

On June 11, 1999 the Office accepted appellant's claim for lateral epicondylitis of the right elbow arising out of his federal duties as an insulator worker on August 15, 1996,

File No. 140343029.¹ On December 14, 2001 the Office issued a schedule award for a 10 percent impairment to his right arm. On April 8, 2002 appellant left his federal employment on a disability retirement because he was unable to perform the full duties of his position.

On March 29, 2006 appellant telephoned the Office and asked to be referred to the vocational rehabilitation program. On March 30, 2006 the Office requested that he provide evidence of why he could no longer perform the light-duty assignment he had at the time of his disability retirement. Appellant did not respond within the 30 days allotted by the Office.

By decision dated May 4, 2006, the Office denied appellant's request for referral to the vocational rehabilitation program on the grounds that he had not established a claim for recurrence of his accepted injury which was a necessary prerequisite. The Office informed him that he had not demonstrated a worsening of his condition that prevented him from performing the light-duty job he had in 2002.²

On May 6, 2006 appellant requested a telephonic oral hearing to review the May 4, 2006 decision. On June 5, 2006 the Office informed appellant that his case was in posture for an oral hearing which would occur within six to eight months. It stated that at least 30 days advance notice would be given advising him of the date, time and location of the hearing. By letter dated August 25, 2006, the Office informed appellant that his telephonic hearing would be held on October 3, 2006 at 11:00 a.m., Eastern Time. It instructed him to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call.

On October 3, 2006 the date of the hearing, appellant did not call the toll free number to join the telephonic hearing. On October 12, 2006 the Office received a letter from appellant dated October 7, 2006 regarding the hearing. Appellant stated that he had not received a call on the date of the hearing despite the fact that he "waited for it as you instructed in your letter." He stated that since that time he had been calling the number provided in the letter, but that no one answered. Appellant inquired whether a hearing would be held at another time.

By decision dated October 16, 2006, the Office found that appellant had abandoned his request for a hearing. The Office stated that he had received written notification of the hearing 30 days in advance of the hearing and had failed to appear. The Office stated that "there was no indication in the file that [appellant] contacted the Office either prior or subsequent to the scheduled hearing to explain [his] failure to appear."

LEGAL PRECEDENT

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

¹ The Office's May 4, 2006 decision indicates that appellant's claim was accepted for bilateral lateral epicondylitis; however, this appears to be an error. The record did not include a copy of his original traumatic injury claim form.

² Appellant is not appealing the May 4, 2006 Office decision.

which a hearing is sought.³ 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.⁴ The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.⁵

The authority governing abandonment of hearings rests with the Office's procedure manual,⁶ 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]."⁷

ANALYSIS

The record establishes that on August 25, 2006, in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the scheduled October 3, 2006 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 he did not receive it. The issue is thus, whether the Office properly found that appellant had abandoned the hearing.

The record establishes that appellant failed to telephone the hearing representative as instructed on October 3, 2006 and that he did not request a postponement prior to that date. However, it does contain evidence that he contacted the Office within 10 days of the scheduled hearing to explain his failure to participate. In a letter dated October 7, 2006 and received by the Office October 12, 2006, appellant stated that he had waited for a telephone call from the Office "as instructed" on the date of the hearing. He explained that he called the Office several times the following day to find out why he had not been called, but received no answer. Appellant asked whether another hearing would be held. In the Office's decision finding that he had abandoned his hearing, it did not acknowledge appellant's letter.

³ 20 C.F.R. § 10.616(a).

⁴ 20 C.F.R. § 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).

⁵ See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

⁶ See *Claudia J. Whitten*, 52 ECAB 483 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

The Board notes initially that appellant's letter was received within 10 days of the scheduled hearing. His October 7, 2006 letter which indicates that he failed to participate in the hearing because he misunderstood the instructions on how to join the conference call hearing, qualifies as notification to the Office of his failure to appear. Because it was received within 10 days of the scheduled hearing, the Board finds that appellant provided adequate notification of his failure to participate.

As the circumstances of this case do not meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant did not abandon his request for an oral hearing.

CONCLUSION

The Board finds that the Office did not properly determine that appellant abandoned his hearing request.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2006 is reversed. The case is remanded to reschedule appellant's oral hearing.

Issued: June 4, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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