

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDDIE ATKINS and DEPARTMENT OF VETERANS AFFAIRS,
HINES VETERANS HOSPITAL, Hines, Ill.

*Docket No. 95-2322; Submitted on the Record;
Issued August 17, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant's current back condition was causally related to the February 27, 1992 employment injury; (2) whether appellant is entitled to a schedule award for a permanent partial impairment of his lower extremities; and (3) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for an oral hearing.

On February 27, 1992 appellant, then a 41-year-old housekeeping aid, filed a claim for a traumatic injury (Form CA-1) alleging that on that date he experienced a pull in his lower back when he lifted a floor fan stand in a corridor. Appellant stopped work on February 27, 1992.

The employing establishment submitted a March 24, 1992 attending physician's report (Form CA-20) of Dr. R. Rawoof, a physiatrist. In his report, Dr. Rawoof indicated that he examined appellant on March 13, 1992 and that appellant injured his lower back while lifting a heavy fan at work. Dr. Rawoof diagnosed acute lumbosacral sprain and recommended that appellant avoid prolonged sitting, standing and walking, and heavy lifting, specifically, more than 25 pounds of his weight. In response to the question whether appellant's condition was caused or aggravated by an employment activity, Dr. Rawoof placed a checkmark in the box marked "yes." Dr. Rawoof discharged appellant from treatment on March 20, 1992.

By letters dated April 28 and May 22, 1992, the Office accepted appellant's claim for a lumbosacral sprain. The Office mailed these letters to the following address: 8211 South Elizabeth Street, Chicago, Illinois, 60620.

The Office received a Form CA-20 from Dr. Basel Al-Aswad, a Board-certified orthopedic surgeon, dated May 15, 1992. Dr. Al-Aswad indicated in his report that appellant was examined on April 6, 1992 and that a computerized tomography scan was performed on April 8, 1992. Dr. Al-Aswad diagnosed a herniated disc L4-L5 and placed a checkmark in the box marked "yes" in response to the question whether appellant's condition was caused or

aggravated by an employment activity. Dr. Al-Aswad referred appellant to Dr. Martin Luken, a Board-certified neurosurgeon, to determine whether surgery was necessary.

Appellant filed a schedule award on May 20, 1992.

By letter dated May 22, 1992, the Office requested that Dr. Al-Aswad submit the April 8, 1992 computerized tomography results. Dr. Al-Aswad submitted the results which indicated that appellant had a herniated disc at the L4-L5 level.

By letter of the same date, the Office requested that Dr. Luken submit a narrative report of his findings. In his July 10, 1992 medical report, Dr. Luken stated that appellant continued to be disabled and that he could not be specific about the duration of appellant's disability other than that appellant would continue to experience pain unless he underwent surgery on his herniated disc. Dr. Luken's response letter was accompanied by his May 18, 1992 medical report that he mailed to Dr. Al-Aswad. In this report, Dr. Luken stated that he could not find any convincing motor or sensory deficit, and that the deep tendon reflexes, including the patellar, adductor, Achilles, and posterior tibial responses were symmetrical and normal. He opined that appellant's symptoms were a result of his disc herniation and recommended conservative treatment.

By letter dated September 10, 1992, the Office requested that Dr. Al-Aswad provide an update on appellant's medical status, including, *inter alia*, appellant's current impairments and their relationship to his work injury. The Office's letter was accompanied by a work restriction evaluation (Form OWCP-5).

On October 20, 1992, the Office received Dr. Luken's October 13, 1992 medical note revealing that appellant had a herniated lumbar disc and a recommendation for a work capacity evaluation. In its December 8, 1992 response letter, the Office advised Dr. Luken that additional medical information and his expected outcome of the work capacity evaluation was necessary to consider his recommendation. By letter dated February 8, 1993, Dr. Luken indicated that he had not seen appellant since July 10, 1992, the date of his last report, and that he did not know the outcome of a work capacity evaluation.

By letter dated May 11, 1993, the Office advised Dr. Luken that it had authorized a work capacity evaluation. The Office also advised Dr. Luken that appellant had filed a claim for a schedule award and requested that he submit a medical report addressing the accompanying questions to support a finding of entitlement to such an award. In so doing, the Office noted that the third edition revised of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* did not permit payment for an impairment of the back or whole body, thus, the Office requested that Dr. Luken determine whether appellant had any impairment of the lower extremities. By letter dated July 30, 1993, Dr. Luken stated that appellant's continuing symptoms were caused by his disc herniation. Dr. Luken's letter was accompanied by the results of a May 26, 1993 work capacity evaluation.

By letter dated March 1, 1994, the Office requested that Dr. Luken provide an update on appellant's medical status. Dr. Luken did not respond to this letter.

