

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KALIMAH SHAKIR and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 99-2138; Submitted on the Record;
Issued August 7, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned her request for a hearing before an Office hearing representative.

On July 2, 1998 appellant, then a 37-year-old SPBS operator, filed a claim for bilateral carpal tunnel syndrome. She submitted a July 13, 1998 medical report from Dr. Suresh Patel, a Board-certified internist, which noted that appellant's electromyogram (EMG) and nerve conduction studies of July 1, 1998 were negative and ruled out carpal tunnel syndrome. Dr. Patel noted a work history of keying for 14 years and diagnosed pain and numbness secondary to keying for a long period. She additionally noted a possible early carpal tunnel syndrome. She indicated, "in my opinion, this is job related."

By letter dated August 7, 1998, the Office requested additional information from appellant including a comprehensive medical report from her treating physician which described her symptoms, results of examinations and tests (including Phalen's and Tinel's signs and results of any nerve conduction or EMG studies, which the Office noted were authorized), diagnosis, the treatment provided, the effect of treatment and Dr. Patel's opinion, with medical reasons on the cause of her condition. The Office specifically noted that appellant's physician should provide an explanation of how appellant's work activities in her federal employment contributed to her condition, if the physician thought that was applicable. Appellant addressed the factual questions requested by the Office and stated that Dr. Patel was on vacation and that she would forward the rest of the documentation requested.

In a report dated September 25, 1998, which the Office received September 28, 1998, Dr. Patel reiterated her findings of her July 13, 1998 report. She indicated that appellant had seen her multiple times and was also seen by a neurologist and a rheumatologist. Dr. Patel again indicated that the July 1, 1998 EMG and nerve conduction studies were negative. She opined

that appellant has pain and numbness secondary to keying for a prolonged period and indicated that this condition was job related.

By decision dated October 13, 1998, the Office denied the claim, stating that the fact of injury was not established.

By letter dated October 26, 1998, appellant requested an oral hearing before an Office hearing representative.

By letter dated April 15, 1999, the Office informed appellant that an oral hearing would be held on May 27, 1999 at 3:15 p.m. in New York, New York. Appellant did not appear.

By decision dated June 7, 1999, the Office determined that appellant had abandoned her request for a hearing as she did not request cancellation at least 3 calendar days prior to her hearing scheduled for May 27, 1999 or show good cause within 10 calendar days of the scheduled hearing for her failure to appear.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

It is not disputed that appellant was experiencing pain and numbness in her hands nor is it disputed that she had workplace exposure to such conditions alleged to have contributed to her symptoms of carpal tunnel syndrome. However, appellant has submitted no medical evidence establishing that she has a diagnosed condition causally related to the employment factors or conditions. In Dr. Patel's reports of July 13 and September 25, 1998, she indicates that appellant has pain and numbness secondary to keying for a prolonged period and further indicates a diagnosis of "possible early carpal tunnel syndrome." Dr. Patel diagnosed not an objective compensable diagnosis, but a pain based diagnosis of "pain and numbness secondary to keying for a prolonged period along with negative EMG and nerve conductive test results."⁵ Moreover, Dr. Patel's impression that appellant has "possible early carpal tunnel syndrome" is couched in speculative terms and is not supported by any objective evidence as Dr. Patel noted that the July 1, 1998 EMG and nerve conduction study tests were negative.⁶ Due to these deficiencies, Dr. Patel's reports are of diminished probative value and are insufficient to establish appellant's claim of disability.

An award of compensation may not be based on surmise, conjecture or speculation, or appellant's belief of causal relationship. The mere fact that a disease or condition develops during a period of federal employment does not establish a work-related condition. As noted above, to establish that an injury was sustained in the performance of duty in an occupational disease claim, appellant must submit rationalized medical evidence addressing how specific work factors caused or aggravated the claimed condition. In this case, appellant has not submitted any medical evidence which diagnoses a medical condition. Consequently, as appellant has not submitted rationalized medical evidence supporting that employment factors or conditions resulted in a diagnosed medical condition, the Office properly denied appellant's claim for compensation.

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

⁴ *Id.*

⁵ *Mary Lou Barragy*, 46 ECAB 781, 789 (1995).

⁶ *See James Mack*, 43 ECAB 321 (1991).

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

“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 cost 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.”

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions. Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rest with the Office’s procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Request.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision, finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving preresoupment hearings, H&R will also issue a final decision on the overpayment, bases on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the

claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”

In the present case, appellant requested an oral hearing before an Office hearing representative and by letter, dated April 15, 1999, the Office informed appellant that the oral hearing would be held on May 27, 1999 at 3:15 p.m. in New York, New York. The letter was addressed to “Kalimah Shakir, 130-33 233rd St. Rosedale, NY 11422,” the address appellant gave on her claim form and to which other correspondence was sent. It is presumed under “the mailbox rule” that a properly addressed correspondence is mailed in the ordinary course of business unless rebutted. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office will raise the presumption that the original was received. Appellant has not submitted evidence sufficient to rebut the presumption. After issuance of the June 7, 1999 decision, appellant alleged that she did not receive notice of the hearing. The Board notes, however, that its jurisdiction is limited to reviewing that evidence that was before the Office at the time of its final decision and the Board may not consider for the first time on appeal whether appellant’s explanation is sufficient to rebut the presumption of receipt under the “mailbox rule.”

Furthermore, the Board notes that the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on May 27, 1999. The record shows that the Office mailed appropriate notice to appellant at her last known address. The record also supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office’s procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

The June 7, 1999 and October 13, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member