United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 08-2066**
	)	**Issued: February 19, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Athens, GA, Employer	)	

Appearances:
Appellant, pro se
No Appearance, for the Director

Oral Argument January 13, 2009

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2008 appellant filed a timely appeal from the January 23, 2008 merit decision of the Office of Workers' Compensation Programs, denying her claim for fact of injury and the July 10, 2008 nonmerit decision, finding that she had abandoned her oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that she sustained a left elbow injury in the performance of duty; and (2) whether appellant abandoned her request for an oral hearing before an Office hearing representative. On appeal, appellant contends that she did not receive notice of the scheduled oral hearing and that the evidence of record is sufficient to establish that she sustained an employment-related left elbow injury.

FACTUAL HISTORY

On September 6, 2007 appellant, then a 48-year-old carrier technician, filed an occupational disease claim (Form CA-2) alleging that she sustained a left elbow injury in

May 2006 while performing repetitive physical therapy exercises for a work-related left shoulder injury. She returned to a light-duty position as a modified mail carrier on November 17, 2006.[1] Appellant claimed that her left elbow injury was exacerbated by the repetitive tasks required by her employment, including reaching with her left arm to retrieve mail from trays and holding mail in her left arm while placing mail into cluster boxes with her right arm. She stopped working on November 25, 2006 and did not return. On September 27, 2007 appellant retired on disability.

By letter dated October 3, 2007, the Office requested that appellant provide additional information and medical evidence supporting her claim.

In an October 21, 2007 statement, appellant stated that she was diagnosed with severe epicondylitis caused by repetitive physical therapy activities and was prescribed anti-inflammatories. A physical therapy report dated June 12, 2006 noted appellant's complaint of left elbow pain.

On June 14, 2006 Dr. Mark C. Cullen, a Board-certified orthopedic surgeon, performed a follow-up examination of appellant's postoperative left and right shoulder injuries and left elbow complaints. He noted appellant's significant left medial and lateral elbow pain. Physical examination of the left elbow revealed mild lateral epicondyle and flexor pronator tenderness and mild pain with wrist extension and grip testing.

In an April 11, 2007 medical report, Dr. Fareha Rahim, a Board-certified internist, stated that she had treated appellant since October 2002. She reported that on May 12, 2006 appellant presented with complaints of epicondylitis in her left elbow, caused by the repetitive activities performed during postoperative therapy of her work-related left shoulder injury. The injury continued to worsen after appellant's return to work on October 21, 2006 due to the repetitive activities of reaching, pushing and pulling required by her letter carrier position.

By decision dated January 23, 2008, the Office denied appellant's claim, finding that she did not submit sufficient evidence establishing that her injury occurred in the performance of duty. The Office found that Dr. Rahim's April 11, 2007 medical report referenced appellant's right elbow and thus did not support the claim for her left elbow injury. Further, it noted that the record did not contain a medical report from the referenced May 12, 2006 examination.

On February 21, 2008 appellant filed a request for an oral hearing before a hearing representative.

In a March 11, 2008 letter, the Office confirmed receipt of appellant's request for an oral hearing. In a letter dated May 15, 2008, it notified appellant that her hearing had been scheduled for June 18, 2008. However, appellant did not appear.

[1] The record reveals that appellant had been on light duty since 2003. She has several other workers' compensation claims, including a claim for a left shoulder injury (under OWCP file number xxxxxx229) and epicondylitis of the right elbow (under OWCP file number xxxxxx789).

By decision dated July 10, 2008, the Office found that appellant abandoned her hearing. It found that appellant was given 30 days notice of the scheduled hearing, she did not appear at the scheduled hearing and there was no evidence that she attempted to contact the Office either prior or subsequent to the scheduled hearing to explain her absence.

LEGAL PRECEDENT -- ISSUE 1

An employee who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[3]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[4]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[5]

ANALYSIS -- ISSUE 1

The issue is whether appellant established that she sustained a left elbow injury due to her employment activities. The Board finds that appellant has not met her burden of proof.

In order to establish her claim, appellant must submit rationalized medical evidence explaining the causal relationship between her employment and her current left elbow condition.[6] She submitted a physical therapy report dated June 12, 2006, a June 14, 2006 medical report from Dr. Cullen and an April 11, 2007 report from Dr. Rahim.[7] The June 12, 2006 physical

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[2] 5 U.S.C. §§ 8101-8193.

