United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 08-966**
	)	**Issued: July 17, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Petaluma, CA, Employer	)	

Appearances:
Joseph F. Shanley, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2008 appellant filed a timely appeal from the June 15, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the denial of an attendant allowance. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's January 16, 2008 nonmerit decision denying appellant's request for reconsideration.

ISSUES

The issues are: (1) whether the Office acted within its discretion to deny appellant's request for an attendant allowance; and (2) whether the Office properly denied appellant's January 3, 2008 request for reconsideration.

FACTUAL HISTORY

On February 11, 1986 appellant, then a 31-year-old letter carrier, sustained an injury in the performance of duty when, while walking along a wet rock path to a home, she slipped and fell on her buttocks and tailbone. She was holding a 20-pound mailbag and could not break her

fall. Appellant had the wind knocked out of her and experienced immediate tailbone, low back and sciatic pain. The Office accepted her claim for low back strain and paid compensation for wage loss on the periodic rolls.[1] It authorized surgery and expanded its acceptance to include inflammation of congenital sacralization.[2]

On June 6, 1993 appellant sustained a consequential injury when her left leg went numb and she "went to fall and caught myself with my left arm." The Office accepted her claim for left wrist sprain. It later accepted the claim for left arm amputation below the elbow, possibly a result of tight dressings around her wrist that cut off circulation to her hand. On November 1, 2006 appellant agreed to accept a lump sum of $158,329.75 for the 100 percent permanent impairment of her left upper extremity.

On February 14, 2000 the Office received a copy of a February 24, 1999 letter from appellant's attorney asking the Office to respond to his October 26, 1998 letter claiming payment for appellant's husband, who acted as an attendant. On February 27, 2000 the attorney provided the Office with a copy of his October 26, 1998 letter, which stated: "[Appellant] wishes to claim the attendance allowance. Please issue a CA-1086 and CA-1090." In April 2000, appellant completed an EN1086 requesting an attendant allowance for the services provided by her husband and daughter. On May 15, 2000 Dr. Wladislaw Ellis, a specialist in neurovascular compressions and other entrapment syndromes, completed an EN1090 indicating that he last examined appellant on April 26, 2000 and that she needed assistance dressing and bathing.[3]

On June 23, 2000 the Office informed appellant that it may not pay for assistance given by family members but that it could pay up to $1,500.00 a month for a home health aide, licensed practical nurse or similarly trained individual.

[1] The medical evidence noted that appellant had a preexisting and asymptomatic congenital anomaly with sacralization of the L5 vertebral segment and pseudoarthrosis between the transverse process of the L5 and the sacrum. Dr. Gary A. Stein, appellant's orthopedic surgeon, reported on March 18, 1986: "These findings do not suggest an acute injury but do suggest congenital and developmental abnormalities at the lumbosacral spine which may or may not be related to her symptoms complex." A computerized tomography scan of the lumbar spine on March 24, 1986 showed no evidence of disc herniation but did show mild posterior facet degenerative joint disease at the lumbosacral level. Repeat electromyography testing of both lower extremities on October 2, 1986 was normal.

[2] On February 10, 1987 appellant underwent a bilateral lateral posterior spinal fusion, L5 to S1, with exploration of the left L5 nerve root, laterally, and decompression of the L5 nerve root at the junction of the L5 transverse process to the sacrum, laterally.

[3] In handwriting that is nearly illegible, he appeared to indicate that appellant needed assistance dressing, washing, cooking and cleaning.

