United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
and	)	**Docket No. 08-1454**
	)	**Issued: December 8, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 21, 2008 appellant filed a timely appeal of a June 5, 2007 merit decision of the Office of Workers' Compensation Programs, denying her claim for wage-loss compensation for disability during the period February 4 to 12, 2007 and a December 3, 2007 nonmerit decision, finding that she abandoned her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she was disabled from February 4 to 12, 2007 due to her accepted employment injury; and (2) whether the Office properly found that she abandoned her request for an oral hearing. On appeal, she contends that she did not receive notice of the hearing.

FACTUAL HISTORY

On September 19, 2006 appellant, then a 63-year-old transportation security screener, filed a traumatic injury claim alleging that on that date she hurt her left shoulder, neck and small finger on her left hand as a result of removing a heavy bag from a conveyor belt. By letter dated December 27, 2006, the Office accepted the claim for left rotator cuff syndrome. It authorized left shoulder surgery which was performed on January 9, 2007 by Dr. Robert J. Grondel, an attending Board-certified orthopedic surgeon. On January 18, 2007 Dr. Grondel released appellant to return to modified-duty work with restrictions regarding the use of her left arm.

The Office paid appellant wage-loss compensation through February 3, 2007 because the employing establishment was unable to provide her with modified-duty work in accordance with Dr. Grondel's restrictions. On January 31, 2007 the employing establishment offered her a limited-duty position effective February 4, 2007. On February 12, 2007 appellant accepted the job offer and returned to work on February 13, 2007.

On February 16, 2007 appellant filed a claim for wage-loss compensation for the period February 4 to 12, 2007. In a February 26, 2007 treatment note, Dr. Grondel stated that appellant was totally disabled for work from January 9 through February 12, 2007. He released her to return to light-duty work with restrictions on February 13, 2007.

By letter dated March 13, 2007, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the medical evidence she needed to submit including, a medical report from Dr. Grondel explaining what objectively changed in her condition since she was originally released to light-duty work with restrictions effective January 18, 2007. The Office also requested that Dr. Grondel explain what objectively changed in appellant's medical condition that restricted her from performing her work duties effective February 4, 2007.

Reports of Tony K. Iwakawa, appellant's physical therapist, addressed the treatment of appellant's left shoulder during the period March 5 through May 7, 2007.

In a March 22, 2007 work capacity evaluation (Form OWCP-5c) and May 2, 2007 treatment note, Dr. Grondel stated that appellant could perform modified-duty work with restrictions. On February 12, 2007 he prescribed physical therapy three times per week for three to four weeks. In a May 2, 2007 report, Dr. Grondel stated that appellant sustained arthritis and pain in the left shoulder acromioclavicular (AC) joint, cervical pain and a nontraumatic left rotator cuff tear.

An April 2, 2007 report of Dr. David M. Fadell, a hand surgeon, stated that appellant sustained sprains and strains of the left wrist, hand and metcarpophalangeal joint.

By decision dated June 5, 2007, the Office denied appellant's claim, on the grounds that the evidence of record failed to establish that she was totally disabled from February 4 to 12, 2007 due to her accepted September 19, 2006 employment injury. The decision was mailed to appellant at her address of record.

On June 20, 2007 appellant requested a telephonic oral hearing before an Office hearing representative. Her request had the same return address.

By letter dated October 5, 2007, the Office notified appellant that her telephonic oral hearing would be held on November 8, 2007 at 1:00 p.m. Eastern Time. It instructed her to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call. The letter was mailed to appellant at her address of record.

In an undated note received by the Office on November 5, 2007, appellant advised that she had a new address and telephone number.

By decision dated December 3, 2007, the found that appellant had abandoned her request for an oral hearing. It noted that she had received written notification of the telephonic hearing 30 days in advance of November 8, 2007 and had failed to appear. The Office found that there was no evidence of record that appellant contacted it, either prior or subsequent to the scheduled hearing, to explain her failure to appear. It mailed the decision to appellant's new address of record.[1]

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.[2] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[3] Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[4] The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[5] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.[6]

[1] Following the issuance of the Office's December 3, 2007 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office with a formal written request for reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

[2] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[3] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[4] *Gary J. Watling*, 52 ECAB 278 (2001).

[5] *Manuel Garcia*, 37 ECAB 767 (1986).

