U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARION E. MOORE and FEDERAL EMERGENCY MANAGEMENT AGENCY, Hyattsville, MD

Docket No. 99-2182; Submitted on the Record;
Issued December 7, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of the surgical procedure performed August 3, 1998; (2) whether the Office met its burden of proof to terminate appellant's compensation effective October 11, 1998; and (3) whether the Office properly found that appellant abandoned her request for a hearing.

On September 16, 1997 appellant, then a 49-year-old temporary employee working in teleregistration, sustained employment-related sprains and contusions to the right arm and hand when a door closed on her. She stopped work that day and received appropriate compensation. The Office continued to develop the claim, and on April 7, 1998 referred appellant to Dr. Craig Person, who is Board-certified in plastic and hand surgery, for a second-opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Person and Dr. Rafik D. Muawwad, appellant's treating Board-certified orthopedic surgeon, on May 7, 1998 the Office referred her to Dr. Robert J. Neviaser, who is Board-certified in orthopedic and hand surgery, to resolve the conflict.[1] By letter dated August 12, 1998, the Office informed appellant that it proposed to terminate her compensation, based on the referee opinion of Dr. Neviaser. Appellant, through counsel, disagreed with the proposed termination and submitted additional medical evidence. By decision dated September 28, 1998, the Office terminated her benefits, effective October 11, 1998 and found that the August 3, 1998 surgery was not authorized. Appellant timely requested a hearing. By notice dated January 12, 1999, the Office advised appellant that a hearing was scheduled for February 19, 1999. Appellant did not appear for the scheduled hearing. By decision dated March 18, 1999, an Office hearing representative found that appellant had abandoned her request for a hearing. The hearing representative noted that appellant had not requested postponement prior to the scheduled hearing, had failed to appear at

[1] Both Drs. Person and Neviaser were provided with the medical record, the statement of accepted facts, and a set of questions regarding residuals of the work injury and the need for surgery.

the hearing and failed to show good cause for failure to appear within 10 days of the scheduled hearing. The instant appeal follows.

Initially, the Board finds that the Office properly denied appellant's request for authorization for surgery.

In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical evidence.[2] Therefore, in order to prove that the surgical procedure of August 3, 1998 was warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for the Office to authorize payment.

The relevant medical evidence in this case, includes a number of reports from appellant's treating Board-certified orthopedic surgeon, Dr. Muawwad. In a December 18, 1997 treatment note, he stated that he had first seen appellant on September 18, 1997 and advised that she had developed reflex sympathetic dystrophy and traumatic de Quervain's disease of the right wrist as a result of the employment injury. A February 12, 1998 electromyographic study was normal with no findings suggestive of entrapment neuropathy or radiculopathy. Dr. Linda T. Kirilenko, a colleague of Dr. Muawwad who is also Board-certified in orthopedic surgery, provided a March 4, 1998 report, in which she noted findings on examination with symptoms of de Quervain's disease and advised that a corticosteroid injection might be beneficial before proceeding to surgery. In a March 12, 1998 treatment note, Dr. Muawwad noted that appellant had a history of reaction to steroids and, therefore, recommended surgical release of the dorsal compartment of the right wrist. In a March 31, 1998 report, an Office medical adviser recommended a second-opinion evaluation. In an April 14, 1998 report, Dr. Person, who is Board-certified in plastic and hand surgery and provided a second opinion for the Office, stated:

> "The most impressive finding on today's examination was the significant discrepancy between the subjective complaints and the objective findings. There were essentially no concrete physical findings appreciated to support the [de Quervain's disease diagnosis]. [She] appeared to overexaggerate the pain associated with even the most minor movements of her entire right upper extremity. However, when she was distracted, a passive reproduction of Finkelstein's test in the right upper extremity did not produce any pain. In addition, her rapid exchange test of grip strength revealed that she was not exerting maximal effort on initial grip testing. Based on today's examination, I see no evidence of residuals from the work injury of September 16, 1997.... At this point, I certainly see no evidence of a de Quervain's tenosynovitis which would warrant any aggressive treatment. In addition, I do not find any evidence of reflex sympathetic dystrophy.... As a surgeon, I would be extremely reluctant to perform any surgery in this particular patient and especially in light of a proposed diagnosis of reflex sympathetic dystrophy. Based upon the paucity of

[2] *See Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

> physical findings ... I see no indication for further medical treatment. I would recommend that she be returned to her previous work duties, although I suspect that some sort of phase-in program or work hardening will be required in a patient who has not worked in over seven months."