On October 5, 2004 appellant underwent an authorized back surgery.[4] On October 12, 2004 she completed a general medical authorization request form requesting an attendant allowance of $1,500.00 a month beginning October 7, 2004:

> "My husband and daughter are attending to my needs 24 hours a day. They dress me, undress me, help me go to the bathroom, bathe, walk, get up, down, eat, wash my teeth -- everything. I can't do anything. I am requesting attendance care payment of $1,500.00 a month for the next 6 months for them ASAP. This is the amount that would have to be paid to anybody else, and I want it to go to them. It is their earnings for this. Please let me know ASAP what else needs to be done to get their pay. Thank you."[5]

On October 20, 2004 the Office informed appellant that additional information was required. It asked her to respond to a list of questions and provided her a questionnaire for her physician to complete. Appellant responded to the list of questions, and Don Bowser, an adult nurse practitioner, completed the physician's questionnaire. A November 2, 2004 prescription note, apparently signed by Mr. Bowser, stated: "Husband to take care of patient at home for 60 days postop[erative]."

On December 23, 2004 the Office informed appellant that it did not appear her husband was a home health aide, practical nurse or other similarly trained individual: "If this is not the case, your spouse should submit documentation that he is licensed and certified by the state of Oregon as a home health aide." On May 23, 2005 the Office learned that appellant's husband developed gangrene and had a leg amputated. On August 15, 2005 Mr. Bowser wrote that appellant had only one hand "and for this reason she continues to need help at home." On September 12, 2005 appellant underwent another surgical procedure.[6]

Appellant asserted that she had requested attendant care in 1994, prior to the Office changing its policy toward paying claimants directly for attendant services, but it ignored her request: "My husband and daughter took care of me that whole time with no help and loss of

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[4] She underwent an L4-5 interbody arthrodesis with pedicle screw fixation, L4-5 posterolateral arthrodesis of facet joints, decompression of the left L4 and L5 nerve roots with removal of synovial cyst from the L4-5 facet joint, intradiscal electrical bone stimulation device to assist with fusion, pedicle screw fixation of L4-5 EBI SpineLink devices, and epidural narcotic lumbar injection.

[5] On October 14, 2004 appellant's husband completed a Provider Enrollment Form, which carried the following warning: "Anyone who misrepresents or falsifies essential information to receive payment from Federal funds may upon conviction be subject to fine and imprisonment under applicable Federal laws." He represented himself as a professional provider of attendant services with an individual practice. Appellant's husband represented that he first treated appellant in 1986 for back surgery, in 1994 for arm amputation and in 2004 for back surgery. He certified that the services shown were indicated and necessary for the patient and were personally furnished by him or were furnished incident to his professional services by his employee or contractor. Appellant's husband was thus able to obtain a provider code number from the Office's billing agent. Stating that he charged $1,500.00 a month for his services, he began requesting authorization for home assistance for "claimant/patient." The Office discovered this and notified its billing agent that appellant's husband had provided no documentation that he was a trained home health aide, practical nurse or other similarly trained individual.

[6] Appellant underwent incision and excision of lumbar surgical wound phlegmon (minimal abscess present) and placement of a deep lumbar wound Jackson-Pratt drain.

work and school.… Both of them have taken me through 4 back surgeries, and an arm amputation. I think that would qualify anybody."

In a decision dated October 1, 2005, the Office denied payment for the services of appellant's husband and daughter, as it was not established either was a home health aide, licensed practical nurse or similarly trained individual. Responding to appellant's assertion that she had requested an attendant allowance in 1994, the Office stated that it thoroughly reviewed the file and received no request prior to her attorney's February 14, 2000 letter.

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on March 19, 2007, she testified that in 1993 and 1994 her husband and daughter took care of her, and she asked the Office for an attendant allowance. Appellant's husband testified that he had no certification as a home health aide, but he did have letters from doctors stating that he was qualified to do the work. Appellant's daughter testified that she had taken care of appellant on and off since 1986, when she was 10 years old:

> "When my dad is not available, I'm the one that takes care of her. I've lifted her off her bed, taken her her pills, go in the bathroom, her annual breast exams that she needs done. I've wrapped her dressings on her arm. I've taken her to therapy appointments, doctor appointments.… Showers, helped her out in the bathroom. She was laid up for a while after her back surgeries that she recently had. I made sure that her dressings were okay. We put some stuff on it, some alcohol and stuff."

