United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 10-397**
	)	**Issued: January 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal from an October 29, 2009 decision of the Office of Workers' Compensation Programs which found that she abandoned her request for a hearing and from an October 23, 2009 merit decision which denied her claim for disability compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues on appeal are: (1) whether appellant met her burden of proof to establish that she was disabled for the period September 9 to December 30, 2008; and (2) whether the Office properly found that appellant abandoned her request for a hearing.

FACTUAL HISTORY

On October 26, 2007 appellant, then a 32-year-old letter carrier, sustained injury to her right foot and toe while in the performance of duty. She did not immediately stop work but

continued to work with restrictions.[1] On December 18, 2008 the Office accepted the claim for contusion of the right foot.

In a December 31, 2008 report, Dr. Gene Shaffer, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment that included the use of a cam walker boot, limited weight bearing and physical therapy. He found evidence of tendinitis and noted that a generalized ankle dysfunction was difficult to rule out. A December 31, 2008 right ankle x-ray revealed mild spurring at the distal fibula. A December 31, 2008 right foot x-ray revealed mild hallux valgus deformity with associated osteoarthritis of the first metatarsophalangeal (MTP) joint. The Office also received physical therapy reports.

In a letter dated January 3, 2009, appellant requested assistance with regard to her left foot and her limited-duty position.

In a letter dated January 5, 2009, Katherine Howard, a customer services supervisor, controverted the claim. She noted that appellant was presently alleging an injury to her left foot as a result of over compensating for the right foot. Ms. Howard noted that appellant's physician cleared her from her right foot injury in December 2007.

On February 2, 2009 appellant filed a claim for wage-loss compensation for total disability from August 30, 2008 through January 30, 2009.

By letter dated February 11, 2009, the Office informed appellant of the type of evidence needed to support her claim. It requested that she submit additional medical evidence within 30 days. The Office noted that appellant had returned to regular duty on December 11, 2007.[2]

In a December 19, 2007 treatment note, Dr. Marks related that appellant continued to have pain and spasm in her foot. He noted a left foot crush injury. On March 10, 2009 Dr. Marks diagnosed a crushed right foot. He advised that the original injury was not a contusion, but a crush. Dr. Marks noted that appellant was on crutches for two weeks and unable to return to full duty. He advised that despite her restrictions she was able to work full time. Dr. Marks advised that appellant was on maternity leave from April 20 to September 9, 2008. He opined that she could return to work and resume her restrictions, which included that she not exceed the two-hour restriction of standing, climbing, walking, running or anything else that caused physical activity or pressure on her right foot. A February 26, 2009 magnetic resonance imaging (MRI) scan of the right foot was unremarkable. A March 16, 2009 MRI scan of the

[1] On December 26, 2007 appellant accepted a modified assignment comprised of casing mail with no lifting over 10 pounds for more than an hour, no standing for more than an hour and no walking for more than an hour. In a December 18, 2008 memorandum of telephone call, the Office confirmed that she returned to limited duty on December 26, 2007 and continued in that capacity until March 2008, when she was placed off work due to pregnancy complications. Appellant returned to the limited-duty position on September 4, 2008.

[2] The Office processed appellant's claim for 142.98 hours from September 9 to December 30, 2008. On February 25, 2009 it determined that an overpayment occurred because the medical evidence did not support payment for this period. In a letter dated February 26, 2009, the Office advised appellant that she must return the check as it was paid in error. On March 20, 2009 the check was returned and cancelled.

right ankle revealed a small osteochondral defect in the posterolateral corner of the talar dome with no features of instability.

In a March 18, 2009 report, Dr. Shaffer noted that the diagnostic reports revealed an osteochondral lesion in the talar dome with some subchondral bone edema. He noted that appellant was treated with an injection. In an April 15, 2009 report, Dr. Shaffer noted that she had right ankle pain and requested authorization for arthroscopic surgery.

In a May 14, 2009 decision, the Office denied authorization for ankle arthroscopy and surgery. It found that the medical evidence did not support a crush injury.

On June 10, 2009 appellant requested a telephonic hearing on the denial of surgery. The hearing was set for October 8, 2009.

In a letter dated June 11, 2009, appellant indicated that her original injury was initially diagnosed as a contusion of her foot; however, it was later determined to be crushed. When she returned to work, although it was documented as full duty, she was still on crutches. Appellant noted that she had to stop physical therapy while she was pregnant.

In a July 27, 2009 report, Dr. Shaffer, diagnosed right talar osteochondral lesion and left ankle instability. The Office also received a July 16, 2009 report from a physician's assistant.

On August 26, 2009 the Office provided appellant notice of the telephonic hearing scheduled for October 8, 2009, advising her of the time of the hearing, the telephone number to be called and the pass code to be entered.

In an October 8, 2009 telephone memorandum, the Office noted that appellant called regarding the hearing number and passcode for the hearing, which was set for that day. Appellant explained that she did not have "the paper with her." The Office provided her with the time of the hearing, 9:45 a.m., the telephone number and passcode.

