U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN R. DUTTON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Tomah, WI

Docket No. 99-486; Submitted on the Record;
Issued September 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on or about July 8, 1997 causally related to his June 17, 1992 accepted injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his hearing request.

On June 17, 1992 appellant, then a 36-year-old nursing assistant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on that date he sustained injury to his back when transferring a patient from a wheelchair to a "Geri" chair. The Office accepted this claim for a low back strain. A claim for recurrence of disability was filed and on July 8, 1994 an Office hearing representative found that a recurrence of disability was established commencing October 4, 1993.

On August 6, 1997 appellant filed a notice of recurrence of disability, alleging that he sustained a recurrence of the June 17, 1992 injury on or about July 8, 1997. Appellant contended stated that he never totally recovered from the original injury. Appellant submitted notes dated August 4 and 15, 1997 from Dr. Michael D. Nelson, a chiropractor, indicating that appellant should remain off work until August 14 to 20, 1997, respectively, bills from Nelson Chiropractic clinic and a physician's status report (Form CA-20) dated August 20, 1997, by Dr. Timothy A. Harbst, a Board-certified physical medicine and rehabilitation specialist, who noted that appellant was suffering from mechanical low back pain related to occupational exposure in 1992 and that appellant had a history of "flare-ups."

In response to a September 19, 1997 request by the Office for further information, appellant submitted chiropractic reports from Dr. Nelson and Dr. S.L. Harris.

In a medical report dated October 8, 1997, Dr. Harbst indicated that appellant was diagnosed with mechanical low back pain with onset dating back to the June 1992 employment injury. He followed appellant intermittently for recurrent flare-ups of low back pain and noted

that magnetic resonance imagings were interpreted as normal with no evidence of a herniated disc. A discogram was described as "abnormal" with a severe pain response at the L5-S1 level. Dr. Harbst noted that appellant's most recent flare-up occurred in July 1997 following which appellant stopped work. On September 18, 1997 he recommended that appellant initiate a return to work in the light-duty job category for four hours a day and then progress his work hours by two hours a day every two weeks. With regard to causal relationship, Dr. Harbst opined:

> "[T]he causal relationship is the fact that [appellant] has had recurrent episodes of the similar lumbosacral pain and occasional radicular features ever since his initial injury in 1992. There does not appear to be a specific insighting factor for his flare-ups as flare-ups may occur regardless of whether he is doing work activities or home activities."

Dr. Harbst also submitted his progress notes on appellant.

Dr. Harbst referred appellant to Dr. J.M. Tarlano for the purpose of a psychological evaluation and assistance with pain management. Dr. Tarlano filed medical reports dated August 21 and September 5 and 18, 1997. He indicated that appellant suffered from "pain disorder associated with both psychological factors and general medical condition."

In a decision dated November 20, 1997, the Office denied appellant's claim for a recurrence of disability finding that the medical evidence failed to establish that appellant sustained a recurrence of total disability on or after July 8, 1997 causally related to his accepted injury.

By letter dated December 8, 1997, appellant requested an oral hearing.

By letter dated July 25, 1998, the Office notified appellant of a hearing scheduled for September 17, 1998. Copies of this letter went to the employing establishment and appellant's attorney. By Form CA-1127a, the employing establishment responded, noting that they would not send a representative to the hearing, but did request a transcript. The record contains a copy of a letter sent by appellant's attorney to appellant, in which she stated that she would not be participating in the hearing.

By decision dated October 1, 1998, the hearing representative informed appellant that, as he did not appear at his scheduled hearing and did not present a timely written request for another hearing or show good cause as to his failure to attend the September 17, 1998 hearing, appellant abandoned his request for a hearing.[1]

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on or about July 8, 1997 causally related to his June 17, 1992 accepted injury.

An appellant who claims a recurrence of disability due to an accepted employment-

[1] In his appeal to the Board, appellant indicated that he never received a letter noting the hearing was set, nor to his knowledge, did his attorney.

related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted employment injury.[2] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[3]

In the instant case, Dr. Harbst's October 8, 1997 medical report does note a causal relationship between appellant's current disability and his original injury. Dr. Harbst stated that appellant had "recurrent episodes of similar lumbosacral pain and occasional radicular features ever since his initial injury in 1992" but noted the fact that there did not appear to be a specific insighting factor for his flare-ups. The Board finds that the reports of Dr. Harbst are not well rationalized with regard to his explanation of causal relationship. The Board further notes that he opined that appellant should increase his working schedule from four hours a day by two hours per day every two weeks. Dr. Harbst's remaining notes and reports and Dr. Tarlano's medical reports do not sufficiently relate the alleged July 8, 1997 recurrence of disability to the June 17, 1992 accepted injury. Furthermore, as neither Drs. Nelson nor Harris diagnosed lumbar subluxation based on x-ray evidence, they are not considered to be physicians under the Federal Employees' Compensation Act.[4] As appellant has not submitted the necessary rationalized medical evidence to substantiate that he sustained a recurrence of disability of his June 17, 1992 accepted injury on or about July 8, 1997, the Office's decision on this matter is affirmed.

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

Under the federal regulations relating to the Office's procedures on hearings, a hearing may be postponed by a written request if the request is received at least three days prior to the hearing. If a claimant fails to appear for a hearing, he or she may request in writing within 10 days after the scheduled hearing that another hearing be scheduled. Another hearing will be scheduled for good cause shown.[5]

In the present case, appellant requested an oral hearing before an Office hearing representative on December 8, 1997 and by letter dated July 25, 1998, the Office informed appellant that the oral hearing would be held on September 17, 1998 at 9:00 a.m. in Milwaukee, Wisconsin. The letter was addressed to "[appellant] 607 Cady Avenue, Tomar, WI 54660," the address appellant gave on his August 6, 1997 notice of recurrence and to which other correspondence was sent. Appellant did not request a postponement 3 days prior to the hearing

[2] *Jose Hernandez*, 47 ECAB 288, 294 (1996); *John E. Blount*, 30 ECAB 1374 (1979).

[3] *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996); *Frances B. Evans*, 31 ECAB 60 (1980).

[4] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist. *Id.* at 181 n.1.

[5] 20 C.F.R. § 10.137; *Nancy W. Gorman*, 48 ECAB 200-01 (1996).

and did not request one in writing within 10 days after the schedule date of the hearing. It is presumed under "the mailbox rule" that a properly addressed correspondence is mailed in the ordinary course of business unless rebutted.[6] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office, will raise the presumption the original was received. Appellant has not submitted evidence sufficient to rebut the presumption. After issuance of the October 1, 1998 decision, appellant submitted an argument pertaining to not receiving the notice of the hearing. The Board notes, however, that its jurisdiction is limited to reviewing that evidence which was before the Office at the time of its final decision. The Board may not consider for the first time on appeal whether appellant's explanation is sufficient to rebut the presumption of receipt under the "mailbox rule."[7] The Board further notes that appellant alleged that his attorney did not receive a copy of the hearing notice. However, the hearing notice indicated that a copy was sent to appellant's attorney. The record also includes a letter from appellant's attorney to appellant dated August 7, 1998 indicating that appellant's attorney received the notice. She advised appellant of the date, time and city of the hearing and noted that she would not be pursuing this matter for appellant. The Office's decision was proper.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated October 1, 1998 and November 20, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[6] *Clara T. Norga*, 46 ECAB 473, 480 (1995).

[7] The Board further notes that, although appellant alleges that he sent a change of address form to the Office "in June," there is no evidence to support this in the record.