an attendant for toe surgery of any kind."

By decision dated June 19, 1998, the Office denied appellant's requested reimbursement for attendant's services noting that the Office orthopedic medical consultant, Dr. Willie Thompson, had opined: "there is no medical need for an attendant for toe surgery of any kind."

The Board finds that this case is not in posture for decision.

Title 5 U.S.C. § 8111(a) states:

"The Secretary of Labor may pay an employee who has been awarded compensation an additional \$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."

However, Title 20 C.F.R. § 10.305 states that the additional sum may not be more than \$1,500.00.

Under these provisions the Office may pay an attendant's allowance upon finding that a claimant is so helpless that he is in need of constant care.<sup>1</sup> The claimant is not required to need around-the-clock care, but is only required to have a continually recurring need for assistance in personal matters. An attendant's allowance is intended to pay for an attendant for assisting a claimant in his personal needs such as dressing, bathing or using the toilet.<sup>2</sup> Additionally, a claimant bears the burden of proof in establishing by competent medical evidence that he requires attendant care within the meaning of the Act.<sup>3</sup> An attendant's allowance is not granted simply upon request of a disabled employee or upon request of his physicians. The need for attendant care must be established by rationalized medical opinion evidence.<sup>4</sup>

In this case, appellant's treating physician, Dr. Morris opined that appellant needed attendant help for six weeks postoperatively to assist with bathroom privileges or for ambulation. These are activities contemplated by 5 U.S.C. § 8111(a) and 20 C.F.R. § 10.305 as personal needs. However, Dr. Morris failed to offer medical rationale explaining how he reached this conclusion. Nevertheless, this form report opinion is sufficient to create a conflict with the unrationalized response of the Office medical adviser, Dr. Thompson, that there was no medical need for an attendant following toe surgery of any kind.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part provides: "If there is disagreement between the physician making the examination for the

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<sup>1</sup> See *Bonnie M. Schreiber*, 46 ECAB 989 (1995); *Grant S. Pfeiffer*, 42 ECAB 647 (1991).

<sup>2</sup> *Id.*

<sup>3</sup> See *Bonnie M. Schreiber*, *supra* note 1; 46 ECAB 989 (1995); *Cynthia S. Snipes (Edward S. Snipes)*, 33 ECAB 379 (1981).

<sup>4</sup> See *Kenneth Williams*, 32 ECAB 1829 (1981).

United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

Therefore, this case must be remanded to the Office for referral of appellant, a statement of accepted facts, questions to be addressed, and the entire case record to an appropriate specialist, for a rationalized medical opinion on whether appellant postoperatively required the services of an attendant for a six-week period.

Consequently, the decision of the Office of Workers’ Compensation Programs dated June 19, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, D.C.  
February 16, 2000

George E. Rivers  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member