Appellant's daughter testified that she took a class in first aid in 1992. Appellant's husband testified that he had taken one, too. Appellant and her husband testified that they both took a class in cardiopulmonary resuscitation (CPR) sometime in the 1970s.

After the hearing, appellant submitted a copy of a letter dated June 8, 1993 in which she requested an attendant allowance under 5 U.S.C. § 8111. She submitted a copy of a September 1, 1993 letter following up on her request, as she had not heard anything from the Office. Appellant submitted a copy of a September 13, 1993 letter stating that she needed to know about her attendance care request. She also submitted a copy of a November 4, 1993 inquiry.

Appellant also submitted a September 25, 2006 report from Dr. Douglas B. McMahon, an osteopath:

> "This letter is in reference to [appellant's] date of birth March 27, 1954, regarding the qualification and need of care by the patient's husband … and daughter…. [Appellant] has a severe federal workers' compensation injury to her low back and has a continuing, nonhealing wound which requires multiple daily dressing changes. The responsibilities of her husband and daughter assisting [appellant] include helping her mobility, transferring, bathing, grooming, personal hygiene, dressing, eating, toileting, bowel and bladder care and cognition.
>
> "It is my medical opinion that, after observation and discussion, [appellant's husband and daughter] are qualified to be [appellant's] care attendants in

providing assistance and care for her activities of daily living as noted above. The qualifications are noted in her prior care of an arm amputation by both of the above attendants as well as observation by this medical provider of the above attendants in the care of [appellant] in the office regularly."

On March 14, 2007 Dr. Ellis addressed the issue:

"I have attended [appellant] for severe neuropathic pain (1993 and 1994, as well as when her lawyer requested attendant's care for her on October 26, 1998). At that point, her everyday needs were taken care of by her husband … and daughter … because of her severe injuries. Services included assistance with feeding, bathing, using the toilet, driving, household cleaning, and anything that a person with one semi-functional arm and continued chronic low back and bilateral upper quadrant pain would require.

"On the basis of her history and clinical evidence, this care seemed perfectly competent."

In a decision dated June 15, 2007, the Office hearing representative affirmed the denial of an attendant allowance. The hearing representative noted that the Office had received no request for such an allowance until 2000. The hearing representative made the following finding: "Because no evidence has been received to support that the claimant's husband and daughter are qualified home health aids, licensed practical nurses or similarly trained individuals coverage cannot be extended."

On January 3, 2008 appellant, through her representative, requested that the Office reconsider its June 15, 2007 decision. She alleged that the Office did not look at all the evidence of record, "which established that there was overwhelming evidence to support reimbursement of an attendant." Appellant's representative contended that the hearing representative did not consider documents "that show that the Office did in fact know about the claimant requesting attendance care before the policy change of January 4, 1999."

In a decision dated January 16, 2008, the Office denied appellant's request to reconsider the merits of her case. Noting that it previously considered appellant's argument that the Office had knowledge of her requests for an attendant allowance before January 4, 1999, the Office found that she did not submit new and relevant evidence to support her request for reconsideration.

On appeal, appellant's representative restates arguments previously made concerning early requests for an attendant's allowance, about a conversation appellant had with a claims examiner, about how appellant's husband and daughter were suitable candidates to provide attendant care and about how appellant's daughter had taken CPR in high school, "which helped with attending her mother at home." Appellant cites numerous errors in the hearing representative's June 15, 2007 decision and states to her U.S. senator: "I am now in foreclosure because of this ridiculous decision."

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act 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.[7] The Office has broad discretionary authority in determining whether the particular service, appliance or supply is likely to affect the purposes specified in the Act.[8] The only limitation on the Office's discretionary authority is that of reasonableness.[9]

Section 8111 of the Act 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 or her so helpless as to require constant attendance.[10]

In 1991 Office regulations implemented section 8111 of the Act with nearly identical language:

> "An employee who has been awarded compensation may receive an additional sum of not more than $1,500 a month, as the Office considers necessary to pay for the service of an attendant, when the Office 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 any impairment resulting from the injury making the employee so helpless as to require constant attendance."[11]

Effective January 4, 1999, the Office revised the regulation:

> "**Section 10.314 Will OWCP pay for the services of an attendant?**
>
> "Yes, OWCP will pay for the services of an attendant up to a maximum of $1,500.00 per month, where 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

[7] 5 U.S.C. § 8103(a).

