United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	
U.S. POSTAL SERVICE, NORTH HOUSTON PROCESSING & DISTRIBUTION CENTER, Houston, TX, Employer	)	**Docket No. 08-1068** **Issued: August 17, 2009**

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 February 27, 2008 appellant timely appealed the April 20, 2007 merit decisions of the Office of Workers' Compensation Programs, which denied both a schedule award and a claimed recurrence of disability. She also timely appealed the Office's Branch of Hearings and Review's October 24, 2007 nonmerit decision finding that she had abandoned her hearing requests. 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 appellant sustained a recurrence of disability beginning August 23, 2006, causally related to her March 16, 1997 employment injury; (2) whether she is entitled to a schedule award; and (3) whether she abandoned her hearing requests.

[1] The record on appeal includes evidence received after the Office issued its April 20, 2007 merit decision. The Board cannot consider evidence for the first time on appeal. 20 C.F.R. § 10.501.2(c) (2008).

FACTUAL HISTORY

Appellant, a 52-year-old flat sorting machine operator, has an accepted claim for lumbar strain and aggravation of lumbar degenerative disc disease, which arose on March 16, 1997. The Office authorized an October 26, 1998 lumbar laminectomy and fusion at L4-5 and L5-S1. Appellant received appropriate wage-loss compensation. The claim was later expanded to include lumbar postlaminectomy syndrome as an accepted condition.

In May 2006 appellant's treating physician, Dr. David Suchowiecky, a psychiatrist specializing in pain management, released her to return to work in a full-time, limited-duty capacity.[2] Appellant accepted a limited-duty job offer as a primary line clerk and returned to work May 17, 2006. On June 22, 2006 she accepted another limited-duty position as a clerk assigned to the postal automation redirection system (PARS) unit.

On July 25, 2006 appellant filed a claim for recurrence of disability beginning July 14, 2006. In August 2006 she filed additional claims for compensation (Form CA-7) for lost wages during the period June 5 to August 22, 2006. By decision dated October 31, 2006, the Office denied appellant's claim for wage-loss compensation for the period June 5 to August 22, 2006.[3]

On November 3, 2006 appellant filed another Form CA-7 claiming lost wages for the period August 23 through November 3, 2006.[4] She also filed a claim for a schedule award. The Office advised appellant on November 17, 2006 of the need for additional medical and factual information regarding both the schedule award and her claim for wage-loss compensation beginning August 23, 2006.

Appellant provided the Office with various treatment records from Dr. Suchowiecky who treated her for complaints of low back pain and depression on August 3, September 5 and 19, October 25 and 31, 2006.[5] On each of these dates Dr. Suchowiecky's treatment notes reflected that appellant was working full time. Effective October 31, 2006, Dr. Suchowiecky released appellant to full duty. His November 22, 2006 progress notes similarly reflected that appellant was working, but when Dr. Suchowiecky saw appellant on December 11, 2006, he reported that she was not working.

Dr. Michael G. Kaldis, a Board-certified orthopedic surgeon, examined appellant on December 12, 2006.[6] At that time, appellant's chief complaints were low back and bilateral leg

[2] Dr. Suchowiecky first saw appellant on March 3, 2004, at which time he diagnosed pain disorder and depression.

[3] Appellant did not exercise her appeal rights with respect to the Office's October 31, 2006 merit decision.

[4] The employing establishment certified appellant's absence on the following dates: August 25 through 29, 2006 (40 hours); September 11, 12, 23 and 24, 2006 (22 hours); the entire month of October 2006 (184 hours); and November 3, 2006 (8 hours).

[5] The doctor's handwritten progress notes are largely illegible.

[6] Dr. Kaldis had previously examined appellant on November 7, 2005.

pain. Dr. Kaldis' physical examination of the lower extremities revealed no abnormalities. Appellant's strength and range of motion were both normal. Dr. Kaldis also found no neurological deficits. With respect to appellant's spine, he reported a mild limitation in flexion and lateral bending. A recent x-ray of the lumbar spine revealed that the cages from appellant's 1998 surgery were in good position at L4-5 and L5-S1. Dr. Kaldis indicated that he saw no reason for removal of the cages or exploration of the surgical site. He, therefore, referred appellant back to Dr. Suchowiecky for pain management.

On December 20, 2006 Dr. Suchowiecky advised that appellant would be completely incapacitated from December 22, 2006 to January 12, 2007 due to pain in her lower back. On January 12, 2007 he advised that appellant could resume full-time work with limited restrictions. On January 19, 2007 Dr. Suchowiecky indicated that appellant was completely incapacitated from January 13 to 18, 2007 due to lower back pain. He also completed a January 19, 2007 duty status report (Form CA-17) indicating that appellant could immediately resume full-time work with limited restrictions, which included a 10-pound lifting restriction, one hour of bending/stooping and no twisting or kneeling.

On April 20, 2007 the Office issued two separate decisions; one denying appellant's claim for wage-loss compensation beginning August 23, 2006 and the other denying her claim for a schedule award.

