United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 08-1447**
	)	**Issued: March 10, 2009**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, French Camp, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 April 21, 2008 appellant timely appealed the September 20, 2007 merit decision of the Office of Workers' Compensation Programs, which terminated her benefits. She also timely appealed the Branch of Hearings & Review's March 20, 2008 nonmerit decision finding 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 wage-loss compensation and medical benefits effective September 20, 2007; and (2) whether appellant abandoned her request for an oral hearing.

[1] The record on appeal includes evidence received after the Office issued its September 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 31-year-old distribution process worker, injured herself in the performance of duty on July 6, 2005. She was participating in a training exercise that required her to repel from a 25-foot high platform. Appellant did not have a functioning full-body harness. Instead, she used an escape belt, which wrapped around her chest and underneath both arms. When appellant stepped off the platform she unexpectedly experienced a jerky motion. She was also apparently unaware that she was required to support her own weight.[2]

The Office initially accepted appellant's claim for neck strain and right shoulder strain. The claim was later expanded to include degeneration of cervical intervertebral discs at C4-5, C5-6 and C6-7. The Office also authorized an April 18, 2006 anterior cervical discectomy, decompression and fusion at C5-6. Dr. Anh X. Le, a Board-certified orthopedic surgeon, performed the April 18, 2006 surgery.

With Dr. Le's approval appellant returned to work in a part-time, limited-duty capacity on February 5, 2007. The Office subsequently compensated her for at least four hours of lost wages per day.

In early 2007, appellant was diagnosed with right carpal tunnel syndrome. When Dr. Le examined her on April 30, 2007 he noted signs of a minor right carpal tunnel syndrome, but no evidence of radiculopathy. He declared appellant permanent and stationary and advised that permanent work restrictions had been assigned. However, Dr. Le did not identify appellant's permanent work restriction. Appellant was to return for follow up on an as-needed basis.

In June 2007, appellant came under the care of Dr. Alan P. Jakubowski, a Board-certified physiatrist, and Dr. Revelyn Arrogante, a Board-eligible physiatrist. In a June 11, 2007 report, Drs. Jakubowski and Arrogante diagnosed upper back pain, myofascial pain syndrome, cervical radiculopathy, herniated cervical disc, arm cramps and carpal tunnel syndrome. Appellant was reportedly participating in a drill where she had to repel from a height of 50 feet to the ground. Drs. Jakubowski and Arrogante noted that she "slipped off the harness and had to grabbed (sic) something so that she [did] not fall." However, there was no specific date of injury reported. Appellant's then-current medications included Cymbalta for depression, Vicodin and Soma for pain and occasional use of Mobic for headaches. Drs. Jakubowski and Arrogante recommended physical therapy, medication, trigger point injections, a TENS unit and a right wrist sprint for appellant's carpal tunnel syndrome. As to appellant's work status, Drs. Jakubowski and Arrogante indicated that she could perform modified duties with no lifting, pushing or pulling, no repetitive use of the right arm, no overhead work involving the right arm and no operating of any machinery or a motor vehicle.

On June 28, 2007 Dr. Le advised that appellant was able to return to normal driving. He also recommended that she wear a soft collar while working at a computer desk. The latter recommendation was for the purpose of avoiding future injury.

[2] Appellant's reported height was 4 feet, 11 inches and she weighed 190 pounds.

In a July 10, 2007 follow-up report, Drs. Jakubowski and Arrogante essentially reiterated their prior diagnoses and work restrictions. It was noted that most of the previously recommended treatment, including physical therapy, had yet to be authorized.

Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on July 3, 2007 and advised that she no longer suffered residuals of the July 6, 2005 employment injury. He described appellant's physical examination findings as "unremarkable and basically normal," with the exception of positive signs of right carpal tunnel syndrome. However, the carpal tunnel syndrome was not related to appellant's July 6, 2005 repelling injury. Dr. Swartz also reported signs of symptom magnification. He further explained that appellant's July 6, 2005 employment injury was an aggravation of her preexisting degenerative disease including disc herniation, spinal stenosis and foraminal narrowing of the cervical spine. But these findings were no longer evident on appellant's postoperative cervical magnetic resonance imaging (MRI) scan.[3] As such, Dr. Startz characterized the aggravation as temporary, having ceased within 12 months of appellant's April 2006 surgery. He further noted that the numbness appellant reported in her right upper extremity was related to her carpal tunnel syndrome, which bore no relationship to the current claim. Dr. Swartz described appellant's prognosis as "reasonably good" and "favorable." As to the need for further medical treatment, he advised against continued use of Vicodin and Soma because of the habit-forming and addictive potential, but appellant could continue using Mobic, a nonsteroidal anti-inflammatory agent. Dr. Swartz indicated that appellant's disability due to her work-related injury ended on April 18, 2007.

In a July 9, 2007 work capacity evaluation (Form OWCP-5c), Dr. Swartz noted that while appellant was not capable of returning to her regular duties, she was able to work an eight-hour day with restrictions, which he characterized as permanent. These included six hours pushing, pulling and lifting with a 25-pound limit, three hours reaching above shoulder, six hours bending/stooping, four hours operating a motor vehicle at work and to and from work, four hours kneeling and climbing and three hours squatting.

On August 16, 2007 the Office advised appellant that it proposed to terminate all benefits based on Dr. Swartz' report. To the extent appellant disagreed with the proposed termination, she was afforded 30 days to submit additional evidence or argument.

The Office subsequently received an August 13, 2007 progress report from Drs. Jakubowski and Arrogante who indicated that appellant had reached maximum medical improvement and henceforth her condition would be managed with pain medication only. Drs. Jakubowski and Arrogante reiterated the same diagnoses and work restrictions as set forth in their June 11 and July 10, 2007 reports.

In a decision dated September 20, 2007, the Office terminated appellant's wage-loss compensation and medical benefits effective that same day.

[3] A November 17, 2006 cervical MRI scan revealed "status post anterior cervical fusion at C5 and C6, without evidence of persistent or recurrent spinal or foraminal stenosis." There was also no evidence of neuropathic impingement of the cord or nerve root.

On October 9, 2007 appellant requested an oral hearing. The Branch of Hearings & Review acknowledged receipt of appellant's request by letter dated October 29, 2007. On January 17, 2008 appellant was notified that a hearing was scheduled for February 27, 2008. Both the October 29, 2007 acknowledgement and the January 17, 2008 hearing notice were sent to appellant's address of record, the same address where the Office previously mailed the September 20, 2007 decision.

By decision dated March 20, 2008, the Branch of Hearings & Review found that appellant abandoned her request for a hearing. The decision noted that a hearing was scheduled for February 27, 2008 and appellant had been provided 30 days advance written notice of the hearing. However, she did not attend the scheduled hearing and did not provide an explanation for her absence. Based on these factors, the Office concluded that appellant had abandoned her hearing request.

Appellant wrote to the hearing representative on March 12, 2008 advising that she had called earlier that same day to inquire about the status of her hearing.[4] During the telephone conversation she reportedly learned that her hearing had been scheduled for "February 17, 2008." Appellant also stated that she was told a hearing notice had been mailed to her on January 17, 2008. She claimed not to have received the notice. Appellant asked the hearing representative for information about how to reschedule another hearing. She explained that she would not have missed her hearing had she known about it.

In a letter dated March 31, 2008, the hearing representative denied appellant's request to reschedule her hearing. He explained that the hearing notice had been sent to appellant's address of record and under the circumstances, she was legally presumed to have received the notice. The hearing representative referred appellant to her appeal rights as outlined in the March 20, 2008 decision.

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 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]

[4] The letter was not received until March 24, 2008.

