U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JODIE L. AUBREY and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Texarkana, TX

Docket No. 01-1178; Submitted on the Record;
Issued January 18, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that he sustained a recurrence of disability on January 27, 2000 causally related to his employment-related June 2, 1999 lumbar strain; and (2) whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant abandoned his request for a hearing before an Office hearing representative.

On June 2, 1999 appellant, then a 43-year-old woodworker, sustained an employment-related lumbar strain when he fell from a forklift. He received continuation of pay for intermittent periods and returned to light duty. The claim was adjudicated by the Office under file number 16-0341251. On September 8, 1999 appellant incurred a second employment-related injury when he was exposed to fumes in the workplace. This was accepted as atopic conjunctivitis and toxic effect due to exposure, and he stopped work due to this employment injury. The Office adjudicated this claim under file number 16-0347162.

On March 10, 2000 appellant submitted a claim under file number 16-0341251, the instant claim, for compensation for the period January 27 to March 28, 2000. By letter dated March 30, 2000, the Office informed him of the type of evidence needed to support his claim and, in response, he submitted medical evidence. In a decision dated May 10, 2000, the Office denied the claim, finding that appellant had not established disability after January 27, 2000 causally related to the employment-related back injury.

On May 17, 2000 appellant requested a hearing before an Office hearing representative. By letter dated January 18, 2001, the Office informed him that the hearing was scheduled for 10:00 a.m. on February 27, 2001 in Shreveport, Louisiana.[1] By decision dated March 13, 2001, the Office found that appellant abandoned his May 17, 2000 request for a hearing. The Office

[1] The hearing was initially scheduled for October 25, 2000 at Arlington, Texas. At appellant's request, the hearing was rescheduled to a closer location.

noted that the hearing was scheduled for February 27, 2001, 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. The instant appeal follows.

The Board finds that appellant has not established that he sustained a recurrence of disability on January 27, 2000 causally related to the June 2, 1999 employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[2]

Causal relationship is a medical issue,[3] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

Under the Federal Employees' Compensation Act,[5] the term "disability" means incapacity, because of the employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.[6]

The medical evidence in this case does not support that appellant sustained a recurrence of disability causally related to the accepted lumbar strain. The medical evidence includes[7] an attending physician's report dated December 8, 1999 in which Dr. C.C. Alkire, a Board-certified

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[2] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] *Mary J. Briggs*, 37 ECAB 578 (1986).

[4] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Maxine J. Sanders*, 46 ECAB 835 (1995).

[7] Appellant also submitted a November 17, 1999 medical report in regard to his chemical exposure. It provided no information regarding his back condition.

orthopedic surgeon, diagnosed herniated nucleus pulposa, lumbar and sciatica. He checked the "yes" box, indicating that the condition was employment related, provided lifting restrictions and did not indicate that appellant could not work. Dr. Joel T. Patterson, a neurosurgeon, provided an office visit check list and a prescription for physical therapy. In the instant case, while appellant submitted some medical reports, none provides an opinion that he was totally disabled due to the accepted lumbar strain. Appellant thus failed to discharge his burden of proof, and the Board finds that he failed to establish a recurrence of disability.

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

The legal authority governing abandonment of hearings rests with the procedure manual of the Office.[8] 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: 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.
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> "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.
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> "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]

[8] Effective January 4, 1999, Office 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. 20 C.F.R. § 10.622(b) (1999). 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.

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

In the present case, the Office scheduled a hearing before an Office hearing representative at a specific time and place on February 27, 2001. The record shows that the Office mailed appropriate notice to appellant at his proper 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.[10]

The decisions of the Office of Workers' Compensation Programs dated March 13, 2001 and May 10, 2000 are hereby affirmed.

Dated, Washington, DC
January 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[10] *Claudia J. Whitten*, 52 ECAB ____ (Docket No. 99-2128, issued August 22, 2001).