

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

January 10, 2006

GSBCA 16666-TRAV

In the Matter of DENISE MARTIN

Denise Martin, APO Area Europe, Claimant.

Robert Schildkraut, Assistant General Counsel, Office of General Counsel, Department of Defense Education Activity, Arlington, VA, appearing for Department of Defense.

BORWICK, Board Judge.

Claimant, Denise Martin, an employee of the Department of Defense Education Activity, agency, was denied business class airline seating to accommodate a serious medical condition during renewal agreement travel. The agency determined that bulkhead coach or two-abreast coach seating would sufficiently accommodate her condition. Claimant filed a claim at this Board challenging the agency's determination. We conclude that the agency's determination was an abuse of discretion and hold for the employee.

Background

On or about April 29, 2003, the agency's Office of Under Secretary of Defense approved business class seating accommodations for claimant's renewal agreement travel from her permanent duty station in Italy to Chicago, Illinois, or San Francisco, California. Claimant's physician provided information which convinced the agency that business class travel was necessary to accommodate claimant's disability resulting from her medical condition.

Claimant suffered from osteoarthritis of the knees, which, according to her treating physician, Dr. Thometz, an orthopedic specialist, grew progressively worse between July 2002 and July 19, 2004. By letter of May 7, 2003, Dr. Thometz recommended that if claimant needed to travel because of work, "she be seated in business class as this allows more room for her left knee."

By memorandum of July 19, 2004, Dr. Thometz wrote that claimant had developed osteoarthritis of both knees and that her condition restricted her from walking, standing, and using stairs. He recommended that during air travel she use "increased seating ability during flying as would be available within business class."

In late January and early February of 2005, claimant made preparations for renewal agreement travel between Venice, Italy, and Chicago, Illinois, for June 2005. She sought agency approval of the use of business class airline seating for the travel. By memoranda of February 5, 2005, and February 9, 2005, Dr. Thometz confirmed his diagnosis of the previous July and restated his recommendation that claimant use business class seating for air travel.

The agency forwarded the claimant's request and the information provided by Dr. Thometz to a medical consultant, Dr. Height, a specialist in internal medicine, who, on February 14, 2005, recommended bulkhead seating or two economy class seats in lieu of premium class accommodations, citing Joint Travel Regulations (JTR) C2200-G. On February 14, the agency informed claimant that her request for business class air travel had been denied, and offered claimant bulkhead coach seats or two-abreast coach seats for her travel.

On March 31, 2005, claimant requested agency approval of one-way air travel in June 2005, from Venice, Italy, to Chicago, Illinois, by business class. By e-mail message sent to the agency the previous day, claimant explained that bulkhead coach seating or two abreast coach seating was not readily available from the travel agent or the airlines. Furthermore, such seating would not allow claimant to raise her legs, which she needed to do on long flights.

On April 11, 2005, Dr. Thometz completed an agency form concerning claimant's medical condition and her need for special accommodations during air travel. He diagnosed claimant to have permanent degenerative joint disease in both knees. If claimant's condition were not accommodated, he reported that claimant would suffer increased pain and swelling from having knees bent for long periods of time. He stated that claimant's condition would benefit from increased leg room on airplane flights. The form asked for a "yes" or "no" answer to the question whether claimant's condition could be accommodated by bulkhead seating. Instead of answering "yes" or "no," Dr. Thometz stated: "Possibly, however business class would have better leg room and ease of getting in and out of seat." In response to other questions, he stated that claimant's ability to travel in coach seating was limited to thirty minutes; that periodic movement around the airplane cabin would not accommodate claimant's condition; and that claimant's condition could not be accommodated by in-flight exercise or by the purchase of two adjoining coach seats.

On April 27, 2005, Dr. Height, the agency's medical consultant, again recommended bulkhead coach or two-abreast coach seats for claimant's airline travel instead of business class seating. On May 23, the agency once again denied claimant's request for business class seating.

On May 24, 2005, claimant submitted a claim to the Board contesting the agency's refusal to provide business class seating for airline travel. The Board docketed the claim on May 26. On June 13, 2005, Dr. Height explained the reasons for her recommendation. She noted that Dr. Thometz had stated in his April 11, 2005, report that claimant could "possibly" be accommodated by bulkhead coach class seating. Dr. Height stated that "based upon the provided medical documentation," claimant has an arthritic medical condition but that there was "no objective medical evidence" provided that precluded bulkhead seating.