By letter dated March 2, 1994, the Office referred appellant along with a statement of accepted facts, a definition of causal relationship, medical evidence, and a Form OWCP-5 to Dr. David Lee Spencer, a Board-certified orthopedic surgeon. This letter was addressed to the same address as the Office's April 28 and May 22, 1992 letters. By letter of the same date, the Office advised Dr. Spencer of the referral and requested that he discuss, *inter alia*, whether appellant's back condition was caused by the employment injury and whether appellant had any permanent partial impairment, and if so, determine the percentage of such impairment.

The employing establishment submitted the April 8, 1994 medical report of Dr. Craig Popp, an orthopedic surgeon, which revealed that computerized tomography scans showed minimal stenosis but no signs of a specific cause for the low back pain, that physical examination was unremarkable, that appellant's prognosis was possibly guarded, and that appellant was to resume physical therapy exercises. The employing establishment also submitted Dr. Popp's May 13, 1994 medical report which indicated that appellant was still experiencing pain with activity and that a magnetic resonance imaging was going to be obtained to pursue appellant's questionable spinal stenosis.

The Office received Dr. Spencer's May 31, 1994 medical report which revealed a history of appellant's employment and the February 27, 1992 employment injury. Dr. Spencer examined appellant and stated that straight leg raising was negative bilaterally, and that motor, sensory and reflex testing of the lower extremities was completely normal. Dr. Spencer further stated that a follow-up magnetic resonance imaging scan was performed and showed that a complete resolution of the previously identified L4-5 disc herniation. Dr. Spencer then opined that appellant's disc herniation had resolved, and that appellant no longer needed any medical treatment. Dr. Spencer further opined that based on the accepted statement of facts and the definition of causal relationship, appellant's episode of back pain and sciatica was more probably than not related to the lifting episode that he reported, but concluded that appellant had made a full and complete recovery from that and no further treatment was necessary.

On August 26, 1994, the Office requested an Office medical adviser to determine the permanent functional loss of use of appellant's left leg. In a September 17, 1994 medical report, the Office medical adviser stated that appellant's physical examination was entirely benign with normal range of motion, negative straight leg raising, and normal motor, sensory and reflex testing of the lower extremities. The Office medical adviser opined that that was a very common outcome for most herniated discs which resolve without surgical treatment and leave no residual deficit. The Office medical adviser concluded that based on Table 75 on page 113 of the fourth edition of the A.M.A., *Guides*, the herniated lumbar disc unoperated on with no residual signs or symptoms merited no permanent partial impairment.

By decision dated October 19, 1994, the Office found the medical evidence of record insufficient to establish that appellant's disability was causally related to the February 27, 1992

employment injury and that appellant had sustained any permanent impairment due to the employment injury. This decision was mailed to appellant's address of record.¹

On November 21, 1994, the Office received appellant's request for an oral hearing. Appellant indicated the following return address in his request: Post Office Box 201052, Chicago, Illinois, 60620. By notice dated March 26, 1995, the Office advised appellant that a hearing was scheduled for April 25, 1995 at 9:45 a.m. at the specified address. The Office also advised appellant that if he no longer desired a hearing then he should request a cancellation immediately from the Branch of Hearings and Review. The notice was sent to appellant's address of record.

By decision dated May 8, 1995, the Office found that appellant had abandoned his request for a hearing because he failed to appear at the hearing and did not provide good cause for his failure to appear within 10 days after the scheduled hearing. The Office mailed this notice to appellant's address of record.

The Board finds that appellant's current back condition was causally related to the February 27, 1992 employment-related injury.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to his employment. As part of this burden he must present rationalized medical opinion evidence supporting an employment relationship, based on a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated the condition. The fact that the condition became apparent during a period of employment is not sufficient to establish the causal relationship, which must be established in each case by affirmative medical evidence.²

The March 24, 1992 Form CA-20 of Dr. Rawoof, a physiatrist, and the May 15, 1992 Form CA-20 of Dr. Al-Aswad, a Board-certified orthopedic surgeon, revealed that appellant's back condition was caused by factors of his employment as indicated by a checkmark in the box marked "yes" regarding causal relationship. However, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.³ Because Drs. Rawoof and Al-Aswad failed to provide any rationale for their conclusion that appellant's back condition was caused or aggravated by factors of his employment, the Board finds that their opinion is insufficient to establish appellant's burden.

¹ The Board notes that appellant submitted new evidence subsequent to the Office's October 19, 1994 decision. Inasmuch as this evidence was not considered by the Office in rendering its decision, the Board has no jurisdiction to review this evidence for the first time on appeal. *Henry W. B. Stanford*, 36 ECAB 160 (1984); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c).

