United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 09-1101**
	)	**Issued: January 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Clinton, MO, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 17, 2009 appellant filed a timely appeal of an August 12, 2008 decision of the Office of Workers' Compensation Programs denying compensation for disability and a February 9, 2009 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 had any disability after July 12, 2008 causally related to her May 2, 2008 employment injury; and (2) whether appellant abandoned her request for a hearing before an Office hearing representative.

FACTUAL HISTORY

On May 2, 2008 appellant, then a 50-year-old noncareer rural mail carrier, injured her right ring finger when a door slammed on her right hand as she was delivering mail. She stopped work on May 5, 2008 and returned to restricted duty on May 15, 2008. The Office accepted her claim for laceration and crushing injury of the fourth finger on the right hand.

In reports dated May 6 and 14, 2008, Dr. Mark Snell, a Board-certified surgeon, diagnosed crush injury to the fourth finger of the right hand. He advised that appellant could return to full-time light duty on May 15, 2008 with lifting, grasping and fine manipulation restrictions of the right hand. On May 21, 2008 Dr. Snell reiterated that appellant could work full-time limited duty with restrictions of the right hand. In a June 3, 2008 duty status report, Dr. Victoria Kubik, a Board-certified orthopedic surgeon, checked a box "no" indicating that appellant could not perform her regular duties and listed work restrictions.

On June 5, 2008 the employing establishment offered appellant a modified limited-duty assignment as a temporary rural carrier in compliance with her work restrictions. Appellant accepted this position on June 9, 2008, which required casing and delivering mail excluding packages over 20 pounds.

In reports dated June 3 and July 3, 2008, Dr. Kubik reiterated that appellant had been working light duty since the May 2, 2008 injury with lifting restrictions for the right hand.

In an August 7, 2008 e-mail, the employing establishment informed the Office that appellant was terminated from employment on July 12, 2008 for security violations not related to her present claim. It noted that she was not terminated due to any physical inability to perform her assigned duties. The employing establishment advised that appellant's light-duty assignment would have remained available if she had not been terminated.

In an August 12, 2008 decision, the Office found that appellant was not entitled to wage-loss compensation effective July 12, 2008. Appellant was not currently working due to termination from the employing establishment for reasons not related to her work injury. The Office noted that the claim remained open for medical care.

On September 2, 2008 appellant requested a telephone hearing.

In a December 10, 2008 letter, the Office notified appellant that the hearing would take place on January 13, 2009. It also provided her with a telephone number and pass code to access the hearing representative at that time. The letter was mailed to appellant's address of record.

In a February 9, 2009 decision, a hearing representative found that appellant abandoned her request for a hearing, having received proper notice but did not appear. The hearing representative noted there was no indication that appellant contacted the Office prior or subsequent to the hearing to explain her failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim by the weight of the evidence.[2] For each period of disability claimed, the employee has the burden of establishing that he was

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

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] To meet his burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.[5]

Under the Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity. When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.[7]

The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Act.[8] When a light-duty position is withdrawn, it is appellant's burden to establish that any increase in disability for work is due to the accepted injury, rather than another cause.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not have any disability after July 12, 2008 causally related to her May 2, 2008 employment injury.

The record reflects that the employing establishment provided appellant with a modified limited-duty assignment within the work restrictions outlined by her treating physicians, Drs. Snell and Kubik. Appellant performed this job until the employing establishment terminated her employment on July 12, 2008 due to security violations unrelated to her accepted injury claim. The employing establishment advised the Office that appellant's light-duty

[3] *C.S.*, 60 ECAB ___ (Docket No. 08-2218, issued August 7, 2009).

[4] *Id. See Edward H. Horton*, 41 ECAB 301 (1989).

[5] *A.D.*, 58 ECAB 149 (2006).

[6] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[7] *Supra* note 3.

[8] *Id*. *See John I. Echols*, 53 ECAB 481 (2002); *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

[9] *C.S., supra* note 3; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.a(1) (May 1997).

assignment would have remained available to her if she had not been terminated. Moreover, medical reports contemporaneous with appellant's termination show that she was able to continue working light duty with lifting restrictions of her right hand. There is no evidence that appellant was terminated due to any physical inability to perform her assigned duties. The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Act.[10] As there is no evidence of record that appellant was not able to perform her assigned duties after July 12, 2008, she was not disabled within the meaning of the Act.[11]

For these reasons, appellant's disability after July 12, 2008 was not the result of her accepted work injury.

LEGAL PRECEDENT -- ISSUE 2

Under the Act and its implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[12] Unless otherwise directed in writing by the claimant, the 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.[13] The Office has the burden of proving that it mailed notice of a scheduled hearing to a claimant.[14]

The authority governing abandonment of hearings rests with the Office's procedure manual, which provides as follows:

> "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, [the 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 [district Office]."[15]

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[10] *Supra* note 8.

[11] *See Normand supra* note 8 (where the Board found that appellant was no longer disabled after being terminated from his position for unofficial use of government property).

[12] *See* 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[13] 20 C.F.R. § 10.617(b).

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

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see R.C.*, 59 ECAB ___ (Docket No. 08-132, issued May 9, 2008).

ANALYSIS -- ISSUE 2

In an August 12, 2008 decision, the Office terminated appellant's partial disability for work after July 12, 2008. Appellant filed a timely request for an oral hearing. In a December 10, 2008 letter, the Office notified her that a telephonic hearing was scheduled for January 13, 2009. It also provided appellant with a telephone number and pass code to connect with the hearing representative at the designated time. Despite that information, appellant neither called at the appointed time nor explained her failure to appear at the hearing within 10 days of the January 13, 2009 scheduled hearing date.[16] The Board finds that appellant has thus abandoned her request for a hearing.

On appeal, appellant contends that she did not receive notice of the scheduled hearing. The record reflects that the Office mailed a copy of the December 10, 2008 hearing notice to appellant's address of record, and it was not returned as undeliverable. 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. This is known as the mailbox rule.[17] As the Office properly mailed a hearing notice of appellant's address of record, it is presumed to have arrived at her mailing address. Appellant also asserts that she left a voice-mail message for the Office on January 20, 2009 inquiring about the status of her hearing, but the record does not substantiate that appellant contacted the Office within 10 days of January 13, 2009.[18]

CONCLUSION

The Board finds that appellant did not have any disability after July 12, 2008 causally related to her May 2, 2008 employment injury. The Board also finds that appellant abandoned her request for a hearing before an Office hearing representative.

[16] *See C.T.*, 60 ECAB ___ (Docket No. 08-2160, issued May 7, 2009).

[17] *Id.*

[18] After issuance of the Office's August 12, 2008 decision, additional evidence was received into the record. However, the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 9, 2009 and August 12, 2008 are affirmed.

Issued: January 20, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board