

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM L. TANKSLEY and DEPARTMENT OF DEFENSE,  
NAVAL AIR STATION, Pensacola, FL

*Docket No. 99-1533; Submitted on the Record;  
Issued November 26, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective December 18, 1997 on the grounds that he had no disability due to his November 29, 1995 employment injury after that date; and (2) whether the Office properly determined that appellant abandoned his request for a hearing.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective December 18, 1997 on the grounds that he had no disability due to his November 29, 1995 employment injury after that date.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup>

In the present case, the Office accepted that appellant sustained an employment-related lumbosacral strain on November 29, 1995 and paid compensation for periods of disability.<sup>4</sup> By decision dated December 18, 1997, the Office terminated appellant's compensation effective December 18, 1997 on the grounds that he had no disability due to his November 29, 1995

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<sup>1</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>2</sup> *Id.*

<sup>3</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> Appellant received a notice of discharge from the employing establishment on November 20, 1995 and was later terminated for cause.

employment injury after that date. The Office based its termination on the opinion of Dr. James Rice, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion. By decision dated September 21, 1998, the Office determined that appellant abandoned his request for a hearing.

In a report dated November 3, 1997, Dr. Rice determined that appellant did not have any disability due to his November 29, 1995 employment injury and could return to his regular work as a materials handler. The Board has carefully reviewed the opinion of his and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Rice's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>5</sup> Moreover, Dr. Rice provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.<sup>6</sup> He provided medical rationale for his opinion by explaining that appellant did not exhibit any significant objective findings upon examination and diagnostic testing. Dr. Rice indicated that it did not appear appellant had received any notable treatment for his back condition for at least the prior year.<sup>7</sup>

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

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.<sup>8</sup> Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

“A scheduled hearing may be postponed or canceled 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 the assessment of costs against such claimant.”

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<sup>5</sup> On appeal, appellant alleged that Dr. Rice did not have access to his medical records, but a review of the record reveals that Dr. Rice did, in fact, review the relevant medical records.

<sup>6</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>7</sup> The record contains a November 25, 1997 note in which a doctor with an illegible signature indicated that appellant could return to work on December 18, 1997 with restrictions. The note does not, however, contain any opinion on the cause of appellant's disability.

<sup>8</sup> 5 U.S.C. § 8124(b).

“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 of the request for a hearing.”<sup>9</sup>

In the present case, by letter postmarked January 17, 1997, appellant requested a hearing before an Office representative in connection with the Office’s December 18, 1997 decision. By notice dated July 25, 1998, the Office advised appellant of the time and place of a hearing scheduled for September 1, 1998. Appellant did not request postponement at least three days prior to the scheduled date of the hearing. Neither did he 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 his failure to appear at the scheduled hearing, constitutes abandonment of his request for a hearing and the Board finds that the Office properly so determined.

The decisions of the Office of Workers’ Compensation Programs dated September 21, 1998 and December 18, 1997 are affirmed.

Dated, Washington, D.C.  
November 26, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 10.137(c).