Discussion

Recently, we set forth the legal standard for allowance of premium class travel in *Gemelia Restum*, GSBCA 16771-TRAV (Nov. 18, 2005):

As a general rule, Government employees are limited to coach-class accommodations when traveling at Government expense. 41 CFR 301-10.122 (2004). There are exceptions to this rule when medical needs justify upgraded seating. *Id.*; see *Margaret M. Tardif*, GSBCA 16664-TRAV [,05-2 BCA ¶ 33,076]; *Gary Hopkins*, GSBCA 16667-TRAV, 05-2 BCA ¶ 33,026; *Joy S. Mickleberry*, GSBCA 16438-TRAV, 04-2 BCA ¶ 32,797; *Steven J. Maass*, GSBCA 16393-TRAV, 04-2 BCA ¶ 32,796. These exceptions are addressed in the Federal Travel Regulation (FTR) and are supplemented in the Joint Travel Regulations (JTR), which apply to civilian employees of the Defense Department. Under the JTR, which would apply to travel undertaken by [the claimant]:

Premium-class [travel] accommodations may be authorized/approved . . . due to medical reasons only if competent medical authority certifies that sufficient justification of disability or other special medical need exists and that the medical condition necessitates (for a specific time period or on a permanent basis) the premium-class accommodations upgrade. The premium-class authorizing/approving official must be able to determine that, at the time of travel, premium-class accommodations are/were necessary because the traveler or dependent is/was so disabled or limited by other special medical needs that other lower-cost economy accommodations (e.g., “bulk-head” seating, or providing two economy seats) cannot/could not be used to meet the traveler’s/dependent’s requirements.

JTR C2000-A.2.c.

Both the FTR and the JTR give the agency discretion to decide whether to grant a request for business-class seating for medical reasons. We thus review the agency’s decision under a deferential standard: the determination should be allowed to stand unless it is arbitrary, capricious, or an abuse of discretion. *Tardif*; *Hopkins*; see also *Linda R. Drees*, GSBCA 16480-TRAV, 04-2 BCA ¶ 32,799; *Sherwood McIntyre*, GSBCA 16345-RELO, 04-2 BCA ¶ 32,687; *William T. Orders*, GSBCA 16095-RELO, 03-2 BCA ¶ 32,389.

Restum, slip op. at 3-4.

It is apparent that Dr. Height, the contract physician, never personally examined claimant, but merely reviewed documentation furnished by the claimant and by Dr. Thometz, claimant’s treating physician. Dr. Height fastened on Dr. Thometz’s use of the word “possibly” in an answer to one question on the medical fitness form dated April 11, 2005, but ignored the rest of the answers provided by Dr. Thometz on that form clearly stating that business class was the class of seating that would accommodate claimant’s chronic

osteoarthritis of the knees and that claimant could only tolerate coach class airline seating for a maximum duration of thirty minutes. Dr. Height also did not consider that Dr. Thometz's recommendation was consistent in this regard from May 7, 2003, through April 11, 2005, the date Dr. Thometz completed the medical fitness form. Nor did she consider that the claimant's medical condition was severe enough in April 2003 to warrant business class seating, with no improvement in her medical condition since that time. Furthermore, the record does not demonstrate that Dr. Height conferred with Dr. Thometz about claimant's medical condition or what accommodations on airline flights would be necessary in light of claimant's condition. The agency's Office of Under Secretary of Defense uncritically accepted Dr. Height's analysis. We cannot conclude that under these circumstances the agency's determination was rationally based. *Restum; Gary Hopkins*, GSBCA 16667-TRAV, 05-2 BCA ¶ 33,026.

The specific travel for which claimant was denied business class seating may have already occurred, but that determination is applicable to future authorized government travel claimant might take. *See Joy S. Mickelberry*, GSBCA 16438-TRAV, 04-2 BCA ¶ 32,797. Unless claimant's medical condition improves, as diagnosed by physicians,¹ on government travel claimant is entitled to business class seating on all airline flights that exceed thirty minutes in duration.

ANTHONY S. BORWICK
Board Judge

¹ Our holding does not mean that claimant is necessarily entitled to business class seating when on government travel for the remainder of claimant's government service. The agency may engage its physicians to periodically monitor the severity of claimant's medical condition and to determine whether bulkhead or two-abreast coach seating would accommodate her condition.