[8] *See Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

[10] 5 U.S.C. § 8111(a).

[11] 20 C.F.R. § 10.305 (1991).

longer be made. Rather, the cost of providing attendant services will be paid under section 8103 of the Act, and medical bills for these services will be considered under section 10.801. This decision is based on the following factors:

> (a) The additional payments authorized under section 8111(a) should not be necessary since [the Office] 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, [the Office] can better determine whether the services provided are necessary and/or adequate to meet the needs of the injured employee. In addition, a system requiring the personal care provider to submit a bill to [the Office], where the amount billed will be subject to [the Office's] fee schedule, will result in greater fiscal accountability."[12]

A claimant bears the burden of proof in establishing by competent medical evidence that he or she requires attendant care within the meaning of the Act. The claimant is not required to need around-the-clock care, but need only demonstrate 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 on the request of a disabled claimant or his or her physicians. The need for attendant care must be established by rationalized medical opinion evidence.[13]

ANALYSIS -- ISSUE 1

The Board finds that the Office did not abuse its discretion in denying appellant's request for an attendant's allowance. The Act does not state that the Office "shall" pay for the service of an attendant.[14] The Act states that the Office "may" pay for the service of an attendant. It is for

[12] *Id*. at § 10.314 (1999); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.9 (June 2003) (an attendant allowance paid directly to the claimant prior to January 1999 will continue to be paid to the claimant until the need for the attendant ceases, and any future period of attendant services for the claimant will be paid under the revised procedures).

[13] *Thomas Lee Cox*, 54 ECAB 509 (2003).

[14] The Act does not mandate a payment of $1,500.00 a month.

the Office to decide whether or not to pay an allowance, and the Board will not disturb that decision in the absence of proof of manifest error, clearly unreasonable judgment or actions that are contrary to both logic and probable deductions from established facts.[15] The only issue is whether the Office abused its discretion when it denied appellant's request for an attendant allowance.

An attendant allowance is not granted simply on the request of a disabled claimant or his or her physicians. Appellant is not entitled to an allowance simply because she requested one. She must establish by competent medical evidence that the service of an attendant is necessary constantly within the meaning of section 8111 of the Act. Mr. Bowser, the adult nurse practitioner, is not a physician and is not competent to address the matter.[16] The questionnaire he completed and the notes he wrote on attendant care have no evidentiary value. They do nothing to discharge appellant's burden of proof. The need for attendant care must be established by rationalized medical opinion evidence.

Appellant has made much of the fact that she first requested an attendant allowance in 1993 and that she referred to this request in other letters later that same year. There is no record of the Office having received these letters prior to the copies appellant made available in 2007. However, there is also no record that appellant supported her 1993 request with rationalized medical opinion evidence. The Board has reviewed the record thoroughly and has not found any physician, in 1993, 1994 or at any time prior to 1999, who offered a reasoned medical opinion to support the need for an attendant. If appellant has a copy of such a report, she has not submitted it. So regardless of whether the Office received a request for an attendant allowance in 1993, or through her attorney in 1998, there was no proper medical basis for the Office to approve such a request.

It was not until May 15, 2000 that Dr. Ellis, a specialist in neurovascular compressions and other entrapment syndromes, reported that appellant needed assistance dressing and bathing. He did not adequately explain how this assistance was necessary constantly because, like someone who was totally blind, or had lost the use of both hands or the use of both feet, or was paralyzed and unable to walk, appellant was "so helpless" as to require constant attendance. Dr. Ellis did not show how appellant belonged to the same class of claimants described by section 8111 of the Act. On March 14, 2007 he noted that appellant's husband and daughter had assisted with everyday needs in the past, such as feeding and bathing and using the toilet. But Dr. Ellis noted this as a historical fact and again made no attempt to explain how appellant was so helpless that she required such assistance constantly. Without sound medical reasoning, his reports are of diminished probative value.

