United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 07-1021**
	)	**Issued: September 7, 2007**
DEPARTMENT OF VETERANS AFFAIRS, LOUIS STOKES CLEVELAND MEDICAL CENTER, Brecksville, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2007 appellant timely appealed the July 13, 2006 merit decision of the Office of Workers' Compensation Programs, which terminated compensation and medical benefits. She also timely appealed the Office's December 29, 2006 nonmerit decision which found that she had abandoned her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective July 13, 2006; and (2) whether appellant abandoned her request for an oral hearing.

[1] The record on appeal contains evidence received after the Office issued its December 29, 2006 decision. The Board's review is limited to the evidence of record at the time the Office rendered its final decision. 20 C.F.R. § 501.2 (2007).

FACTUAL HISTORY

On January 8, 1974 appellant, then a 27-year-old nursing assistant, injured her back during an altercation with a patient. The Office accepted her claim for low back contusion, aggravation of discogenic pathology at L4-5, acute lumbosacral sprain with radiculitis and psychogenic overlay. Appellant last worked in 1976. On November 20, 1992 she underwent a decompression laminectomy and removal of herniated disc at L4-5, which the Office authorized. Following her 1992 surgery, appellant had a recurrent herniated disc at L4-5. However, because of her weight and cardiac condition she was not considered a suitable candidate for further surgery. In October 1995, appellant's then treating physician, Dr. Barry J. Greenberg, considered her to be totally and permanently disabled.[2] Dr. Dennis A. Glazer, an impartial medical examiner, expressed a similar opinion in April 2000.[3] While appellant continued to experience problems with her back, she was not receiving any specific psychiatric treatment for her accepted condition of psychogenic overlay.[4]

Dr. Steven A. Cremer, a Board-certified physiatrist, examined appellant on July 24, 2003. He diagnosed chronic lumbar pain and noted that there was not much he could do for appellant because of her multiple medical problems. A recent x-ray of the lumbar spine showed significant degenerative disease, inadequate fusion with motion present on flexion and extension and foraminal encroachment by spurs from the facet joints at multiple levels in the lumbar spine. Dr. Cremer recommended medication, a transcutaneous electrical nerve stimulator (TENS) unit and a follow-up evaluation in one month.

In a January 14, 2004 report, Dr. Cremer noted that appellant had not returned for a follow-up examination and, therefore, he could not say whether she benefited from the recommended TENS treatment. In response to a series of questions posed by the Office, Dr. Cremer indicated that there was no evidence of any low back contusion on appellant's previous examination. He also indicated that clinical findings of lower extremity weakness supported that appellant had an ongoing lumbosacral sprain with radiculitis. Dr. Cremer stated that there was a temporary aggravation of the L4-5 disc, but he was unable to determine whether the aggravation had ceased. With respect to appellant's 1992 surgery, he noted that appellant's radiculitis and limited range of motion were evidence of ongoing residuals from the prior surgery.

Dr. Priti Nair, a Board-certified physiatrist and Office referral physician, examined appellant on April 13, 2004. He found that appellant's low back contusion had completely resolved. Dr. Nair also stated that there were no objective findings on physical examination to

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[2] Dr. Greenberg is a Board-certified orthopedic surgeon and he performed the November 20, 1992 surgical procedure.

[3] Dr. Glazer is a Board-certified orthopedic surgeon. He found that appellant was severely limited in the activities she could perform. According to Dr. Glazer, appellant could work one hour or less sitting and pushing up to five pounds. The Office selected Dr. Glazer to resolve a conflict of medical opinion between Dr. Greenberg and Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon and Office referral physician.

[4] Dr. Michael A. Kachmer, a Board-certified psychiatrist and Office referral physician, evaluated appellant on September 17, 1999 and found that she was not suffering from any significant psychiatric disorder at that time.

support ongoing lumbosacral strain with radiculitis. Regarding the accepted aggravation of discogenic pathology at L4-5, he noted that there were insufficient physical findings to suggest continued aggravation. However, Dr. Nair noted that appellant's reported symptoms of low back pain and an April 13, 1993 lumbar magnetic resonance imaging (MRI) scan were consistent with discogenic pathology at L4-5. According to him, the physical examination findings did not support an active radiculopathy. Dr. Nair also noted that the pain distribution appellant reported in her left lower extremity was more consistent with the degenerative pathology noted on the MRI scan at L5-S1. He concluded that the condition of L4-5 discogenic pathology was static without any substantial alteration in appellant's physical condition and the aggravation caused by work activity had returned to baseline level. While appellant could not perform her duties as a nursing assistant, Dr. Nair indicated that she could potentially work in a light-duty or sedentary job classification. He also noted that there was no need for further medical treatment.

Dr. Nair did not complete a work capacity evaluation (Form OWCP-5c) as previously requested and it was unclear from his opinion whether appellant's inability to resume her former nursing assistant duties was due to her January 8, 1974 employment injury. The Office requested clarification on several occasions, but was unable to obtain a supplemental report from Dr. Nair.

