U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE A. PATRICK and U.S. POSTAL SERVICE,
POST OFFICE, Morrow, Ohio

Docket No. 97-633; Submitted on the Record;
Issued January 13, 1999

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 terminated appellant's compensation benefits effective August 24, 1995; (2) whether appellant established that she had any disability after August 24, 1995 causally related to the January 8, 1971 employment injury; (3) whether the Office met its burden of proof to terminate appellant's medical benefits; and (4) whether the Office properly found that appellant abandoned her request for a hearing.

This is the second appeal before the Board in this case. By decision dated July 13, 1989, the Board remanded the case to the Office for further development as a conflict in the medical evidence existed regarding whether appellant had sustained a recurrence of disability beginning July 23, 1981 causally related to her January 8, 1971 employment injury.[1] The law and facts as set forth in the previous decision and order is incorporated herein by reference.

Subsequent to the July 13, 1989 Board decision, the Office referred appellant to Dr. William D. Tobler, a Board-certified neurosurgeon and based on his reports, by letter dated November 1, 1990, accepted that appellant was unable to work after June 1981 due to an aggravation of her preexisting lumbar strain and secondary radicular irritation. By letter dated January 26, 1991, the Office informed appellant that, based on the report of Dr. Salem Foad, a rheumatologist, it was accepted that factors of employment caused a temporary aggravation of preexisting psoriatic arthritis but that this aggravation had ceased and that she was then capable of working four hours per day. Following further development by the Office, appellant was returned to the periodic rolls.[2]

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[1] Docket No. 89-286. The Board notes that the Office has accepted lumbosacral strain, lumbar myositis, cervical myositis, musculoligamentous strain of the cervical spine, postcontusion headaches, aggravation of psoriatic arthritis of the hands and aggravation of herniated lumbar disc as employment related.

[2] The record also contains an Office memorandum dated April 24, 1991 indicating that conflicts in the medical

By letter dated August 24, 1994, Dr. Michael G. Lawley, appellant's treating osteopathic physician, advised that she had been discharged from his care on November 29, 1993 when he felt that she could return to work.

On September 28, 1994 the Office referred appellant, along with the medical record, a set of questions and a statement of accepted facts, to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for a second-opinion evaluation. By report dated November 10, 1994, Dr. Fisher advised that, while appellant had residuals from the January 1971 employment injury, she could return to work with restrictions including no excessive bending, stooping or lifting greater than 20 pounds. In an attached work capacity evaluation, he advised that she could work six hours per day.

Dr. Lawley continued to file reports and in a March 22, 1995 treatment note, advised that appellant had severe leg pain and that her back was "status-quo."

In a May 3, 1995 letter, the Office asked Dr. Lawley whether appellant's condition had changed since his August 1994 report, whether she could return to her date-of-injury job and whether she continued to suffer residuals of the 1971 employment injury. In a May 17, 1995 treatment note, Dr. Lawley advised that appellant's back was doing "quite poorly" and that she had severe leg pain.

Following an Office request, in a supplementary report dated May 31, 1995, Dr. Fisher advised that appellant had no objective back findings and could work eight hours per day. He stated that the restrictions were prophylactic in nature and that she could return to work without restriction in two to three months.

In a June 9, 1995 report, Dr. Lawley advised that since August 24, 1994 he had seen appellant on multiple occasions with her last visit being May 17, 1995, at which time her back condition had worsened with severe radicular pain of the left leg. He opined that she could not return to her former employment as it included a large amount of bending, stooping and lifting which would aggravate her symptomatology.

By report dated June 30, 1995, Dr. Fisher advised that appellant had no findings of aggravation of psoriatic arthritis of the hands.

By letter dated July 19, 1995, the Office informed appellant that it proposed to terminate her compensation. The Office noted Dr. Lawley's lack of Board-certification and found that the weight of the medical opinion rested with Dr. Fisher, who is Board-certified in orthopedic surgery and provided a well-rationalized opinion based on his examination and review of the medical evidence.

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opinion evidence still remained regarding appellant's back and hand conditions.

By decision dated August 24, 1995, the Office terminated appellant's compensation, effective that day, on the grounds that the weight of the medical evidence established that her employment-related disability had ceased.

On September 12, 1995 appellant, through counsel, requested a hearing. By notice dated March 7, 1996, the Office advised appellant that a hearing was scheduled for March 19, 1996. Neither appellant nor her representative appeared for the scheduled hearing. By decision dated April 30, 1996, an Office hearing representative found that appellant had abandoned her request for a hearing. The hearing representative noted that appellant had not requested postponement prior to the scheduled hearing, had failed to appear at the hearing and failed to show good cause for failure to appear within 10 days of the scheduled hearing.