Dr. Neviaser, who is Board-certified in orthopedic and hand surgery and is chairman of the Department of Orthopedic Surgery at George Washington University Medical Center, provided a June 10, 1998 impartial medical evaluation, in which he noted the history of injury and appellant's complaints of pain. He advised:

> "Physical [examination] demonstrates no evidence of a swelling about the distal forearm or wrist. Her neck exam[ination] is unremarkable. Her shoulder and elbow exam[ination] is also unremarkable. She has full active and passive motion of the fingers, wrist and hand. There is no neurologic or tendon deficit. She states she has some tenderness over the first dorsal compartment and some over the musculotendinous junction of the extensor pollicis longus. There is, however, no crepitus in the extensor intersection region.... My impression is [she] had a contusion/crush injury at the time of injury. I do not find significant abnormalities at this time other than her complaints of tenderness and pain. I do not agree that she has an operative condition. I find that essentially she is able to work. In my opinion there are no permanent residuals according to A.M.A., [*Guides*] [American Medical Association, *Guides to the Evaluation of Permanent Impairment*]. No further treatment is needed."

Appellant underwent surgical release of the first dorsal compartment of the right wrist on August 3, 1998.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[3] In this case, appellant's counsel contended that the opinion of Dr. Neviaser should not be accorded special weight because a physician selected and compensated by the Office could not be considered impartial and argued that the opinion of Dr. Muawwad, in conjunction with that of Dr. Kirilenko, should be accorded greater weight because he was appellant's treating physician.

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[4] Under Office

[3] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[4] *Wallace B. Page*, 46 ECAB 227 (1994).

procedures, a claimant is entitled to participate in the selection of an impartial medical specialist. However, the claimant does not possess an unqualified right to participate. In two instances, the Office will prepare a list of three specialists for selection by the claimant: first, when there is a specific request for participation and a valid reason for participation is provided; or, when there is a valid objection to the physician selected by the Office.[5]

The record in the instant case, indicates that there is no evidence of improper selection procedure and appellant was fully informed before the scheduled impartial examination of the nature of the conflict. Furthermore, she did not submit a written request to participate in the selection before the scheduled examination and did not object to the physician until after receipt of the pretermination notice. As appellant had a full opportunity to object to the selection of the referee examiner, the Board finds that her objections are not valid.[6] The Board, therefore, finds that, as Dr. Neviaser, a Board-certified orthopedic surgeon, of professorial rank, provided a comprehensive report, in which he explained why surgery was not needed, his report should be accorded special weight. Appellant, therefore, failed to establish that the August 3, 1998 surgical procedure was employment related and medically warranted.

The Board further finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[7]

As stated above, Dr. Neviaser provided a comprehensive report, in which he advised that appellant had no permanent residuals of the employment injury. While appellant submitted additional reports from Dr. Muawwad after the pretermination notice, he merely noted that she had undergone the surgical procedure and reiterated his previous findings and conclusions. The Board finds that these reports are insufficient to overcome the special weight accorded Dr. Neviaser.[8] Thus, as appellant had no employment-related disability on or after October 11, 1998, the Office met is burden of proof to terminate her compensation benefits on that date.

Lastly, the Board finds that appellant abandoned her hearing request.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[9]

[5] *David Alan Patrick*, 46 ECAB 1020 (1995).

[6] *See Roger S. Wilcox*, 45 ECAB 265 (1993).

[7] *See Patricia A. Keller*, 45 ECAB 278 (1993).

[8] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994).

[9] 5 U.S.C. § 8124(b).

Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in pertinent part:

> "A scheduled hearing may be postponed or canceled at the option of the Office, or upon written request of the claimant if the request if 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 the assessment of costs against such claimant."
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> "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. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claimant to appear at the third scheduled hearing shall constitute abandonment at the request for a hearing."[10]

The Board has previously affirmed that an appellant's failure to request postponement or rescheduling of the hearing, pursuant to the regulation, together with failure to appear at the scheduled hearing constitutes abandonment of the hearing request.[11]

In the present case, by notice dated January 12, 1999, the Office advised appellant of the time and place of the hearing scheduled for February 19, 1999. She did not request postponement at least three days prior to the scheduled date of the hearing and did not request, within 10 days after the scheduled date of the hearing, that another hearing be scheduled. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constituted abandonment of her request for a hearing and the Board finds that the Office properly so determined.

[10] 20 C.F.R. § 10.137.

[11] *See Mike C. Geffre*, 44 ECAB 942 (1993).

The decisions of the Office of Workers' Compensation Programs dated March 18, 1999 and September 28, 1998 are hereby affirmed.

Dated, Washington, D.C.
December 7, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member