The only other medical report that addresses attendant care comes from Dr. McMahon, an osteopath. On September 25, 2006 Dr. McMahon noted a severe injury to appellant's low back and a nonhealing wound from her September 12, 2005 surgery, which required multiple daily dressing changes. He vouched for the qualifications of appellant's husband and daughter to provide assistance with activities of daily living, based on his own observation and as they had

[15] *See Daniel J. Perea*, 42 ECAB 214 (1990) (authorization for surgery).

[16] *Vicky L. Hannis*, 48 ECAB 538 (1997) (a nurse is not a physician).

provided care in the past for an arm amputation. Any personal care services that might have been medically necessary in 2005 or 2006 must be provided by a home health aide, licensed practical nurse or similarly trained individual. A CPR class in the 1970s and a first aid class in 1992 do not establish that appellant's husband and daughter received training similar to a home health aide or a licensed practical nurse. This is a serious matter, particularly where improperly tight dressings around appellant's wrist may have contributed to the progression of the condition that led to the amputation of her arm below the elbow. Office regulations explain that professionals are better able than family members to provide quality personal care services, including assistance in feeding, bathing and using the toilet, and for that reason the Office will not make direct payments to a claimant to cover such services. The only exception is "where payments were being made prior to January 4, 1999." Here, of course, no such payments were being made, nor in the absence of rationalized medical opinion evidence, supporting appellant's 1993 request, was there any basis for the Office to make such payments.

The Board finds that the Office did not abuse its discretion in denying appellant's request for attendant services. Appellant submitted no rationalized medical opinion to support her request in 1993 or, through her attorney, in 1998. Her 2004 request for an attendant allowance of $1,500.00 a month for the six months beginning October 7, 2004 is not supported by rationalized medical opinion evidence as medically necessary. And even so, the Office is precluded by regulation from paying appellant directly to cover such services. Any needed personal care services must be provided by a home health aide, licensed practical nurse or similarly trained individual. The Office therefore acted properly within its discretion to deny such payment to appellant's husband and daughter. The Board will affirm the hearing representative's June 15, 2007 decision.

The benefit provided by section 8111 of the Act remains available to appellant. Where the need for attendant services is medically documented, the Office will pay up to $1,500.00 a month for professional personal care services. What is not available to appellant is the use of section 8111 as a source of family income.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[17] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[18]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.605 (1999).

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[19]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[20] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

Appellant sent her January 3, 2008 request for reconsideration within one year of the hearing representative's June 15, 2007 decision. The request is therefore timely, but the request does not show that the Office erroneously applied or interpreted a specific point of law, does not advance a relevant legal argument not previously considered by the Office and does not contain evidence that constitutes relevant and pertinent new evidence not previously considered by the Office.

Appellant alleges that the Office did not look at all the evidence of record, "which established that there was overwhelming evidence to support reimbursement of an attendant." The hearing representative duly considered her argument that she sent letters requesting an attendant allowance before the regulations changed on January 1, 1999 and the evidence she submitted after the hearing. The Board finds no merit in appellant's argument that the hearing representative did not consider all the evidence of record.

Because appellant's request for reconsideration does not meet at least one of the standards for obtaining a merit review of her case, the Board will affirm the Office's January 16, 2008 decision denying a merit review of her case.

CONCLUSION

The Board finds that the Office acted within its broad discretion to deny appellant's request for an attendant allowance. The Board also finds that the Office properly denied appellant's January 3, 2008 request for reconsideration.

[19] *Id*. at § 10.606.

[20] *Id*. at § 10.607(a).

[21] *Id*. at § 10.608.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2008 and June 15, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 17, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board