On May 2, 2007 appellant requested oral hearings with respect to both April 20, 2007 decisions. On August 21, 2007 the Branch of Hearings and Review notified her that her requested telephone hearings were scheduled for October 10, 2007 at 1:15 and 2:00 p.m.[7]

By decision dated October 24, 2007, the Branch of Hearings and Review found that appellant abandoned her requested hearings. The decision noted that hearings were scheduled for October 10, 2007 and she had been provided 30-days' advance written notice of the hearing. However, appellant failed to appear and did not provide an explanation for her absence either prior or subsequent to the scheduled hearings. Based on these factors, the Office concluded that appellant had abandoned her hearing requests.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[8] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such

[7] Appellant notified the Office on June 11, 2007 of her recent change of address. The Office acknowledged the change of address by letter dated June 21, 2007. The Branch of Hearings and Review mailed its August 21, 2007 notice to appellant's new address of record.

[8] 20 C.F.R. § 10.5(x).

an assignment are altered so that they exceed her established physical limitations.[9] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy her burden of proof by showing a change in the nature and extent of the injury-related condition such that she was no longer able to perform the light-duty assignment.[10]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing that the recurrence of disability is causally related to the original injury.[11] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[12] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[13]

ANALYSIS -- ISSUE 1

Appellant has not alleged that her claimed recurrence of disability beginning August 23, 2006 was the result of a change in the nature and extent of her limited-duty assignment. There is no evidence that the employing establishment either withdrew the June 22, 2006 limited-duty assignment or otherwise altered appellant's job duties in the PARS unit prior to her work stoppage. Therefore, if appellant is to prevail on her recurrence claim, she must establish a change in the nature and extent of her employment-related condition.[14]

The contemporaneous medical evidence does not support an employment-related disability on or after August 23, 2006. Neither Dr. Kaldis nor Dr. Suchowiecky established that appellant was disabled from performing her limited-duty assignment as a result of her March 16, 1997 accepted employment injury. Dr. Kaldis' December 12, 2006 report did not address whether appellant was disabled for work. Dr. Suchowiecky's progress notes from early August 3 through November 22, 2006 reflected, at least to his knowledge, that appellant had been working full time. It was not until December 11, 2006 that Dr. Suchowiecky first reported that appellant was not working. Over the next five weeks he found appellant completely incapacitated due to pain in her lower back. Noticeably absent from Dr. Suchowiecky's December 2006 and January 2007 treatment records is any assessment as to the cause of appellant's debilitating back pain. The current record is devoid of any rationalized medical evidence attributing appellant's claimed disability on or after August 23, 2006 to her accepted employment injury. Consequently, appellant has failed to establish a change in the nature and extent of the injury-

[9] *Id.*

[10] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[11] 20 C.F.R. § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[12] *See Helen K. Holt, supra* note 11.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[14] *Theresa L. Andrews, supra* note 10.

related condition such that she was no longer able to perform her light-duty assignment. The Office, therefore, properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[15] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[16] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[17]

ANALYSIS -- ISSUE 2

Appellant has an accepted claim for an employment-related lumbar spine injury. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[18] To the extent that appellant's accepted back injury has caused permanent impairment to her lower extremities, a schedule award would be appropriate. The reports and treatment records provided by Dr. Kaldis and Dr. Suchowiecky, however, do not identify an employment-related permanent impairment affecting either lower extremity. Dr. Suchowiecky's progress notes offer little or no insight with respect to determining the extent of any permanent impairment and Dr. Kaldis' latest report suggests the absence of any permanent impairment to the lower extremities. Dr. Kaldis' December 12, 2006 report noted complaints of lower back and bilateral leg pain, but, apart from appellant's subjective complaints, his examination of her lower extremities revealed no neurological deficits or any other abnormalities with respect to decreased strength or loss of range of motion. Accordingly, the Board finds that the medical evidence of record fails to establish that appellant has permanent impairment of a scheduled member. The Office, therefore, properly denied her claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 3

A claimant dissatisfied with a decision on her claim is entitled, upon timely request, to a hearing before a representative of the Office.[19] Unless otherwise directed in writing by the

[15] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

[16] 20 C.F.R. § 10.404.

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[18] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[19] 5 U.S.C. § 8124(b); 20 C.F.R. § 10.616(a).

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.[20] The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.[21] Assuming proper notice has been provided by the Office, a hearing is considered to have been abandoned when the following conditions have 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.[22]

ANALYSIS -- ISSUE 3

Appellant's hearings were scheduled for October 10, 2007, but she failed to appear. The record indicates that the Branch of Hearings and Review provided her written notice of the scheduled hearings on August 21, 2007, which was more than 30-days' advance notice. The hearing notice was mailed to appellant's address of record, which is the same address she used with respect to the filing of the current appeal. As noted, appellant did not appear at the October 10, 2007 hearings and there is no indication from the record that she requested a postponement prior to the hearing. Additionally, there is no evidence that she contacted the Branch of Hearings and Review within 10 days after the scheduled hearing. The Board finds that the Branch of Hearings and Review provided appellant timely notification of the hearings scheduled for October 10, 2007. Appellant did not attend the hearings, she did not request postponement, and she did not contact the Office within 10 days after the scheduled hearings. Therefore, all conditions necessary for a finding of abandonment have been met.

CONCLUSION

Appellant has not established that she sustained a recurrence of disability on August 23, 2006, causally related to her March 16, 1997 employment injury. The Board further finds that she is not entitled to a schedule award. Additionally, the Branch of Hearings and Review properly found that appellant abandoned her previously requested hearings.

[20] 20 C.F.R. § 10.617(b).

[21] *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

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

ORDER

IT IS HEREBY ORDERED THAT the October 24 and April 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2009
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