U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTOPHER SMITH and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING, Cleveland, Ohio

Docket No. 96-1846; Submitted on the Record;
Issued July 2, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for a schedule award related to an accepted November 19, 1993 right ankle sprain and anterior tibial spur; and (2) whether the Office properly found that appellant abandoned his right to a hearing.

In this case, the Office accepted that appellant, then a 36-year-old lead fiscal accountant, sustained a right ankle sprain and an anterior tibial spur of the right ankle on November 19, 1993 in the performance of duty when struck by a cleaning cart.

On October 21, 1994 appellant claimed a schedule award. In a January 11, 1995 letter, the Office advised appellant of the type of medical and factual evidence needed to establish his schedule award claim, including his physician's determination of the date of maximum medical improvement.

In a January 25, 1995 report, Dr. William R. Bohl, an attending Board-certified orthopedic surgeon, noted treating appellant since November 24, 1993 for the accepted right ankle sprain. He noted that appellant had a recrudescence of pain and swelling on January 20, 1995 examination, with limited range of right ankle motion. X-rays obtained at that time showed a "moderate sized anterior tibial spur." Dr. Bohl initially prescribed Achilles tendon stretching exercises in lieu of surgery, noting that the spur could be "removed arthroscopically to gain improved motion." Dr. Bohl concluded that "since the ankle can probably be improved a statement of date of maximum medical improvement is inappropriate at this time and it is uncertain without further treatment how much of [appellant's] disability [was] permanent."

In a March 15, 1995 report, Dr. Arthur K. Cieslak, a Board-certified surgeon and Office medical adviser, reviewed Dr. Bohl's January 25, 1995 report and the medical record. He

concluded that as Dr. Bohl opined that appellant had not yet reached maximum medical improvement as surgery was needed, it was premature to calculate a schedule award.[1]

In a May 22, 1995 report, Dr. Bohl noted that conservative measures, including physical therapy heel lifts and heel cushions, did not alleviate appellant's increasing symptoms. He opined that due to continued pain and tenderness in the anterior ankle joint with the anterior tibial spur, appellant required "arthroscopy for excision of the spur and anterior synovectomy." Dr. Bohl explained that spurs were a normal result of "an ankle sprain with calcification of the anterior capsule joint causing [an] impingement syndrome."

The Office authorized Dr. Bohl to perform surgical removal of the anterior tibial spur of the right ankle, including arthroscopy and anterior synovectomy.

By decision dated September 25, 1995, the Office denied appellant's claim for a schedule award on the grounds that he had not established that he had reached maximum medical improvement, and thus it was premature to calculate a schedule award. The Office noted that Dr. Bohl's January 25, 1995 report emphasized the need for surgery to remove the tibial spur in order to improve appellant's range of motion, and thus appellant had not reached maximum medical improvement.

Appellant disagreed with this decision, and on October 10, 1995, through his attorney representative, requested a hearing before a representative of the Office's Branch of Hearings and Review. By March 7, 1996 letter addressed to appellant at his address of record,[2] the Office advised appellant that a hearing had been scheduled for March 21, 1996 at 12:00 p.m. in Cleveland. Appellant was advised that if he no longer desired a hearing, he should immediately request cancellation.

Other than the March 7, 1996 notice of hearing, the record contains no record of communication or correspondence between appellant and the Office dated between the October 10, 1995 request for hearing and the Office's April 30, 1996 decision.

By decision dated April 30, 1996, the Office found that appellant had abandoned his request for a hearing on the grounds that he failed to appear at the scheduled March 21, 1996 hearing, "did not request cancellation at least 3 calendar days prior to the scheduled hearing," and failed to show good cause for his failure to appear.

Regarding the first issue, the Board finds that the Office properly denied appellant's claim for a schedule award on the grounds that he had not yet reached maximum medical improvement.

[1] The Office advised appellant by May 4, 1995 letter that the Office medical adviser determined that he had not reached maximum medical improvement, and thus it was premature to calculate a schedule award.

[2] The letter was sent to appellant at "6810 Virginia Ave., Parma, OH 44129."

