

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUET BRINSON and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 01-919; Submitted on the Record;
Issued January 2, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has abandoned his request for an oral hearing before the Office of Workers' Compensation Programs hearing representative; and (2) whether appellant has met his burden of proof in establishing that he sustained a knee condition in the performance of duty causally related to factors of his federal employment.

On February 10, 1999 appellant, then a 56-year-old shipfitter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) wherein he alleged that he sustained an injury to his knees when, while riding bus transportation provided by the employing establishment, he slipped on the bus stairs. This claim was assigned number A14-339741. By letter dated April 6, 1999, the Office accepted appellant's claim for bilateral knee contusions. In a decision dated December 7, 1999, the Office found that the evidence did not support compensation for wage loss beyond June 10, 1999.

On June 7, 2000 appellant filed a notice of occupational disease (Form CA-2) wherein he contended that he suffered from severe osteoarthritis of both knees and degenerative joint disease in both knees as a result of his federal employment. Appellant submitted a supplemental statement wherein he noted that he developed this condition due to carrying 50-pound tool bags, climbing ladders and stairs, crawling on his knees in ships and walking 2.5 miles to the work site. He also noted that he was exposed to PCB and other chemicals during his federal employment, which led to his problems with his knees. Appellant noted that he had filed previous claims in relation to this disease. This claim was assigned number A14-348762.

In support of his claim, appellant submitted a December 21, 1999 medical report by Dr. Charles A. Peterson, a Board-certified orthopedic surgeon, wherein Dr. Peterson noted that he had treated appellant for 10 months with regard to his knees. Dr. Peterson concluded: "It is my opinion that this man's continued work at the shipyards doing the heavy duty that he has done has caused his arthritis of the knees. It is my opinion this is aggravated by an injury occurring on February 4, 1999, which made it more symptomatic."

Appellant also submitted a statement by a supervisor dated February 10, 2000, wherein he responded to various questions. The supervisor noted that appellant's description of duties was accurate and that he had numerous problems with his knees since 1991. He also noted that appellant was exposed to PCB.

Other documents submitted by appellant include medical progress notes and physician's reports from 1990 to 1997.

By letter dated March 31, 2000, the Office asked appellant to provide further information, including a description of his current employment duties. Appellant did not respond to this letter.

The Office also requested further information from the employing establishment. On April 11, 2000 the employing establishment responded to an Office request for further information about appellant's duties at work. The employing establishment noted:

"Since [appellant's] return to work on September [27,] 1999, his work assignment has been to answer [tele]phones, perform light filing and distribution of mail to office staff in the immediate area. There is no physical exertion involved, such as lifting, pushing, pulling, bending or stooping in this work. Work assignment is performed at a leisurely pace, with rest breaks whenever necessary. [Appellant's] job of record is [s]hipfitter, which he physically has been unable to perform in any capacity since 1996. Since that time, [appellant] has been assigned various work assignments within his physical limitations, which unfortunately, have been temporary as permanent job assignments have been unavailable."

The employing establishment also submitted a copy of its medical records on appellant. In addition to duplicative records, the employing establishment submitted a work limitation form from September 27 to October 19, 1999, which noted that appellant needed a sitting job with minimal work and special parking due to his bad knees. An October 20, 1999 progress report indicated that appellant had permanent work restrictions of "minimal walking/standing. No stooping, stairs, scaffolds, crawling, [vertical] ladders, kneeling. Sit down type job only."

By decision dated May 12, 2000, the Office denied appellant's claim, finding that appellant failed to establish a causal relationship between his occupational disease in his knees and his federal employment. The Office noted that appellant had filed several prior claims for knee injuries and that since "the issue of whether his past work activities as a shipfitter caused or contributed to his osteoarthritis of the knees was currently on appeal, the scope of this claim will be limited to the claimant's subsequent work activity." The Office found that appellant has worked since September 27, 1999 at a desk job and that since 1996 appellant has worked light duty, when available, due to work restrictions.

By letter dated April 26, 2000, but mailed May 30, 2000, appellant requested an oral hearing.

