U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSIE B. EDMONDS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

Docket No. 98-2009; Submitted on the Record;
Issued February 17, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 19, 1997 on the grounds that she no longer had any residuals or disability due to her March 16, 1994 employment injury; and (2) whether the Office properly determined that appellant had abandoned her request for an oral hearing.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective August 19, 1997 on the grounds that she no longer had any residuals or disability due to her March 16, 1994 employment injury.

On March 16, 1994 appellant, then a 58-year-old registered nurse, filed a traumatic injury claim (Form CA-1), assigned claim number A13-1048607 alleging that on that date she experienced lower back pain and pain in her left hip and buttock area when she pulled a patient into the bed.[1] Appellant stopped work on March 26, 1994.

By letter dated June 4, 1994, the Office accepted appellant's claim for lumbar strain with radiculopathy.

[1] Prior to filing the instant claim, appellant filed a traumatic injury claim (Form CA-1) assigned number A13-325373 on September 16, 1969 alleging that on September 10, 1969 she sustained a lower back injury and sharp pain down her right leg while transferring a patient from his bed to the scales. The Office accepted appellant's claim. On September 29, 1979 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on September 18, 1977. The Office accepted appellant's recurrence claim. On February 12, 1979 appellant filed a Form CA-1 assigned number A13-572820 alleging that on that date, she injured her lower back while transferring a patient from a geri chair to the commode. Appellant stopped work on February 12, 1979 and returned to work on February 23, 1979. The Office accepted appellant's claim for a lumbosacral strain. The Office consolidated the above claims into the instant claim assigned number A13-1048607 under a master case file assigned A13-10448607.

By letter dated September 19, 1994, the Office requested Dr. Harry Marinow, a Board-certified orthopedic surgeon and appellant's treating physician, to submit a medical report regarding the status of appellant's accepted condition and her ability to return to full-time duty.[2] His November 9, 1994 medical report indicated that appellant was not capable of performing her regular work duties due to her ongoing symptoms and that she should continue to stay on modified work duty.

By letter dated October 12, 1995, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Milton Ashby, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Ashby of the referral.

Dr. Ashby submitted a November 2, 1995 medical report revealing that on March 16, 1994, appellant sustained a work-related temporary aggravation of a preexisting nonwork-related spinal degenerative disease of the disc and facet joints.

In an August 27, 1996 letter, the Office advised Dr. Ashby to provide a supplemental medical report addressing whether appellant's employment-related condition had resolved. In response, Dr. Ashby submitted a September 7, 1996 medical report revealing that appellant did not have any residuals of her March 16, 1994 employment injury.

In a notice of proposed termination of compensation dated July 15, 1997, the Office advised appellant that it proposed to terminate her compensation based on Dr. Ashby's medical opinion. The Office also advised appellant to submit additional medical evidence supportive of her continued disability within 30 days.

By decision dated August 19, 1997, the Office terminated appellant's compensation effective that date on the grounds that Dr. Ashby's medical opinion established that appellant no longer had any residuals or disability due to her March 16, 1994 employment injury. In a September 6, 1997 letter, appellant requested an oral hearing before an Office representative.

By notice dated March 28, 1998, the Office advised appellant that a hearing was scheduled for Thursday, May 14, 1998 at 10:00 a.m. at the specified address. The Office also advised appellant that if she no longer desired a hearing then she 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 26, 1998, the Office found that appellant had abandoned her request for a hearing because she failed to appear at the hearing and did not provide good cause for her failure to appear within 10 days after the scheduled hearing. The Office mailed this notice to appellant's address of record.

[2] The record reveals that appellant was disabled during the period March 25 through June 24, 1994. The record further reveals that appellant returned to limited-duty work on June 27, 1994.

