U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY W. ELIASON and DEPARTMENT OF THE ARMY, FORT WAINWRIGHT, Fairbanks, AK

Docket No. 00-933; Submitted on the Record;
Issued October 17, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of April 25, 1999; and (2) whether the Office abused its discretion in finding that appellant abandoned his request for a hearing.

On February 22, 1988 appellant, a 54-year-old air conditioning equipment mechanic, injured his back when he slipped and fell from a flight of stairs. The Office accepted appellant's claim for neck strain on March 7, 1988. Appellant has not returned to work since the date of injury and the Office paid compensation for total disability.

In a report dated December 14, 1994, Dr. W.S. Holt, a neurosurgeon, stated:

> "Present findings I think are related to his employment as stated in the facts, including post-traumatic vascular headaches with tunnel vision, intermittent vertigo, the chronic cervical strain and the positional vertigo related either to vertebral artery compression and/or benign positional vertigo.
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> "The diagnosis is difficult. There is evidence from these findings that disability is related to the incident of [February 22, 1988]. I would estimate this measures approximately 18 percent of the total body related to his Dix-Halpike test connected with the positional vertigo, the vertebral compression syndrome with clinical limitations and the chronic posturing headaches.
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> "At the present time I do doubt that [appellant] can return to the duties preceding his accident dated February 1988. Lifting and turning of his head to fix different kinds of air conditioning will accentuate it. Air conditioning and refrigeration will be prohibited for questionable blacking out, syncopal episodes and vertigo.

"Concerning occupations that this gentleman may perform basically consisting of sedentary occupation at a work desk that does not require extensive use of range of motion of his neck nor excessive lifting particularly any type of activity that requires him to bend over, turn his head rapidly which will lead to increasing episodes both of his migraines as well as his positional vertigo.

"At the present time he is disabled from employment. At the present time I think the vascular headaches will improve whether 30 or 40 percent of what they were initially is not clear but it is [an estimate] on my part. They will not resolve totally. The benign positional vertigo has improved and would be estimated to be approximately 40 percent initially and may improve, but it has now lasted more than two years and it is unlikely. At least parts of his symptoms are permanent. I would anticipate he will always have increasing headaches positional precipitated [and] associated with a vascular component in the form of a visual disturbance [and] acute dizziness.

To clarify appellant's current condition, the Office scheduled a second opinion examination for appellant with Dr. Eliope Paz, a Board-certified in psychiatry and neurology. In a report dated February 25, 1998, Dr. Paz stated that he was unable to find any objective signs or residuals from the accepted neck strain injury. He advised that the mild tenderness in the cervical paraspinal muscles was more subjective than objective in nature and no spasms of the cervical muscles were present. Dr. Paz stated that the range of motion of the cervical spine was full for someone of appellant's age, based on both active and passive examination. He concluded that appellant did not require any further treatment for his work-related injuries due to the fact that he had remained stable without medical treatment since 1994.

On January 25, 1999 the Office issued a notice of proposed termination of compensation to appellant. The Office found that all residuals from the 1988 work injury had resolved, based on Dr. Paz's February 25, 1998 report, which it found represented the weight of the medical evidence. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

By letter dated April 12, 1999, appellant contested the proposed termination of benefits. He stated that Dr. Paz's examination lasted only 20 minutes, which, he claimed, was not sufficient to make a judgment regarding his condition. Appellant also claimed that he had attempted to obtain medical treatment since December 1994, the date of his most recent examination, but that the Office had failed to respond to his requests for treatment.

By decision dated April 14, 1999, the Office terminated appellant's compensation, effective April 25, 1999.

In a letter received by the Office on May 18, 1999, appellant requested an oral hearing.

An Office memorandum dated June 3, 1999 indicated that appellant telephoned the Office on that date and requested copies of his medical records. He also informed the Office that his current address was "P.O. Box 431000, Big Pine Key, Florida, 33043."

In an October 7, 1999 letter, the Office informed appellant that a hearing would be held on November 15, 1999. This letter was sent to appellant's parents' address, "31108 Avenue J, Big Pine Key, Florida, 33043."

By decision dated December 8, 1999, the Branch of Hearings and Review found that appellant abandoned his request for a hearing.

The Board finds that the case is not in posture for decision on the issue of whether the Office abused its discretion in finding that appellant abandoned his request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act[1] provides claimants under the Act a right to a hearing if they request one within 30 days of the Office's decision. Section 10.137 of the Code of Federal Regulations previously set forth the criteria for abandonment of a request for a hearing:

> "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 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."[2]

These regulations were 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.[3] 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.

[1] 5 U.S.C. § 8124

[2] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[3] 20 C.F.R. § 10.622(b) (1999).

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests
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> "(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.
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> "Under these circumstances, [Branch of Hearings and Review] H&R will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office] DO. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence before returning the case to the DO.
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> "(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.
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> "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."[4]

Section 10.617 provides that the hearing representative retains complete discretion to set the time and place of the hearing and will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.

In this case, appellant failed to appear at the scheduled hearing on November 15, 1999 and alleged that he was not properly notified. Appellant noted on appeal that he did not receive the notice of hearing until December 25, 1999.

It is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[5] However, absent evidence of a properly addressed notice, the presumption cannot arise.[6]

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.e (January 1999).

[5] *Newton D. Lashmett,* 45 ECAB 181 (1993); *Michelle R. Littlejohn,* 42 ECAB 463 (1991).

[6] *Id.*

The Board finds that the Office overlooked appellant's June 3, 1999 telephone call in which he informed the Office that his correct address was "P.O. Box 431000, Big Pine Key, Florida, 33043." The October 7, 1995 notification letter was sent to an incorrect address, "31108 Avenue J, Big Pine Key, Florida, 33043"instead of to appellant's correct address of record, "P.O. Box 431000, Big Pine Key, Florida, 33043." Thus the presumption of receipt under the mailbox rule does not arise. The record does not demonstrate that appellant was notified of the scheduled hearing and appellant was denied a hearing to which he was entitled. Therefore, this case must be remanded for appellant to be given the opportunity for his requested hearing.

Because of the Board's disposition of the second issue, it is premature for the Board to address the first issue, which constitutes the merits of the case.

The December 8 and April 14, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
October 17, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member