U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. STEVENSON, JR. and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, San Francisco, CA

Docket No. 02-568; Submitted on the Record;
Issued August 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained injuries on October 24, 2000, as alleged; and (2) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned his request for a hearing before an Office hearing representative.

On December 5, 2000 appellant, then a 33-year-old criminal investigator, filed a traumatic injury claim alleging that on December 1, 2000 he sustained injuries to his neck and back when he was involved in a motor vehicle accident in the performance of duty. In support of his claim, appellant submitted the police accident report documenting the incident.

By letter dated January 11, 2001, the Office advised appellant that the information submitted was insufficient to establish that he sustained an injury on December 1, 2000 and requested that he submit additional factual and medical evidence, including a comprehensive medical report from his physician. The Office allowed 30 days for appellant to submit the requested medical evidence.

By letter dated January 17, 2001, appellant responded to the Office's request and submitted reports dated December 6 and 28, 2000 from Dr. James F. Hayes, a chiropractor whom he saw twice a week. Dr. Hayes diagnosed lumbar and cervical sprains and strains and indicated that he had treated appellant with chiropractic manipulation and traction.

By decision dated February 15, 2001, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the initial evidence submitted was sufficient to establish that the claimed event, incident or exposure occurred at the time, place and in the manner alleged, but denied the claim on the grounds that the record contained no medical evidence from a qualified physician diagnosing a medical condition caused by the automobile accident. The Office explained that a chiropractor cannot be considered a physician under the Federal Employees' Compensation Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.

By telephone call on February 21, 2001, the Office again explained to appellant the type of medical evidence needed to establish his claim.

By letter received March 2, 2001, appellant requested an oral hearing before an Office representative, but did not submit any additional evidence at that time.

By letter dated June 12, 2001, the Office advised appellant that a hearing in his case would be held on July 27, 2001 at the address specified. The record shows that the letter was properly addressed to appellant.

By decision dated August 23, 2001, the Branch of Hearings and Review found that as appellant had failed to appear for his oral hearing, he had abandoned his request.

The Board initially finds that appellant has not established that he sustained an injury as alleged.

A person who claims benefits under the Act[1] has the burden of establishing the essential elements of his claim, including that he sustained an injury while in the performance of duty and that he had disability as a result.[2] In accordance with the Federal (FECA) Procedure Manual, in order to determine whether an employee actually sustained an injury in the performance of his duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered in conjunction with the other.

The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.[3] In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and that generally can be established only by medical evidence.[4] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[5] The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[6]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Charles E. Evans*, 48 ECAB 692 (1997); *see* 20 C.F.R. § 10.110(a).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

[5] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[6] *Charles E. Evans*, *supra* note 2.

In this case, the Office accepted that appellant submitted sufficient factual information to establish that he was involved in an employment-related motor vehicle accident on December 1, 2000 at the time, place and in the manner alleged. Therefore, the only issue is whether appellant established that he sustained an injury as a result of the employment incident. Although, in a letter dated January 11, 2001, the Office requested that appellant submit medical evidence to establish that he sustained a personal injury as a result of the December 1, 2000 incident, appellant provided only copies of reports from his treating chiropractor. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[7] In the instant case, Dr. Hayes did not diagnose subluxation, but rather muscle sprains and strains. In addition, there is no evidence in the record that any x-rays were performed. As it is apparent that Dr. Hayes was not treating appellant for a subluxation that was demonstrated by x-ray, he is not a "physician" under the Act and his opinion on the diagnosis and cause of appellant's condition is of no probative medical value.[8] Therefore, the second prong of the fact-of-injury test has not been established and appellant has not met his burden of proof.

The Board further finds that Office properly determined that appellant abandoned his request for an oral hearing.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present:
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> "[T]he 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.
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> "(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.

[7] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[8] *Sheila A. Johnson*, 46 ECAB 323 (1994).

> "(3) 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."[9]

In the present case, the Office advised appellant, in a notice dated June 12, 2001, of the time and place of the hearing scheduled for July 27, 2001. The record 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.

On appeal appellant contends that he never received notice of the hearing date, time and place. 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.[10] The presumption arises when it appears from the record that the notice was properly addressed and duly mailed. In this case, the record contains a properly addressed copy of the hearing notice. This, together with the mailing custom or practice of the Office itself, raises the presumption that the original was received by the addressee. The Office's finding of abandonment in this case rests on the strength of this presumption.

On appeal appellant explained that he was not aware of the hearing scheduled in his case. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.[11] The Board may, therefore, not consider whether appellant's explanation is sufficient to rebut the presumption of receipt raised by the "mailbox rule." When the Office issued its decision on August 23, 2001, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

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

[11] 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

The decisions of the Office of Workers' Compensation Programs dated August 23 and February 15, 2001 are hereby affirmed.

Dated, Washington, DC
August 12, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member