Approximately two years lapsed before the Office referred appellant for another second opinion examination. Dr. Kaffen, who previously examined appellant at the Office's behest in 1999, reexamined her on April 5, 2006. In a report dated May 3, 2006, he found that the accepted conditions of low back contusion, acute lumbosacral sprain and lumbar radiculitis, secondary to herniated disc at L4-5 had all resolved. Dr. Kaffen also noted that there was "no indication that [appellant] sustained an aggravation of her preexisting condition." While he noted that appellant had undergone surgery in 1992, he did not otherwise comment on long-term effects of the procedure. Dr. Kaffen also stated that appellant had nonwork-related conditions consisting of lumbar facet arthrosis, degenerative disc disease at L5-S1 and recurrent left-sided herniated disc at L4-5. According to him, appellant's current back problems were not causally related to her 1974 employment injury, but secondary to the nonallowed conditions of recurrent herniated disc and degenerative disc disease at L5-S1 as well as facet arthrosis. Dr. Kaffen recommended that future treatment consist of nonnarcotic analgesic medication and restriction of activities. He did not complete a work capacity evaluation form or otherwise address appellant's ability to resume work as a nursing assistant.

On May 31, 2006 the Office advised appellant of its intention to terminate her compensation and medical benefits based on the opinions of Dr. Nair and Dr. Kaffen. Appellant was afforded 30 days to respond to the proposed termination of benefits. She did not respond and on July 13, 2006 the Office issued a final decision terminating future compensation and medical benefits effective immediately.

On August 10, 2006 appellant requested an oral hearing. On November 14, 2006 the Office notified appellant that a teleconference/hearing was scheduled for December 20, 2006. The hearing did not proceed as scheduled and on December 29, 2006, the Branch of Hearings & Review issued a formal decision finding that appellant abandoned her hearing request.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[7] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[8]

ANALYSIS -- ISSUE 1

The Office terminated compensation and medical benefits on the basis that the weight of the medical evidence established that the work-related conditions of "low back contusion, acute lumbosacral sprain with lumbar radiculitis, aggravation of discogenic pathology at L4-5 and psychogenic overlay" had resolved. The Office relied upon Dr. Kachmer's September 17, 1999 psychiatric evaluation as a basis for concluding that the accepted condition of psychogenic overlay had resolved. With respect to appellant's orthopedic condition, the Office relied on Dr. Nair's April 13, 2004 report and Dr. Kaffen's May 3, 2006 report as a basis for terminating compensation and medical benefits.

While the record supports that appellant does not have any continuing disability or residuals associated with her accepted condition of psychogenic overlay, the Board finds that the Office did not meet its burden to terminate compensation and medical benefits relevant to appellant's accepted orthopedic condition. The Office previously questioned Dr. Nair's April 13, 2004 report and requested clarification from him. After repeated requests, the Office was unable to obtain a supplemental report and, therefore, it referred appellant to Dr. Kaffen for evaluation. The Office's subsequent resurrection of Dr. Nair's report is untenable. Dr. Nair's opinion as to whether appellant has any continuing employment-related disability remains unclear. In this instance, the Office offered no reasonable explanation for relying on a medical opinion it had previously found to be unreliable; and was by the time of the Office's decision several years stale. The Board also notes that Dr. Nair based his April 13, 2004 opinion in larger part on what was at the time an 11-year-old lumbar MRI scan. Appellant obtained a more recent x-ray of her lumbosacral spine in July 2003 that Dr. Nair apparently was not privy to.

With respect to Dr. Kaffen's recent opinion, the Board notes that he had previously examined appellant for the Office, but neither Dr. Kaffen nor the Office made mention of his prior report dated July 10, 1999. His current report, dated May 3, 2006, is deficient for at least three reasons. First, Dr. Kaffen did not comment on appellant's ability to resume her former

[5] *Curtis Hall*, 45 ECAB 316 (1994).

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[7] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[8] *Calvin S. Mays*, 39 ECAB 993 (1988).

duties as a nursing assistant. Second, he did not accept that appellant sustained an aggravation of a preexisting condition. The Office accepted the claim for "aggravation of discogenic pathology at L4-5." Dr. Kaffen's three-page report offers no explanation for his disagreement with the Office's acceptance of the claim for aggravation of discogenic pathology. From both a legal and medical standpoint, this claim has proceeded for over three decades on the premise that the January 8, 1974 employment incident aggravated a preexisting degenerative condition in appellant's lumbar spine. Absent a clear rationale, Dr. Kaffen's contrary opinion is unpersuasive. His May 3, 2006 report is also deficient in that he did not identify appellant's November 20, 1992 L4-5 laminectomy and herniated disc removal as employment related. This is particularly significant because Dr. Kaffen noted that appellant's July 4, 2003 x-ray revealed a laminectomy defect at L4-5. He also noted, without explanation, that appellant's recurrent disc herniation at L4-5 was not employment related. If the 1992 Office-approved surgery failed to resolve appellant's condition, then it is unclear how her current L4-5 disc herniation is not associated with her accepted employment injury. When Dr. Cremer examined appellant on July 24, 2003 he noted x-ray evidence of an "inadequate fusion…." In his January 14, 2004 report, Dr. Cremer noted that there were ongoing residuals from appellant's 1992 surgery.