[6] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left rotator cuff syndrome on September 19, 2006 in the performance of duty. On February 16, 2007 appellant sought compensation for wage loss for disability from February 4 to 12, 2007. The Office, by decision dated June 5, 2007, found that appellant was not totally disabled for work during the claimed period. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and the accepted condition.[7]

Dr. Grondel's February 26, 2007 treatment note stated that appellant was totally disabled for work from January 9 through February 12, 2007. He released her to return to light-duty work with restrictions on February 13, 2007. Dr. Grondel, however, did not explain the basis for changing his medical opinion one month after releasing appellant to return to work. He failed to provide any rationale for the change in his January 18, 2007 opinion that appellant could return to modified-duty work with restrictions as requested by the Office. The Board, therefore, finds that Dr. Grondel's February 26, 2007 treatment note is insufficient to establish that appellant was disabled during the period February 4 to 12, 2007 causally related to her September 19, 2006 employment injury.

Dr. Grondel's February 12, 2007 prescription ordered physical therapy for appellant three times per week for three to four weeks. In a March 22, 2007 OWCP-5c form and May 2, 2007 treatment note, he stated that appellant could work with restrictions. In a May 2, 2007 report, Dr. Grondel stated that she sustained arthritis and pain in the left shoulder AC joint, cervical pain and a nontraumatic left rotator cuff tear. However, this evidence does not address whether appellant was totally disabled during the claimed period due to her accepted employment-related injury and is devoid of a history of injury and treatment. The Board, therefore, finds that Dr. Grondel's prescription, OWCP-5c form, treatment note and report, do not support appellant's claimed disability from February 4 to 12, 2007.

Similarly, Dr. Fadell's April 2, 2007 report does not establish appellant's claim. He stated that appellant sustained sprains and strains of the left wrist, hand and metcarpophalangeal joint. However, Dr. Fadell does not address whether appellant was totally disabled from February 4 to 12, 2007. Further, he did not opine, with rationalized medical opinion, that the diagnosed conditions were caused by the accepted employment injury.

The reports of Mr. Iwakawa, appellant's physical therapist, which addressed the treatment of appellant's left shoulder, do not constitute probative medical evidence. A physical therapist is not a "physician" as defined under the Act.[8] Therefore, Mr. Iwakawa's reports do not constitute competent medical evidence to support appellant's claim.

Appellant has failed to submit rationalized medical evidence establishing that her total disability during the period February 4 to 12, 2007 resulted from the residuals of her accepted

[7] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[8] *See David P. Sawchuk*, 57 ECAB 316 (2006).

September 19, 2006 left rotator cuff syndrome. Therefore, the Board finds that she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[9] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the 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 to appellant and her representative a notice of a scheduled hearing.[11]

The authority governing abandonment of hearings 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.
>
> "(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.

[9] 20 C.F.R. § 10.616(a).

[10] 20 C.F.R. § 10.617(b). Office procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (January 1999).

[11] *See Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

"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."[12]

ANALYSIS -- ISSUE 2

Appellant made her request for an oral hearing within 30 days of the Office's June 5, 2007 decision denying her claim for wage-loss compensation. Her request was timely and entitled her to a hearing as a matter of right. On October 5, 2007 the Office notified appellant that a telephonic oral hearing was to be held on November 8, 2007 and provided a telephone number and pass code. On appeal, appellant contends that she did not attend the scheduled hearing because she did not receive the notice of hearing. However, the record reflects that a copy of the October 5, 2007 hearing notice was mailed to appellant's address of record and was not returned as undeliverable. Appellant's hearing request contained her address. Although she subsequently provided change of address information to the Office to reflect her new address, she did so after the Office sent her notification of the hearing. Appellant did not inquire about the status of her hearing request. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[13] This is known as the mailbox rule. As the record reflects that the Office mailed a hearing notice to appellant's address of record at the time the notice was sent, it is presumed that it arrived at her mailing address. The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for her failure to attend within 10 days of the scheduled date of the hearing. As the circumstances of this case meet the criteria for abandonment, the Board finds that appellant abandoned her request for a hearing.

CONCLUSION

The Board finds that appellant has failed to establish that she was disabled from February 4 to 12, 2007 due to her accepted employment injury. The Board further finds that the Office properly found that appellant abandoned her request for an oral hearing.

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

[13] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

ORDER

IT IS HEREBY ORDERED THAT the December 3 and June 5, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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