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.304 of the implementing regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereinafter, the *Guides*) as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.[5]

The A.M.A., *Guides* lists specific procedures for determining impairment of affected body parts. First, the physician must determine the date of maximum medical improvement, and then determine the effect of the medical condition on life activities.[6] A schedule award is not payable until maximum improvement of a claimant's condition has a been reached. The determination of maximum medical improvement is factual in nature and depends primarily on the medical evidence.[7]

In this case, appellant submitted medical reports from Dr. Bohl, an attending Board-certified orthopedic surgeon, who opined that appellant would not reach maximum medical improvement until after surgical removal of an anterior tibial bone spur. In a January 25, 1995 report, Dr. Bohl opined that as appellant's ankle could be improved with surgery to remove the spur and thus increase range of motion, "a statement of date of maximum medical improvement [was] inappropriate at th[at] time" as it was uncertain without surgery "how much of [appellant's] disability [was] permanent." Dr. Bohl again recommended surgery in a May 22, 1995 report.

The Board notes that Dr. Cieslak, a Board-certified surgeon and Office medical adviser, concurred with Dr. Bohl's determination that appellant had not yet reached maximum medical improvement.

Thus, the Office properly denied appellant's claim for a schedule award as the medical evidence established that he had not yet reached maximum medical improvement, the prerequisite for calculating a schedule award.

Regarding the second issue, the Board finds that the Office properly determined that appellant abandoned his right to a hearing.

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.304.

[5] *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

[6] A.M.A., *Guides*, 9.

[7] *Jerre R. Rinehart*, 45 ECAB 518 (1994).

Section 8124(b) of the Federal (FECA) Employees' Compensation Act[8] provides claimants under the Act, a right to a hearing if they request a hearing within 30 days of the Office's decision. Under section 10.137 of the applicable regulations,[9] a scheduled hearing may be postponed upon written request of a claimant or his representative 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. If a claimant fails to appear for a scheduled hearing, he or she has 10 days after the date of the scheduled hearing to request that another hearing be scheduled. If a claimant or his representative fails to appear at a second hearing without good cause, he is considered to have abandoned his request for a hearing. If good cause is shown for failure to appear at a second scheduled hearing, another hearing will be scheduled. The regulations state "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 of the request for a hearing."

The regulations impose penalties only for failure to appear at a hearing without any notice or with less than three days notice. The Office's regulations provide that a claimant who fails to appear at a scheduled hearing, and fails to request another hearing within 10 days, has abandoned the request for a hearing.[10] The Board has held that an appellant abandoned his request for a hearing where he did not request postponement at least 3 days before the scheduled date of the hearing and where he did not request, within 10 days after the date of the scheduled hearing, that another hearing be scheduled. Appellant's failure to make such requests, together with his failure to appear at the scheduled hearing, constituted an abandonment of his request for a hearing.[11]

On October 10, 1995 letter, appellant requested a hearing before a representative of the Office's Branch of Hearings and Review. There is no evidence of record, and appellant does not contend, that he did not timely receive the Office's March 7, 1996 notice of hearing advising him that a hearing had been scheduled in his case for March 21, 1996 in Cleveland. This notice advised appellant that he should notify the Office immediately if he no longer desired a hearing.

The record indicates that appellant did not communicate with the Office's Branch of Hearings and Review either to show good cause for his failure to appear, to request postponement, or to request that another hearing be scheduled. Thus, the Office correctly found that appellant had abandoned his right to a hearing.

[8] 5 U.S.C. § 8124.

[9] 20 C.F.R. § 10.137.

[10] *Michelle R. Littlejohn*, 42 ECAB 463 (1991); *Stephen A. Nowak*, 42 ECAB 615 (1991); *Bruce Whitver*, 42 ECAB 834 (1991).

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

The decisions of the Office of Workers' Compensation Programs dated April 30, 1996 and September 25, 1995 are hereby affirmed.[12]

Dated, Washington, D.C.
July 2, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[12] Following issuance of the April 30, 1996 decision, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued its final decision, in this case, April 30, 1996. 20 C.F.R. § 501.2(c)