U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. CHASE and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Hines, IL

Docket No. 99-2498; Submitted on the Record;
Issued October 16, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant developed degenerative joint disease in his right hip while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for an oral hearing.

On August 28, 1998 appellant, then a 48-year-old cook, filed an occupational disease claim alleging that the degenerative joint disease in his right hip was causally related to his employment. Appellant stopped work on July 8, 1998 and has not returned.

Evidence of record includes a radiology report from Dr. Alfred J. Lescher, a Board-certified radiologist, dated April 15, 1995, which notes no evidence of a fracture or other bony abnormality in appellant's right knee. Appellant also submitted a narrative report from Dr. Kelly Low, a chiropractor, dated August 27, 1998. Dr. Low noted that radiographs of appellant's right knee failed to show any abnormality, but later radiographs of appellant's hips and lumbar spine indicate bilateral degenerative joint disease of the hips as well as the lumbar spine, most pronounced on the right, with large osteophytic spurs bilaterally and pronounced reduction of the right femoralacetabular joint space.

In an October 22, 1998 letter, the Office advised appellant that the information submitted in his claim was not sufficient to determine whether appellant was eligible for benefits under the Federal Employees' Compensation Act. The Office advised appellant of the additional medical and factual evidence needed to support his claim. Specifically, appellant was asked to provide a physician's reasoned medical opinion, including a discussion by appellant's physician as to the causal relationship between appellant's claimed condition and specific employment factors. Additionally, appellant was informed that under the Act, chiropractors are only allowed to act as treating physicians for subluxations of the spine, which must be supported by radiology findings.

In response to the Office's letter, appellant forwarded a report from Dr. Low dated January 7, 1994. She reviewed AP and lateral views of appellant's lumbar spine. Dr. Low

diagnosed degenerative joint disease of the lumbar spine and pubic symphysis. She also noted a subluxation at the L4-5 levels.

In a decision dated December 8, 1998, the Office rejected appellant's claim. The Office found that there was no medical evidence to substantiate that appellant's medical condition was caused by his federal employment.

By letter dated December 19, 1998, appellant requested a hearing before an Office hearing representative. Appellant also submitted a narrative summary of his medical condition and work history.

By letter dated May 1, 1999, the Office informed appellant that an informal hearing would be held on June 15, 1999. On July 6, 1999 the Office found that appellant abandoned his request for an oral hearing before an Office hearing representative, for failure to appear at the hearing.

The Board finds that appellant has failed to establish that he sustained an injury while in the performance of duty.

An employee seeking benefits under the Act has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[1] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete medical certainty and must be supported by medical rationale explaining

[1] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[3]

In this case, appellant has not provided rationalized medical opinion evidence supporting a causal relation between his hip condition and his work conditions.

As noted above, part of the burden of proof includes the submission of rationalized medical evidence establishing that the claimed condition is causally related to employment factors. As appellant has not submitted such evidence, he has not met his burden of proof in establishing his claim.

In the instant case, medical reports from appellant's chiropractor, Dr. Low indicate bilateral degenerative hip disease and a subluxation at the L4-5 levels.

Section 8101(2) of the Act recognizes a chiropractor as a physician "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[4] In this case, appellant did not file a claim for a subluxation of the spine. Further, Dr. Low's diagnosis of degenerative joint disease of the lumbar spine and pubic symphysis cannot be considered medical evidence.[5]

Additionally, the radiology report from Dr. Lescher does not address appellant's claimed condition and in fact, notes that there is no evidence of a fracture or other bony abnormality in appellant's right knee.

As appellant has failed to attribute his hip condition to his federal employment, the Office properly denied his claim.

The Board also finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

In a decision dated July 6, 1999, the Office found that appellant abandoned his December 19, 1998, request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for June 15, 1999, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "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

[3] *Id.*

[4] 5 U.S.C. § 8101(2); *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[5] *Samuel Theriault*, 45 ECAB 586 (1994).

postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in 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."[6]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[7] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.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.

"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]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

[6] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[7] 20 C.F.R. § 10.622(b) (1999).

> "This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[8]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on June 15, 1999. The record shows that the Office mailed appropriate notice to claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The July 6, 1999 and December 8, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 16, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.e (January 1999).