By letter dated October 14, 2000, appellant was notified that his hearing would take place on November 28, 2000 and referred to file number A14-0339741. By letter to appellant dated October 19, 2000, the hearing representative noted that although the October 14, 2000 letter

referenced file number A14-339741 as “that is the ‘master’ file number that contains the records of both his claim for the February 4, 1999 injury (A14-339741) and the claim for occupational disease that was filed on January 7, 2000 (A14-348762),” the hearing representative explained that the decision, which appellant made a timely request for hearing was the decision dated May 12, 2000, that was issued in case number A14-348762.

Appellant responded by letter dated November 6, 2000, wherein he stated that he requested a hearing on claim number A14-348762, the occupational disease claim.

By letter dated November 17, 2000, the hearing representative reiterated what she had said in her earlier letter, *i.e.*, that the hearing would be on the May 12, 2000 decision, that was issued in case number A14-3348762.

By letter dated December 12, 2000, the hearing representative notified appellant that as he did not show for the November 28, 2000 hearing, it was deemed that he abandoned his request for a hearing.

The Board finds that appellant abandoned his request for a hearing before the Office hearing representative.

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 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.”¹

These regulations, however, were once again revised 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.² 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.

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

² 20 C.F.R. § 10.622(b) (1999).

The legal authority governing abandonment of hearings now rests with the Office's procedure manual.³ Chapter 2.1601.6e 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, the 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, the 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, the 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.

"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."⁴

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on November 28, 2000. The record shows that the Office mailed appropriate notice to the claimant at his last known address. 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 Board finds that appellant abandoned his request for an oral hearing before the Office hearing representative.

Appellant contends on appeal that he did not appear at the oral hearing because the hearing was for claim number A14-0339741 and he had requested a hearing on A14-348762. Appellant's argument is without merit. Although the actual hearing notice may have sparked some confusion as it was labeled "File Number A14-0339741," the hearing representative wrote two letters, clearly explaining that the hearing involved the May 12, 2000 decision, in A14-

³ See *Levi Drew*, 52 ECAB _____ (Docket No. 99-1453, issued July 12, 2001).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6e (January 1999).

348762, *i.e.*, the occupational disease claim, which is the claim for which appellant requested the hearing. Appellant chose to ignore the hearing date. Accordingly, he abandoned his right to an oral hearing.

The Board further finds that the evidence is insufficient to establish a causal relationship between appellant's diagnosed condition in his knees and his recent work activities.

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden of establishing 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 filed within the applicable time limitation for the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁷

In an occupational disease claim such as this, the claimant must submit: (1) medical evidence establishing the 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 disease; and (3) medical evidence establishing that the employment factors were the proximate cause of the disease or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁸

In the case at hand, although it is undisputed that appellant's prior work as a shipfitter was strenuous, appellant has failed to provide any evidence of recent strenuous work. Although appellant alleged in his claim form and the statement attached thereto that he suffered an occupational disease to his knees due to carrying tool bags, climbing ladders and stairs, crawling on his knees and walking 2.5 miles to his work site, he failed to provide dates of these activities. Due to several outstanding prior claims on appeal, the Office requested that appellant provide such information and appellant failed to do so. The Office, however, provided information wherein it stated that appellant had been on light-duty work since 1996 and that since his return to work following his accepted February 4, 1999 injury, he has been doing light-duty office work. Due to appellant's failure to provide evidence of recent strenuous work, Dr. Peterson's report is not persuasive. Dr. Peterson indicated that appellant's "continued work at the shipyards doing the heavy duty that he has done has caused arthritis in his knees." Dr. Peterson's report is based on the assumption that appellant was continually performing heavy work, a fact not supported by the evidence of record. Accordingly, appellant has failed to establish that he sustained injuries to his knees as a result of his federal employment.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *Charles P. Evans*, 48 ECAB 692 (1997).

⁸ *Jerry D. Osterman*, 46 ECAB 500 (1995); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

The December 12 and May 12, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 2, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member