U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN E. KNIGHT and DEPARTMENT OF THE ARMY,
Fort Sam, Houston, TX

Docket No. 01-276; Submitted on the Record;
Issued October 15, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation benefits; and (2) whether the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The Board has duly reviewed the record on appeal and finds that the Office properly terminated appellant's wage-loss compensation benefits.

On December 10, 1997 appellant, then a 46-year-old maintenance mechanic supervisor, filed a claim alleging that his panic attacks were brought on by upper management. The Office accepted the claim for depression, panic disorder and temporary aggravation of post-traumatic stress disorder. Appellant received wage-loss compensation for temporary total disability since May 20, 1998.

On November 9, 1999 the Office advised the Department of Veterans Affairs (VA) that appellant was receiving compensation for total disability due to depression, panic disorder, and temporary aggravation of post-traumatic stress disorder and asked that it provide information regarding his service-connected benefits for the same condition. The record reveals that appellant's original claim with the VA included a 10 percent disability rating for post-traumatic stress disorder. Reports of telephone calls to the VA revealed that since October 1, 1998, appellant paid at the 100 percent disability rate for service-connected spondylothesis and a service-connected post-traumatic stress disorder. It was noted that appellant was currently receiving a disability VA rating of 50 percent for his post-traumatic stress disorder.

By letter dated March 7, 2000, the Office issued an election letter to appellant indicating that he was required to make an election between receiving the Office wage-loss compensation and VA disability benefits. Appellant was further notified that if no election was received within 30 days identifying which benefits he wished to receive, the Office would construe that to mean that VA benefits were being elected and Office wage-loss benefits would cease. No election was submitted.

By decision dated April 11, 2000, the Office terminated appellant's wage-loss benefits effective April 22, 2000 on the basis that appellant's failure to respond constituted an election of VA benefits. Appellant was advised that his file remained open for medical benefits.

Section 8116[1] of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

> "(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, *he may not receive salary, pay, or remuneration of any type from the United States, except* --
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> (1) in return for service actually performed;
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> (2) pension for service in the Army, Navy or Air Force;
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> (3) *other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death*…." (Emphasis added.)

Commencing October 1, 1998, appellant was in receipt of VA benefits for 100 percent disability due, in part, to his service connected post-traumatic stress disorder. He was also in receipt of compensation benefits under the Act for total disability due, in part, to an aggravation of his preexisting post-traumatic stress disorder. Once appellant began to receive 100 percent total disability benefits from the VA, such benefits were paid for the same injury as benefits from the Office and became dual benefits pursuant to section 8116(a)(3).[2] He was advised by the Office's letter of March 7, 2000 that he was required to elect between the Office benefits and VA disability benefits. Appellant was specifically advised that if no election was received within 30 days identifying which benefits he wished to receive, the Office would construe that to mean that he was electing VA benefits and the Office's wage-loss benefits would terminate. As the Office did not receive any election response from appellant, the Office properly concluded that appellant elected VA benefits and properly terminated wage-loss benefits effective April 22, 2000.

The Board also finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

In a decision dated October 2, 2000, the Office found that appellant abandoned his April 14, 2000 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for September 28, 2000, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

[1] 5 U.S.C. § 8116.

[2] *See Gary L. Bartolucci*, 34 ECAB 1569 (1983).

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[3]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[4] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

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

[3] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[4] 20 C.F.R. § 10.622(b) (1999).

"(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.

"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."[5]

In the present case, the Office scheduled an oral hearing before an Office hearing representative on September 28, 2000. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The October 2 and April 11, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 15, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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