By letters dated August 14 and 21, 1996 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In an August 9, 1996 report, Dr. George D.J. Griffin, III., a Board-certified orthopedic surgeon, noted findings on examination. In an August 19, 1996 report, Dr. Russell P. Clarke, a Board-certified orthopedic surgeon, advised that appellant had sustained disc herniation when she fell in 1971 and was now permanently impaired but capable of sedentary activities. In an August 23, 1996 report, Dr. Scott W. Spann[3] noted findings on examination and that Dr. Tobler had opined that appellant's herniated disc must have occurred between 1983, when she had a negative computerized tomography (CT) scan and 1986, when she had a positive magnetic resonance imaging (MRI) scan. Dr. Spann diagnosed herniated nucleus pulposus with spinal stenosis at L4-5. In a September 13, 1995 report, Dr. C.T. Lee, a Board-certified neurosurgeon, noted findings on examination and diagnosed employment-related lumbar disc displacement with left nerve-root compression.

By decision dated November 4, 1996, the Office denied modification of the prior decision, on the grounds that the evidence submitted in support of her application was insufficient. The instant appeal follows.

Initially, the Board finds that appellant abandoned her hearing request.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[4] Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in pertinent part:

> "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

[3] Dr. Spann's credentials are not known.

[4] 5 U.S.C. § 8124(b).

hearing or late notice may result in the assessment of costs 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. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. 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 at the request for a hearing."[5]

The Board has previously affirmed that an appellant's failure to request postponement or rescheduling of the hearing, pursuant to the regulation, together with failure to appear at the scheduled hearing constitutes abandonment of the hearing request.[6]

In the present case, by notice dated March 7, 1996, the Office advised appellant of the time and place of the hearing scheduled for March 19, 1996. Appellant did not request postponement at least 3 days prior to the scheduled date of the hearing and did not request, within 10 days after the scheduled date of the hearing, that another hearing be scheduled. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constituted abandonment of her request for a hearing and the Board finds that the Office properly so determined.

The Board further finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 24, 1995.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[7] In the instant case, the Board finds that the weight of the medical evidence rests with the well-rationalized opinion of Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, who provided a second-opinion evaluation for the Office. By report dated August 24, 1994, Dr. Lawley, appellant's treating osteopathic physician, advised that she had been discharged

[5] 20 C.F.R. § 10.137.

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

[7] *See Patricia A. Keller*, 45 ECAB 278 (1993).

from his care on November 29, 1993 when he felt that she could return to work. Although he later advised that appellant's back condition had worsened with severe radicular pain of the left leg and opined that she could not return to her former employment as it included a large amount of bending, stooping and lifting, which would aggravate her symptomatology, Dr. Lawley did not indicate how employment factors had caused this condition. Furthermore, the record indicates that appellant had been assigned to permanent limited duty with restrictions on physical activity in compliance with medical restrictions. Dr. Fisher, however, provided a well-rationalized explanation of his findings and conclusions that appellant could return to an eight-hour workday and that all residuals of the January 1971 employment injury had ceased. The Board, therefore, finds appellant had no employment-related disability on or after October 21, 1994 and the Office met is burden of proof to terminate her compensation on that date.

The Board also finds that appellant failed to establish that she had any continuing disability causally related to her accepted employment injury.

As the Office met is burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had disability causally related to her accepted injury.[8] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[9]

While appellant submitted a number of medical reports subsequent to the termination, none of these reports includes a rationalized opinion explaining how her current condition was causally related to employment factors. While Dr. Clarke advised that she sustained a disc herniation when she fell at work in 1971, he does not discuss the negative CT scan in 1983 or explain why it was not until 1986 when an MRI scan demonstrated disc herniation. Likewise, Dr. Lee provides no explanation for his conclusion that appellant's condition is employment related.

The Board finds that these reports are not sufficient to meet appellant's burden of proof as none of the physicians discussed the cause of her current condition. As appellant failed to present sufficient rationalized medical evidence to establish that her condition or disability at that time was causally related to her employment injury, she failed to meet her burden of proof.

Finally, the Board finds that the Office improperly terminated appellant's medical benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization

[8] *See George Servetas*, 43 ECAB 424 (1992).

[9] *See* 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, 45 ECAB 383 (1994).

for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[10]

In terminating appellant's medical benefits, the Office relied on the reports of Dr. Fisher, who provided a second-opinion evaluation for the Office. Dr. Fisher, however, advised that at the time of his examination appellant continued to have residuals of the January 8, 1971 employment injury. The record, therefore, does not establish that appellant's accepted condition had totally resolved and the Office did not meet its burden of proof in terminating appellant's medical benefits for residuals of his employment-related injury.

The decisions of the Office of Workers' Compensation Programs dated November 4 and April 30, 1996 are hereby affirmed in part and reversed in part, consistent with this opinion of the Board.

Dated, Washington, D.C.
January 13, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[10] *Frederick Justiniano*, 45 ECAB 491 (1994).