U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TANYA C. DOUGANS and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

Docket No. 99-881; Submitted on the Record;
Issued June 7, 2000

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 May 26, 1998 on the grounds that she had no disability due to her May 18, 1996 employment injury after that date; and (2) whether the Office properly determined that appellant abandoned her request for a hearing.

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective May 26, 1998 on the grounds that she had no disability due to her May 18, 1996 employment injury after that date.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

On May 18, 1996 appellant, then a 19-year-old mailhandler, sustained an employment-related lumbosacral contusion; the Office paid compensation for periods of disability. By decision dated June 8, 1998, the Office terminated appellant's compensation effective May 26, 1998 on the grounds that she had no disability due to her May 18, 1996 employment injury after that date. The Office based its termination on the April 6, 1998 opinion of Dr. Kent Peterson, a

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[3] *Id.*

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Board-certified orthopedic surgeon, who served as an impartial medical examiner. By decision dated November 6, 1998, an Office hearing representative determined that appellant had abandoned her request for a hearing.

The Office properly determined that there was a conflict in the medical opinion between Dr. Donald R. Boekle, appellant's attending Board-certified orthopedic surgeon and the government physician, Dr. Louis Levitt, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals from the May 18, 1996 employment injury.[5] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Peterson for an impartial medical examination and an opinion on the matter.[6]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Peterson, the impartial medical specialist selected to resolve the conflict in the medical opinion. The April 6, 1998 report of Dr. Peterson his establishes that appellant had no disability after May 26, 1998 due to her May 18, 1996 employment injury.

In his April 6, 1998 report, Dr. Peterson stated that his examination of appellant was normal except for some limitation of motion. He posited that appellant's employment injury, a lumbosacral contusion, is the type of injury which would have resolved after several weeks. Dr. Peterson noted that diagnostic testing did not show any evidence of nerve root compression. He indicated that appellant had reached maximum medical improvement and did not require any further medical treatment, but that chronic pain management might be in order. Dr. Peterson stated, "It appears to this examiner that there is a large emotional overlay to [appellant's] complaints and it would be my opinion from a physical standpoint that [she] could return to her full duties without restriction."

The Board has carefully reviewed the opinion of Dr. Peterson and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His 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. Moreover, Dr. Peterson provided a proper analysis of the factual and medical history and the

[5] In reports dated in February 1997 and thereafter, Dr. Boekle indicated that appellant had partial disability due to her employment injury. In a report dated January 14, 1997, Dr. Levitt determined that appellant could return to full duty.

[6] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.[8] He provided medical rationale for his opinion by explaining that appellant did not have any objective residuals of her May 18, 1996 employment injury and that she had the type of injury which would have resolved itself. Dr. Peterson suggested that appellant's symptoms could be explained by her emotional state.

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

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[9] 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 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 the 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. 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."[10]

In the present case, by letter dated July 6, 1998, appellant requested a hearing before an Office representative in connection with the Office's June 8, 1998 decision. By notice dated October 8, 1998, the Office advised appellant of the time and place of a hearing scheduled for October 28, 1998. She did not request postponement at least three days prior to the scheduled

[8] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[9] 5 U.S.C. § 8124(b).

[10] 20 C.F.R. § 10.137(c).

date of the hearing. Neither did appellant request within 10 days after the scheduled date of the hearing that another hearing be scheduled.

On appeal, appellant alleged that she did not receive the Office's October 8, 1998 notice advising her of the hearing to be held on October 28, 1998. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[11] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[12] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[13] The Office's finding of abandonment in this case rests on the strength of this presumption. The Office's October 8, 1998 notice which advised appellant of the time and place of a hearing scheduled for October 28, 1998 was addressed to 11444 Connecticut Avenue, Kensington, MD 20895. This was also the address to which the Office's June 8, 1998 decision and other documents clearly received by appellant were mailed and, therefore, it must be presumed to be a proper address for appellant. Prior to the issuance of the Office's November 6, 1998 decision, the record did not contain any evidence to rebut the presumption that appellant received the notice.

As noted above, appellant did not request postponement at least three days prior to the scheduled date of the hearing or request within 10 days after the scheduled date of the hearing that another hearing be scheduled. Therefore, the Office properly determined that she abandoned her request for a hearing.

[11] *George F. Gidicsin*, 36 ECAB 175, 178 (1984).

[12] *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

[13] *Larry L. Hill*, 42 ECAB 596, 600 (1991).

The decisions of the Office of Workers' Compensation Programs dated November 6 and June 8, 1998 are affirmed.

Dated, Washington, D.C.
June 7, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member