[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).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly relied on Dr. Swartz' opinion as a basis for terminating appellant's wage-loss compensation and medical benefits. In his July 3, 2007 report, Dr. Swartz clearly stated that appellant "no longer continues to suffer residuals of the July 6, 2005 injury." He explained that appellant's physical examination findings were "unremarkable and basically normal." Dr. Swartz also indicated that the postoperative cervical MRI scan "looked quite clean and devoid of ... findings." Although there was evidence of right carpal tunnel syndrome, Dr. Swartz indicated that this condition was unrelated to appellant's July 6, 2005 employment injury. According to Dr. Swartz, the July 6, 2005 employment injury temporarily aggravated appellant's preexisting cervical degenerative disc disease, with disc herniation, spinal stenosis and foraminal narrowing. He explained that the temporary aggravation ceased within 12 months of appellant's April 2006 surgery. Dr. Swartz further noted that appellant's disability, either total or partial, had ceased by April 18, 2007. Appellant's prognosis was favorable and the only further medical treatment Dr. Swartz deemed reasonable was continued use of nonsteroidal anti-inflammatory drugs. However, he did not indicate that this was associated with appellant's July 6, 2005 employment injury. Dr. Swartz also imposed various work restrictions that he did not specifically relate to appellant's accepted employment injury. Given the paucity of objective evidence, the Office properly characterized these work restrictions as merely "prophylactic."

Appellant's treating physician, Dr. Le, reportedly imposed permanent work restrictions in April 2007. However, these restrictions are not apparent from the record. On June 28, 2007 Dr. Le removed any driving limitations and the only advice given was that appellant wear a soft collar when working at a computer desk. This too was purely prophylactic in nature.

The various reports from Drs. Jakubowski and Arrogante beginning in June 2007 do not undermine Dr. Swartz' opinion regarding the absence of any employment-related residuals. They repeatedly diagnosed upper back pain, myofascial pain syndrome, cervical radiculopathy, herniated cervical disc, arm cramps and carpal tunnel syndrome. Drs. Jakubowski and Arrogante consistently found appellant limited to performing modified-duty work. But they also consistently failed to explain how appellant's various conditions were causally related to the employment injury.[9] It is also noteworthy that their reports did not identify a specific date of injury. Moreover, their description of the repelling incident is not entirely consistent with the evidence of record.

The weight of the medical evidence establishes that appellant no longer has residuals of the July 6, 2005 employment injury. The Office, therefore, properly terminated appellant's wage-loss compensation and medical benefits effective September 20, 2007.

[9] Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

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.[10] 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.[11] The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.[12] 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.[13]

ANALYSIS -- ISSUE 2

Appellant claims she missed the hearing because she did not receive notification that it was scheduled for February 27, 2008. A copy of the January 17, 2008 hearing notice is included in the record. The Branch of Hearings & Review sent the notice to appellant's address of record, which is the same address she listed on her October 9, 2007 hearing request and where the Office had previously mailed the September 20, 2007 decision terminating benefits. This is also the same address appellant used with respect to the filing of the current appeal.

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.[14] This presumption is commonly referred to as the "mailbox rule."[15] It arises when the record reflects that the hearing notice was properly addressed and duly mailed.[16] The current record supports invocation of the mailbox rule and appellant has not submitted any evidence to rebut the presumption. Accordingly, the Board finds that the Branch of Hearings & Review provided appellant timely notification of the hearing scheduled for February 27, 2008. Appellant did not attend the hearing, she did not request postponement and she did not contact the Office within

[10] 5 U.S.C. § 8124(b) (2006); 20 C.F.R. § 10.616(a).

[11] 20 C.F.R. § 10.617(b).

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

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

[14] *Kenneth E. Harris,* 54 ECAB 502, 505 (2003).

[15] *Id.*

[16] *Id.*

10 days after the scheduled hearing.[17] Therefore, all conditions necessary for a finding of abandonment have been met.

CONCLUSION

The Office properly terminated appellant's wage-loss compensation and medical benefits because she no longer had residuals of her July 6, 2005 employment injury. Additionally, the Branch of Hearings & Review properly found that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2008 and September 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 10, 2009
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] Appellant reportedly telephoned the Branch of Hearings & Review on March 12, 2008. This communication, if properly established, would nonetheless fall outside the 10-day post-hearing timeframe imposed by the Branch of Hearings & Review.