[3] *D.B.*, 58 ECAB ___ (Docket No. 07-440, issued April 23, 2007); *George W. Glavis*, 5 ECAB 363, 365 (1953).

[4] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish,* 46 ECAB 276, 279 (1994).

[5] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[6] *See supra* note 4.

[7] At oral argument before the Board, appellant relied on a May 12, 2006 medical report from Dr. Rahim. As noted in the Office's January 23, 2008 decision, this report does not exist in the record.

therapy note does not constitute probative medical evidence as a physical therapist is not a physician as defined under the Act.[8] Dr. Cullen's June 14, 2006 medical report only stated that appellant experienced left elbow pain. He did not address the cause of her left elbow pain. Therefore, his report is of diminished probative value.[9]

The only medical evidence of record addressing the cause of appellant's left elbow condition is the April 11, 2007 medical report from Dr. Rahim. The Board notes that, in the January 23, 2008 decision, the Office incorrectly found that Dr. Rahim's report discussed an injury to appellant's right elbow and was not relevant to her left elbow claim. Dr. Rahim's report states that appellant presented with a left elbow injury caused by repetitive physical therapy activities, which was aggravated by the repetitive letter carrier duties once she returned to work. However, the Board finds that Dr. Rahim's report appears to merely repeat appellant's history regarding the cause of her left elbow condition instead of providing a medical explanation on causation. Dr. Rahim did not fully address how appellant's repetitive work and physical therapy activities caused left elbow injury. Therefore, her report is of diminished probative value.[10]

The Board finds that the medical evidence submitted by appellant is inadequate to establish that she sustained a left elbow injury causally related to her employment activities.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act provides that a claimant not satisfied with a decision on her claim is entitled, upon timely request, to a hearing before a representative of the Office.[11]

The authority governing abandonment of hearings rests 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 Requests.

> (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.

[8] *See* 5 U.S.C. § 8101(2). *See also David P. Sawchuck*, 57 ECAB 316 (2006).

[9] *Robert Broome*, 55 ECAB 339 (2004); *Linda I. Sprague*, 48 ECAB 386 (1997).

[10] *Victor J. Woodhams*, *see supra* note 5.

[11] 5 U.S.C. § 1824(b).

> 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]."[12]

The Office has the burden of proving that it mailed to claimant notice of the scheduled hearing. It is presumed, in the absence of evidence to the contrary, that a notice properly mailed to an individual in the ordinary course of business was received by that individual. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.[13]

ANALYSIS -- ISSUE 2

On February 21, 2008 appellant filed her request for an oral hearing before an Office hearing representative. By letter dated May 15, 2008, the Office notified appellant that an oral hearing was scheduled for June 18, 2008. On appeal, appellant contends that she never received notice of her oral hearing. However, the record reflects that a copy of the May 15, 2008 hearing notice was mailed to appellant's address of record and was not returned as undeliverable.

The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[14] This is known as the mailbox rule.[15] As the record reflects that the Office mailed a hearing notice to appellant's address of record, it is presumed that it arrived at her mailing address. The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for her failure to attend within 10 days of the scheduled date of the hearing. As the circumstances of this case meet the criteria for abandonment, the Board finds that appellant abandoned her request for a hearing.

CONCLUSION

The Board finds that appellant did not establish that she sustained a left elbow injury in the performance of duty. The Board also finds that the Office properly determined that appellant abandoned her oral hearing.

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[12] Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Abandonment of Hearing Request*, Chapter 2.1601.6(e) (September 25, 2007).

[13] *Samuel Smith*, 41 ECAB 226 (1989).

[14] *See James A. Gray*, 54 ECAB 277 (2002); *Charles R. Hibbs*, 43 ECAB 699 (1992).

[15] *W.P.*, 59 ECAB ___ (Docket No. 08-202, issued May 8, 2008).

ORDER

IT IS HEREBY ORDERED THAT the July 10 and January 23, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.[16]

Issued: February 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[16] The Board notes that at oral argument appellant made reference to a January 24, 2008 report from an Office medical adviser. As this evidence was not considered by the claims examiner in the last merit decision on January 23, 2008, the Board has no jurisdiction to review it for the first time on appeal. 20 C.F.R. § 501.2(c). *See also A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).