The evidence relied upon by the Office to terminate compensation and medical benefits does not address the issue of whether appellant has any disability or residuals associated with her November 20, 1992 Office-approved surgery. In fact, the decision's conclusion does not include the November 20, 1992 surgery among the list of accepted employment-related conditions. Because the effects of appellant's 1992 surgery have not been adequately addressed, the Board finds that the Office improperly terminated appellant's compensation and medical benefits with respect to her accepted orthopedic condition. This aspect of the July 13, 2006 decision is accordingly reversed. However, the Office properly found that appellant's psychiatric condition had resolved. Therefore, she is no longer entitled to medical benefits for treatment of the accepted condition of psychogenic overlay.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision on her claim is entitled, upon timely request, to a hearing before a representative of the Office.[9] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.[10] The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.[11]

[9] 5 U.S.C. § 8124(b) (2000); 20 C.F.R. § 10.616(a) (2007).

[10] 20 C.F.R. § 10.617(b). The employing establishment will be provided similar notice at least 30 days in advance of the scheduled hearing. *Id.*

[11] *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002). In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient. *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the "mailbox rule." *Id.* It arises when the record reflects that the notice was properly addressed and duly mailed. *Id.*

Assuming proper notice has been provided by the Office, a hearing is considered to have been abandoned when each of the following three conditions has been met: (1) the claimant has not requested a postponement; (2) the claimant has failed to appear at a scheduled hearing; and (3) the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.[12] If all three conditions have been met, the Branch of Hearings & Review will issue a formal decision finding that the claimant has abandoned her request for a hearing, and the case record will be returned to the appropriate district Office.[13]

ANALYSIS -- ISSUE 2

On August 10, 2006 appellant timely requested an oral hearing in connection with the Office's July 13, 2006 decision terminating compensation and medical benefits. She chose the option of having a teleconference if the Office deemed it suitable. In a November 14, 2006 notice to appellant at her address of record, the Office advised her that the hearing she requested was scheduled for 10:00 a.m., December 20, 2006.[14] The record does not indicate that appellant participated in the scheduled teleconference/hearing. On December 29, 2006 the Office issued a decision finding that appellant had abandoned her request for a hearing.

Appellant does not claim that she did not receive the November 14, 2006 hearing notice. On appeal, she explained that she was unable to participate in the scheduled hearing because she received a call on December 20, 2006 from her son's physician informing her that he would likely die that day. According to appellant, her son passed away at approximately 4:00 p.m. on December 20, 2006.[15]

When the Office issued its decision on December 29, 2006, the record contained no explanation for appellant's failure to participate in the December 20, 2006 scheduled hearing. Appellant acknowledged on appeal that she had not previously advised the Office that her son had passed away the day of the scheduled hearing. A finding of abandonment is appropriate where the claimant has not requested a postponement, has failed to appear at the scheduled hearing, and has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.[16] All three conditions are present in the instant case, and therefore, the Office properly found that appellant abandoned her request for a hearing. The unfortunate circumstances of her son's untimely demise would have undoubtedly justified

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

[13] *Id.* In cases involving prerecoupment hearings, the Branch of Hearings & Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district Office. *Id.*

[14] The November 14, 2006 notice also included a toll free telephone number and a pass code, along with instructions on how to connect to the teleconference/hearing.

[15] Appellant provided the Board documentation relevant to her son's date, time and cause of death. As previously noted, the Board may not consider evidence that was not a part of the record at the time the Office issued its final decision. *See supra* note 1.

[16] *See supra* note 12.

postponement of appellant's hearing.[17] However, she did not provide this information and the proper documentation in a timely fashion. Because the record at the time the Office issued its decision contained no explanation for appellant's failure to participate in the December 20, 2006 scheduled hearing, the Office's December 29, 2006 decision was proper.

CONCLUSION

The Office properly terminated appellant's medical benefits with respect to her accepted condition of psychogenic overlay. However, the Office did not meet its burden to terminate wage-loss compensation and medical benefits with respect to appellant's accepted orthopedic condition and approved surgery. Additionally, the Branch of Hearings & Review properly found that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2006 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part in accordance with this decision. The December 29, 2006 decision of the Branch of Hearings & Review is affirmed.

Issued: September 7, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] *See* 20 C.F.R. § 10.622(c).