

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA A. VALDERRAMA and U.S. POSTAL SERVICE,
PACIFIC CARRIER ANNEX, San Francisco, CA

*Docket No. 02-1025; Submitted on the Record;
Issued October 17, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned her request for a hearing before an Office hearing representative; and (2) whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on May 22, 2000 causally related to her accepted employment-related conditions.

On August 26, 1996 the Office accepted that appellant, then a 36-year-old letter carrier, developed bilateral deQuervain's syndrome as a result of her federal employment duties. The Office had previously accepted that in 1994, she developed bilateral carpal tunnel syndrome, bilateral chronic tendinitis and chronic cervical strain, necessitating permanent full-time light duty, which she continued to perform eight hours a day. Appellant lost time from work intermittently, but did not stop work completely. On May 22, 2000 she began working only six hours per day and filed a claim for two hours of wage-loss compensation.

By decision dated April 12, 2001, the Office denied appellant's claim for a recurrence of disability on the grounds that the record contained no rationalized probative evidence establishing a causal relationship between appellant's accepted injuries and her increase in disability.

Subsequent to the Office's April 12, 2001 decision, appellant submitted a timely request for an oral hearing before an Office representative and submitted additional medical evidence in support of her claim.

By letter dated October 30, 2001 and properly addressed to appellant, the Office notified her that a hearing had been scheduled for December 5, 2001, at a specified time and place. She did not appear at the hearing. By letter dated December 10, 2001, appellant notified the Office that she had never received a notification of the hearing time, place and date and requested that the hearing be rescheduled.

In a decision dated December 13, 2001 and finalized December 17, 2001, the Office found that appellant had abandoned her request for an oral hearing before an Office representative. The Office specifically found that as the October 30, 2001, notice had been properly addressed, under the mailbox rule it is presumed to have been received by her and, therefore, her failure to appear constituted an abandonment of her request.¹

The Board finds that the Office improperly determined that appellant abandoned her request for an oral hearing.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised 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.

“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for hearing that 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.”²

These regulations, however, were again revised 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.³ 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.

(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

¹ It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *Mike C. Geffre*, 44 ECAB 942 (1993). The presumption arises when it appears from the record that the notice was properly addressed and duly mailed.

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

³ 20 C.F.R. § 10.622(b) (1999).

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, 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 prerecoumment hearings, H & R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

(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.”⁴

In the present case, the Office advised appellant in a notice dated October 30, 2001, of the time and place of the hearing scheduled for December 5, 2001. The record supports that appellant did not request postponement and that she failed to appear at the scheduled hearing. However, the record does establish that appellant provided notification for her failure to appear by December 10, 2001, which was within 10 days of the scheduled date of the hearing and further requested that the hearing be rescheduled. Therefore, this case does not meet the conditions for abandonment specified in the Office’s procedure manual and the Office improperly found that appellant abandoned her request for an oral hearing before an Office hearing representative. Under the circumstances of this case, the Office should have advised the claimant that a request to reschedule a hearing has the effect of converting the format from an oral hearing to a review of the written record. Therefore, this case is remanded to the Office for a full review of the written record, including the new evidence submitted with appellant’s request for a hearing, followed by a merit decision. In view of appellant’s entitlement to further merit review, it would be premature for the Board to adjudicate whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on May 22, 2000.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

The decision of the Office of Workers' Compensation Programs dated December 13, 2001 and finalized December 17, 2001 is set aside and the case is remanded for further action as set out above.

Dated, Washington, DC
October 17, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member