U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET G. WHITMIRE and DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Dallas, TX

Docket No. 00-733; Submitted on the Record;
Issued December 3, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for payment of an attendant's allowance following her July 17, 1996 surgery.

On January 20, 1984 appellant, then a 32-year-old meat inspector for the employing establishment, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that, on December 13, 1983, a co-worker slipped and while trying to keep herself from falling, accidentally kicked appellant's foot with a steel-toed boot, thereby causing an injury to appellant's left foot. By letter dated October 2, 1984, the Office accepted appellant's claim for a fracture to her left foot and subsequently accepted her claim for nephritis and bilateral shoulder impingement. Appellant underwent four surgeries on her foot.

Appellant's most recent surgery and the surgery that is relevant to the issue at hand was performed by Dr. Bruce Rolfe, a Board-certified orthopedic surgeon, on July 17, 1996. On this date, appellant underwent a left calcaneal osteotomy with flexor digitorum transfer and medial capsular plication of the talonavicular joint. On July 24, 1996 Dr. Rolfe wrote a prescription for a wheelchair, bedside commode and a tub seat.

In an undated note that was received by the Office on November 14, 1996, Dr. Rolfe indicated that appellant would need an attendant for a minimum of two months, July 19 to September 19, 1996, due to her surgery.

By letter dated January 16, 1997, the Office requested further information from Dr. Rolfe.

In a note dated October 1, 1996 and received by the Office on January 17, 1997, Dr. Rolfe indicated that appellant needed a personal attendant to care for her from October 1 to October 15, 1996 while she recovered.

By letter dated November 10, 1997, the Office referred appellant to Dr. Larry K. Brinkman, a Board-certified orthopedic surgeon, for a second opinion examination. In a medical report dated December 4, 1997, Dr. Brinkman stated that he did not believe that appellant had a left foot fracture "but simply a traumatized accessory navicular leading to a chronic pain syndrome as a result of multiple surgical procedures." He further believed that a significant amount of appellant's left foot pain was probably unrelated to her injury of December 13, 1983. He concluded: "Based on medical reports from the July 19, 1996 surgery to the claimant's foot, I do not believe that the services of a personal care attendant is warranted under any circumstances for foot surgery in an otherwise healthy, middle-aged female."

In a medical note dated March 31, 1999, the Office medical adviser noted that a personal attendant for the period after appellant's July 17, 1996 surgery was not warranted.

By decision dated April 13, 1999, the Office denied appellant's request for an attendant's allowance for the period from July 19 through October 15, 1996. The Office determined that an attendant was unnecessary for assistance with the accepted conditions.

By letter dated May 11, 1999, appellant requested an oral hearing.

At the hearing held on September 14, 1999, appellant testified that she had four surgeries on her foot, that she was in the hospital for four or five days for her July 17, 1996 surgery and that Linda Hunt took her home from the hospital, helped her into her house and helped her with her personal business including bathing and using the toilet. Appellant testified that she could not have safely bathed, got in and out of bed, dressed and gone to the bathroom without the help of an attendant. Appellant testified that the Office initially told her that it was okay to get an attendant, but then reneged on their word. Responding to questions from the hearing representative, appellant indicated that she has never been paid for any portion of the attendant's expenses, that she did not have the wheelchair on the day she came home from the hospital but did have crutches, and that Dr. Rolfe said that he would not let her go home without an attendant. The hearing representative explained to appellant that she needed medical rationale from her treating doctor, Dr. Rolfe, as to why she needed an attendant. Ms. Hunt testified that she assisted appellant getting home from the hospital, that she helped bathe appellant and take her to the bathroom and helped her get dressed. Ms. Hunt noted that she was not a nurse.

By decision dated November 23, 1999, the hearing representative denied appellant's claim for an attendant's allowance for July 19 through September 19, 1996, finding that appellant had not met her burden of proof to provide competent medical evidence that such care was needed.

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

The Federal Employees' Compensation Act[1] provides for an attendant's allowance under section 8111(a),[2] which states:

> "The Secretary of Labor may pay an employee who has been awarded compensation an additional sum of not more that $1,500.00 per 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."

Under this provision, the Office may pay an attendant's allowance upon finding that a claimant is so helpless that she is in need of constant care.[3] The claimant is not required to need around-the-clock care. She only has to have a continually recurring need for assistance in personal matters.[4] 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 her personal needs such as dressing, bathing or using the toilet.[5] Additionally, a claimant bears the burden of proof to establish by competent medical evidence that she requires attendant care within the meaning of the Act.[6] An attendant's allowance is not granted simply upon request of a disabled employee or upon request of her physicians. The need for attendant care must be established by rationalized medical opinion evidence.[7]

In the instant case, appellant's treating physician, Dr. Rolfe, opined that appellant needed a personal attendant following her return from the hospital for the July 19, 1996 surgery. However, Dr. Rolfe failed to offer medical rationale explaining how he reached this conclusion. Nevertheless, Dr. Rolfe's opinion is sufficient to create a conflict with the report of the second opinion physician, Dr. Brinkman, whose opinion that appellant did not need an attendant was similarly unrationalized.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8111(a).

[3] *Grant S. Pfeiffer*, 42 ECAB 647, 652 (1991).

[4] *Bonnie M. Schreiber*, 46 ECAB 989, 991 (1995).

[5] *See Grant S. Pfeiffer, supra* note 3.

[6] *See Cynthia S. Snipes (Edward S. Snipes)*, 33 ECAB 379, 383 (1981).

[7] *See Kenneth Williams*, 32 ECAB 1829, 1832 (1981).

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.

Consequently, the decisions of the Office of Workers' Compensation Programs dated November 23 and April 13, 1999 are hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC
December 3, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member