² *Brian E. Flescher*, 40 ECAB 532 (1989).

³ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

Dr. Al-Aswad's April 8, 1992 computerized tomography results, and the July 10, 1992 medical report and October 13, 1992 medical note of Dr. Luken, a Board-certified neurosurgeon, indicating that appellant had a herniated disc are insufficient to establish appellant's burden inasmuch as they failed to address whether there was a causal relationship between appellant's back condition and the February 27, 1992 employment injury.

The April 8, 1994 medical report of Dr. Craig, an orthopedic surgeon, revealed that appellant had minimal stenosis, but no signs of a specific cause for his low back pain based on computerized tomography scans.

Dr. Luken's May 18, 1992 medical report revealing that appellant's symptoms of the lower extremities were caused by the February 27, 1992 employment injury is insufficient to establish appellant's burden because he did not provide any medical rationale for his opinion.

The May 31, 1994 medical report of Dr. Spencer, a Board-certified orthopedic surgeon and second opinion physician, indicated a history of appellant's employment and the February 27, 1992 employment injury, and his findings on physical and objective examination. Dr. Spencer's opinion that appellant's episode of back pain and sciatica were more probably than not related to the employment injury, but that appellant's condition had resolved constitutes a rationalized opinion based upon an accurate factual and medical background. Therefore, the Board finds that appellant has failed to establish that his current back condition was caused by the February 27, 1992 employment injury.

The Board also finds that appellant has failed to establish that he is entitled to a schedule award for a permanent partial impairment of his lower extremities.

Appellant alleges that he is entitled to a schedule award for his back condition resulting from the February 27, 1992 employment injury. However, no schedule award is payable for a member, function or organ of the body not specified in the Federal Employees' Compensation Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁵ claimant is not entitled to such an award.⁶

Regarding appellant's entitlement to a schedule award for his lower extremities, Dr. Spencer stated in his May 31, 1994 medical report that straight leg raising was negative bilaterally, that motor, sensory and reflex testing of the lower extremities was completely normal. An Office medical adviser reviewed appellant's medical records and reiterated Dr. Spencer's findings. The Office medical adviser stated that his findings constituted a very common outcome for most herniated discs which resolve without surgical treatment and leave no residual deficit. The Office medical adviser concluded that appellant had no disability of the left leg based on Table 75 of the fourth edition of the A.M.A., *Guides*. The Board concludes that the

⁴ *Ted W. Dietderich*, 40 ECAB 963 (1989).

⁵ The Act specifically excludes the back from the definition of "organ." See 5 U.S.C. § 8101(20).

⁶ *George E. Williams*, 44 ECAB 530 (1993).

Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant did not have any permanent impairment of the lower extremities and that appellant has failed to provide probative, supportable medical evidence that he has such an impairment.

The Board further finds that the Office properly determined that appellant abandoned his request for an oral hearing.

Section 10.137 of Title 20 of the Code Federal Regulations sets forth the criteria for abandonment of hearings:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.”

* * *

“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”⁷

In this case, the Office mailed its March 26, 1995 notice of hearing, as well as, its previous correspondence and decisions to appellant at the following address: 8211 South Elizabeth Street, Chicago, Illinois, 60620. Appellant neither attended the hearing nor requested within 10 days of the date of the scheduled hearing that another hearing be rescheduled. The Board finds that, under these circumstances, appellant’s failure to appear at the hearing or to show good cause for his failure to appear at the hearing within 10 days after the scheduled hearing constituted abandonment of his request for a hearing. The evidence of record establishes that the Office properly served appellant with notice of hearing. Although appellant used the address Post Office Box 201052, Chicago, Illinois, 60620 as his return address in his November 21, 1994 request for an oral hearing, he did not specifically advise the Office that there was a change in address or to send its notice of the scheduled hearing and any further correspondence to his post office box address.

On appeal, appellant contends that he received no notice of the hearing. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the

⁷ 20 C.F.R. §§ 10.137(a), (c).

⁸ *Clara T. Norga*, 46 ECAB 473 (1995); *Mike C. Geffre*, 44 ECAB 942 (1993).

Office itself, will raise the presumption that the original was received by the addressee. The Office's finding of abandonment in this case rests on the strength of this presumption.

Appellant has explained to the Board that he did not in fact receive notice of the hearing and that he had requested that the Office mail the notice of the scheduled hearing to his post office box address rather than to his home address because he did not always receive his mail at the home address. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.⁹ The Board may, therefore, not consider whether appellant's explanation is sufficient to rebut the presumption of receipt raised by the "mailbox rule." When the Office issued its decision on May 8, 1995, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

The May 8, 1995 and October 19, 1994 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 17, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁹ 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.