U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. HALL and U.S. POSTAL SERVICE,
POST OFFICE, Dover, DE

Docket No. 97-2330; Submitted on the Record;
Issued July 20, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of October 13, 1996; and (2) whether the Office properly determined that appellant abandoned her request for a hearing.

On August 16, 1990 appellant, then a 40-year-old distribution clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained an injury to her lower back and left side while performing her duties earlier that same day. Appellant ceased work on August 17, 1990. Dr. James R. Schreppler, a chiropractor, examined appellant on August 20, 1990 and provided an initial diagnosis of subluxation at L5 with associated nerve root entrapment and acute low back pain. Dr. Schreppler released appellant to return to work in a limited-duty capacity on August 23, 1990. Upon returning to work, appellant sustained a recurrence of disability on August 24, 1990, and Dr. Schreppler determined that she was totally disabled as of that date.[1] On September 11, 1990 the Office accepted appellant's claim for subluxation at L5. The Office subsequently paid appropriate wage-loss compensation and medical benefits.

On September 3, 1992 Dr. Theodore B. Strange, a Board-certified orthopedic surgeon, examined appellant at the Office's request. Dr. Strange found no x-ray evidence to support a diagnosis of subluxation. He further noted that, while appellant's employment injury might have aggravated a preexisting condition, the effects of her August 16, 1990 injury should have lasted no more than six weeks. Dr. Strange concluded that there were no present effects from appellant's August 1990 work injury and that she was only mildly disabled and could resume limited-duty work.

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[1] Appellant subsequently resigned from her position with the employing establishment effective November 5, 1990.

On May 19, 1995 the Office advised appellant that due to a conflict of medical opinion, she would have to undergo further evaluation by an impartial medical examiner. On that same day the Office forwarded the case record, a statement of accepted facts, and list of specific questions, to Dr. Daniel J. Gross, a Board-certified orthopedic surgeon, who examined appellant on July 26, 1995, and in a report dated August 3, 1995, he found no indication of a subluxation on any of the x-rays. Dr. Gross provided a diagnosis of lumbar strain, and noted that "[w]ith treatment, this should have resolved." He further indicated that appellant's current condition could not be attributed to the August 16, 1990 work injury and that there were no present effects from that prior injury. In conclusion, Dr. Gross noted that appellant was not totally disabled for any employment and was suitable to return to work, albeit with some restrictions due to her poor condition.

In a notice of proposed termination of compensation dated April 17, 1996, the Office advised appellant that it proposed to terminate her compensation benefits because the weight of the medical evidence supported that all injury-related residuals had ceased. Additionally, the Office provided appellant with a copy of Dr. Gross' August 3, 1995 report and advised appellant that if she disagreed with the proposed action she should submit additional medical evidence or argument supportive of her continued disability within 30 days. On June 7, 1997 appellant's counsel challenged the Office's reliance on Dr. Gross' report based upon the doctor's alleged failure to consider certain medical evidence of record. Appellant did not, however, submit any new medical evidence regarding her current condition.

By decision dated September 11, 1996, the Office terminated appellant's compensation benefits effective October 13, 1996 on the grounds that the medical evidence of record failed to establish that appellant had any continuing disability causally related to her August 16, 1990 employment injury. In an accompanying memorandum, the Office noted that Dr. Gross' report clearly referenced the medical evidence he was alleged to have overlooked, and that Dr. Gross had, in fact, reviewed the entire record. The Office, therefore, concluded that the report of the impartial medical examiner represented the weight of the medical evidence in the case.

On September 18, 1996 appellant's counsel filed a timely request for an oral hearing before the Office, which was scheduled for May 22, 1997. Appellant, however, failed to appear for the scheduled hearing, and the Office, by decision dated June 9, 1997, advised appellant that her request for a hearing was deemed to have been abandoned. On June 24, 1997 appellant filed an appeal with the Board.

The Board has duly reviewed the evidence of record in this appeal and finds that the Office met its burden of proof in terminating appellant's compensation benefits as of October 13, 1996.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate

[2] *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3]

In the instant case, the Office determined that a conflict of medical opinion existed based on Dr. Strange's September 3, 1992 report and; therefore, the Office properly referred appellant to an impartial medical examiner.[4] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5] The Board finds that the impartial medical examiner's August 3, 1995 opinion is sufficiently well rationalized and based upon a proper factual background. Dr. Gross not only examined appellant, but also reviewed appellant's medical records. He also reported accurate medical and employment histories. Inasmuch as Dr. Gross concluded that appellant was not currently disabled as a result of her August 1990 employment injury, the Office properly relied on his opinion as a basis for terminating appellant's compensation benefits.

The Board further finds that the Office properly determined that appellant abandoned her request for a hearing.

Section 8124(b) of the Act provides that a claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before a representative of the Office.[6] On September 20, 1996 the Office received appellant's timely request for an oral hearing in connection with the September 11, 1996 decision terminating compensation benefits. In an April 12, 1997 notice addressed to appellant at her address of record, the Office advised appellant that the hearing she requested had been scheduled for May 22, 1997. Appellant, however, did not appear at the scheduled hearing.

Section 10.137 of Title 20 of the Code of Federal Regulations, which pertains to the postponement, withdrawal or abandonment of a hearing request, provides in relevant 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 is received by the Office at least 3 days prior to the scheduled date of the hearing and good cause for the postponement is shown."

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[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[4] Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. *Shirley L. Steib*, 46 ECAB 309, 317 (1994); *see Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

[5] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[6] 5 U.S.C. § 8124(b).

> "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 … shall constitute abandonment of the request for a hearing."[7]

In the present case, appellant neither requested postponement at least 3 days prior to the scheduled date of the hearing, nor did she request another hearing within 10 days after the date of the previously scheduled hearing. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constitutes abandonment of her request for a hearing, and the Board finds that the Office properly so determined in its June 9, 1997 decision.

On appeal, appellant's counsel contends that he did not receive proper notice of the scheduled hearing.[8] The record indicates that the Office forwarded a copy of the April 12, 1997 hearing notice to appellant's counsel.[9] 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.[10] This presumption, commonly referred to as the "mailbox" rule, arises when it appears from the record that the notice was properly addressed and duly mailed.[11] The Office's finding of abandonment in this case rests on the strength of this presumption. Although appellant's counsel currently contends that he did not receive proper notice of the hearing, when the Office issued its decision on June 9, 1997, the record contained no explanation for appellant's failure to appear. 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.[12] The Board, therefore, is precluded from considering whether the explanation offered by appellant's counsel for the first time on appeal is sufficient to rebut the presumption of receipt raised by the "mailbox rule."[13] Inasmuch as the record at the time the Office issued its decision contained no explanation for appellant's failure to appear, the Office's June 9, 1997 decision was proper.

The decisions of the Office of Workers' Compensation Programs dated June 9, 1997 and September 11, 1996 are hereby affirmed.

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[7] 20 C.F.R. § 10.137(a) and (c).

[8] Counsel does not specifically indicate whether appellant received notice of the hearing, but merely argues that "If notice was sent only to [appellant] that is insufficient notice."

[9] While the record includes at least two different addresses for appellant's counsel, the April 12, 1997 hearing notice was forwarded to "Mark Dunkle P.O. Box 598 Dover, DE. 19903." This is the same address that appears on the letterhead of counsel's September 18, 1996 request for a hearing.

[10] *George F. Gidicsin*, 36 ECAB 175 (1984).

[11] *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[12] 20 C.F.R. § 501.2(c).

[13] Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

Dated, Washington, D.C.
July 20, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member