In a memorandum of telephone call dated October 23, 2009, appellant inquired about her claim for compensation for the period September 9 to December 30, 2008. The Office explained that it would issue a formal decision and noted that it had only accepted a right foot contusion.

By decision dated October 23, 2009, the Office denied appellant's claim for compensation from September 9 to December 30, 2008. It found that the claim was accepted for a foot contusion and that appellant failed to submit sufficient medical evidence to establish any additional injuries or show disability for the claimed period.

By decision dated October 29, 2009, the Office found that appellant abandoned her oral hearing request as she failed to appear at the hearing and did not contact the Office prior to or subsequent to the hearing date to explain her absence.[3]

LEGAL PRECEDENT -- ISSUE 1

The Board notes that the term "disability," as used in the Federal Employees' Compensation Act means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[4] 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. 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.[5] 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.[6] 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 her disability and entitlement to compensation.[7]

ANALYSIS -- ISSUE 1

Appellant sustained a right foot contusion on October 6, 2007. She continued at work under restrictions and performed limited-duty work until March 2008 when she stopped work due to her pregnancy. She returned to limited-duty work on September 4, 2008 and thereafter claimed wage-loss compensation from September 9 to December 30, 2008.

On December 31, 2008 Dr. Shaffer noted appellant's history of injury and treatment. He noted that the ankle appeared to have evidence of tendinitis or possible generalized ankle dysfunction. The Board notes that Dr. Shaffer did not provide any opinion that appellant was disabled from work for the claimed period and is of limited probative value. The other reports of Dr. Shaffer did not address whether appellant's work injury caused disability during the claimed period. In a March 10, 2009 report, Dr. Marks diagnosed a crushed right foot. He noted that appellant was on crutches for two weeks and unable to return to full duty but was able to work full time. Dr. Marks noted her maternity leave from April 20 to September 9, 2008 and advised

[3] In a letter postmarked November 24, 2009, appellant requested a review of the written record from the October 23, 2009 decision. On December 9, 2009 the Office denied the request for a review of the written record. Appellant filed her appeal with the Board on November 30, 2009. The December 9, 2009 decision is null and void as the Board and the Office may not simultaneously have jurisdiction over the same case. The Office may not issue a decision granting or denying a request for a hearing or review of the written record regarding the same issue on appeal before the Board. *See Arlonia B. Taylor*, 44 ECAB 591 (1993).

[4] *Patricia A. Keller*, 45 ECAB 278 (1993).

[5] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

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

[7] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, *supra* note 5.

that she was subsequently able to resume her work with restrictions. His report did not offer any opinion finding appellant was disabled for work due to the accepted right foot contusion for the period at issue. Instead, Dr. Marks supported that appellant could work within restrictions. His other treatment notes did not address disability for the claimed period.

Appellant also submitted other medical reports including several diagnostic reports. However, these reports did not contain any discussion of whether she was disabled for the period commencing from September 9 to December 30, 2008 or if so, whether the disability was causally related to her accepted employment injury. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[8]

The record also contains a report from a physician's assistant and physical therapy reports. However, these reports are of no probative value as they are not physicians as defined under the Act and, therefore, not competent to provide a medical opinion.[9]

Although appellant alleged that she was disabled for the period September 9 to December 30, 2008, due to her accepted employment injury, the medical evidence of record does not establish that her claimed disability during the time frame was related to her accepted right foot contusion.

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.[10] 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.[11] It has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.[12]

[8] *Michael Smith*, 50 ECAB 313 (1999).

[9] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physicians assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

[10] 20 C.F.R. § 10.616(a).

[11] *Id*. at § 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).

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

The authority governing abandonment of hearings rests with the Office's procedure manual,[13] 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]."[14]

ANALYSIS -- ISSUE 2

In a May 14, 2009 decision, the Office denied authorization for ankle arthroscopy and surgery. On June 10, 2009 appellant requested a telephonic hearing, which was set for October 8, 2009. On August 26, 2009 the Office mailed an appropriate notice of the scheduled October 8, 2009 telephonic hearing. The Board notes that the notice was sent more than 30 days prior to the hearing and that there is no contention that she did not receive it. The issue is, thus, whether the Office properly found that appellant abandoned the hearing request.

The record establishes that appellant failed to participate at the scheduled October 8, 2009 hearing as instructed and that she did not request a postponement prior to that date. Although she called the Office on October 8, 2009, she noted that she did not have her "paper" with her. Appellant merely requested the hearing number, passcode and was advised of the time of the hearing. She did not indicate that she desired a postponement. The record confirms that appellant did not participate in the scheduled telephonic hearing. The record contains no evidence that she contacted the Office within 10 days to reschedule the hearing or explain her failure to participate in the scheduled telephonic hearing.

As the circumstances of this case meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned her request for an oral hearing.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was disabled for the period September 9 to December 30, 2008. The Board also finds that the Office properly found that she abandoned her request for a hearing.

[13] *See Claudia J. Whitten*, 52 ECAB 483 (2001).

[14] Federal (FECA) Procedure Manual, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 29 and 23, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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