United States Department of Labor
Employees' Compensation Appeals Board

BARBARA J. MAGLIO, Appellant	)	
and	)	**Docket No. 04-1693**
	)	**Issued: December 3, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Bradford, MA, Employer	)	

Appearances:
Barbara J. Maglio, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 23, 2004 appellant filed an appeal of a June 7, 2004 decision in which the Office of Workers' Compensation Programs found that she had abandoned her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the June 23, 2004 decision denying appellant's hearing request. Because more than one year has elapsed between the last merit decision of the Office dated April 4, 2003 and the filing of this appeal on June 23, 2004, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly found that appellant abandoned her request for a hearing before an Office hearing representative. Appellant contends on appeal that she had previously requested a review by teleconference and indicated that she could not attend a hearing in Boston, Massachusetts because she experienced panic attacks when thinking about driving there.

FACTUAL HISTORY

On June 7, 2002 appellant, then a 52-year-old rural carrier, sustained an employment-related low back strain when she injured her back while lifting a tray of mail. She did not stop work, came under the care of Dr. Philip J. Tavares, Board-certified in emergency medicine and underwent physical therapy.

On January 2, 2003 appellant filed a Form CA-2a, recurrence of disability claim, stating that on December 21, 2002 she injured her back when she picked up a heavy tray of holiday mail. She stopped work that day and returned on December 31, 2002. Appellant submitted a number of medical reports dating from December 28, 2002 to January 22, 2003, signed by Maria Rivera, a physician's assistant, and Karen Windle, a registered nurse.

By letter dated February 28, 2003, the Office informed appellant of the type evidence needed to support her claim and to include a comprehensive medical report from her treating physician. She was given 30 days to respond. In a March 10, 2003 response, appellant stated that she brought the Office letter to her "attending physician," Ms. Windle who advised that she had submitted her notes to the Office and opined that appellant should get a report from her personal physician. Appellant concluded, "please let me know what more my physician needs to submit whereas she claims she already has."

In a decision dated April 4, 2003, the Office noted that the claim was being developed as a new injury rather than a recurrence of disability. The Office denied the claim, finding that appellant submitted no competent medical evidence as the reports submitted had not been signed by a physician as defined by the Federal Employees' Compensation Act.[1]

In a letter dated May 1, 2003, appellant requested a hearing that was scheduled for October 21, 2003 in Boston, Massachusetts. In a telefax letter dated October 20, 2003, appellant requested that the hearing be postponed because her father had died the previous day. She also requested a teleconference in lieu of a hearing. By letter dated November 14, 2003, the Office informed appellant that the hearing had been postponed and would be rescheduled at a later date. In a notice dated April 23, 2004, the Office informed appellant that the hearing had been rescheduled for May 26, 2004 at 3:00 p.m. in Boston, Massachusetts.

The record indicates that appellant did not communicate with the Office prior to the May 26, 2004 hearing, did not appear at the hearing and did not communicate with the Office after the scheduled hearing. In a decision dated June 7, 2004, the Office found that she had abandoned her hearing request.

[1] 5 U.S.C. §§ 8101-8193. Reports from a physician's assistant are not considered medical evidence as a physician's assistant is not considered a physician under the Act. *Ricky S. Storms*, 52 ECAB 340 (2001). Likewise, a nurse is not a "physician" under the Act. *Vincent Holmes*, 53 ECAB ___ (Docket No. 00-2644, issued March 27, 2002). Thus, neither can render a medical opinion on the causal relationship between a given physical condition and implicated employment factors.

LEGAL PRECEDENT

The legal authority governing abandonment of hearings rests with the procedure manual of the Office.[2] 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 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 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.
>
> "(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."[3]

Section 10.622(b) of the Office's regulations addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions. Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. Scheduling is at the sole discretion of the hearing representative, and is not reviewable.[4]

ANALYSIS

In a telefax communication dated October 20, 2003, appellant requested that the initially scheduled hearing be postponed due to a death in her family. She also requested that a teleconference be held in lieu of an oral hearing. The Office granted the postponement but

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

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

[4] 20 C.F.R. § 10.622(b).

rescheduled a hearing, to be held on May 26, 2004 in Boston, Massachusetts. The record shows that on April 23, 2004 the Office mailed appropriate notice regarding the May 26, 2004 hearing to appellant at her proper address.

Appellant contends on appeal that she had requested a teleconference. While Office procedures provide that a teleconference may be substituted for an oral hearing,[5] this is at the discretion of the hearing representative.[6] The April 23, 2004 Office communication put appellant on notice that an oral hearing had been rescheduled for May 26, 2004. She did not communicate with the Office either before or within 10 days after the hearing to question why she had not been scheduled for a teleconference or to address other concerns she might have.

The record supports that appellant did not request a postponement of the May 26, 2004 hearing, failed to appear at the scheduled hearing, and failed to provide any notification for such failure within 10 days of the May 26, 2004 hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.[7]

CONCLUSION

The Board finds that the Office properly found that appellant abandoned her hearing request.

[5] *Id.*

[6] *Id.*

[7] *Claudia J. Whitten*, *supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2004 be affirmed.

Issued: December 3, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member