Once the Office has accepted a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[3] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4]

In this case, the Office relied on the medical opinion of Dr. Ashby in terminating appellant's compensation benefits. In a November 2, 1995 medical report, he provided a history of appellant's March 16, 1994 employment injury, medical treatment and current symptoms. Dr. Ashby also provided a description of appellant's work duties as a registered nurse, his findings on physical examination and a detailed review of medical records. He diagnosed chronic lumbar sprain and mild lumbar scoliosis with facet arthritis at L4-5 and L5-S1 primarily with multiple levels of degenerative disc disease with only central disc protrusions. Regarding appellant's future medical treatment, Dr. Ashby stated that no formal treatment was necessary aside from follow-up care for renewal of medications, there was no advantage in any continued formal physical therapy or other invasive studies and that appellant was not a candidate for any surgery. He opined that appellant's current, as well as, previous employment injuries were trivial and that none of the documents he reviewed from Dr. Marinow and his own examination demonstrated an objective neurological deficit of the lower extremities to correlate with incrimination of any of the degenerated lumbar discs in appellant's spine. Dr. Ashby further opined that appellant could be considered to have incurred a sprain or strain to the lumbar spine in March 1994 that was a work-related temporary aggravation of preexisting nonwork-related spinal degenerative disease of the disc and facet joints.

In his September 7, 1996 supplemental medical report, Dr. Ashby explained that appellant's work-related injuries were considered minor soft tissue that were capable of resolution within four to six weeks based on all available clinical research and publications without even formal medical attention. He opined that appellant's employment-related injury fell into this category, but stated that although the Office accepted appellant's claim for radiculopathy, this was an unreasonable diagnosis based on his examination of appellant and the medical documents of record. Dr. Ashby further stated that based on his examination and a review of the medical records and a statement of accepted facts, appellant should have been in preinjury status within six weeks following her employment injuries. Specifically, Dr. Ashby explained:

> "[A]s indicated, the only justification for permanent residuals or limitations in regard to sprain injuries would in fact have to be correlated with a diagnosis beyond the sprain which would have to be third degree complete disruption associated with spinal instability and a diagnosis of spinal instability to be documented on the basis of flexion and extension x-rays and abnormal mobility of the segments being demonstrated radiographically or true unlocking of the

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

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

> facet joints with a diagnosis of subluxation or dislocation. Nothing like that has been documented to suggest that this [appellant] should not have resolved spontaneously within six weeks any of those injuries being described and accepted by your office. The same is associated with this rather vague injury allegedly occurring on March 16, 1994, and in my estimation there is no subsequent documentation on a permanent basis of any preexisting degenerative changes which are not work related by such a minor injury and certainly by June 1, 1994, this [appellant] should have been permanent and stationary in regard to that spraining injury without residuals and need for any limitations in regard to her employment."

The Board finds that Dr. Ashby's opinion is rationalized to support a finding that appellant no longer had any residuals or disability due to her March 16, 1994 employment injury and based on a proper factual and medical background.

The medical reports of Dr. Marinow failed to provide any medical rationale explaining how or why appellant continued to have residuals or disability causally related to her March 16, 1994 employment injury. Specifically, in his June 26, 1996 medical report, which was received by the Office subsequent to its notice of proposed termination of compensation on July 28, 1997, Dr. Marinow merely indicated his findings on physical examination and his recommendations regarding appellant's medical treatment, which included, *inter alia*, L5-S1 decompression neuroforaminotomy with possible discectomy.

Inasmuch as Dr. Ashby's medical opinion constitutes the weight of the reliable, probative and substantial evidence, the Board finds that the Office properly terminated appellant's compensation benefits effective August 19, 1997 on the grounds that she no longer had any residuals or disability due to her March 16, 1994 employment injury.

The Board further finds that the Office properly determined that appellant abandoned her 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 canceled 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."
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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."[5]

In this case, the Office mailed its March 28, 1998 notice of hearing, as well as, its previous correspondence and decisions to appellant at the following address: 5500 Ackerfield, apartment 206, Long Beach, California 90805. The evidence of record, therefore, establishes that the Office properly served appellant with a notice of hearing. 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 her failure to appear at the hearing within 10 days after the scheduled hearing constituted abandonment of her request for a hearing.

On appeal, appellant contends that she 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.[6] 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 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 she did not in fact receive notice of the hearing. 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.[7] 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 26, 1998, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

[5] 20 C.F.R. §§ 10.137(a), (c).

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

[7] 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.

The May 26, 1998 and August 19, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
February 17, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member