

**United States Department of Labor
Employees' Compensation Appeals Board**

D.D., Appellant

and

**DEPARTMENT OF THE NAVY, AIR
STATION, Meridan, MS, Employer**

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**Docket No. 07-1951
Issued: December 20, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 30, 2006 finding that he had not established disability from September 2 to October 15, 2004 causally related to his federal employment. Appellant also appealed a June 5, 2007 nonmerit decision from the Branch of Hearings and Review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly found that appellant had abandoned his request for an oral hearing; and (2) whether appellant has met his burden of proof to establish that he was disabled from September 2 to October 15, 2004 to his accepted employment injury.

FACTUAL HISTORY

On July 9, 2004 appellant, then a 62-year-old police officer, filed of traumatic injury alleging that on June 26, 2004 he slipped and fell in the performance of duty and injured his right shoulder and back. The Office accepted appellant's claim for rib fracture on October 27, 2004.

Appellant completed a claim for compensation requesting leave buyback intermittently from September 2 through October 15, 2004. On July 18, 2006 the Office again requested additional medical evidence supporting that appellant's intermittent disability from September 2 to October 15, 2004 was due to his accepted employment injury of rib fracture.

By decision dated August 30, 2006, the Office denied appellant's claim for compensation.¹

Appellant requested an oral hearing on September 6, 2006. He provided his address as 3212 Northview Drive, Meridan, MS, 39305-1543. In a letter received by the Office on January 16, 2007, appellant requested a telephonic hearing rather than the oral hearing scheduled for March 2007. Appellant provided an address of 39 Drew Court, Dallas, GA 30157. By letter dated February 6, 2007, the Branch of Hearings and Review scheduled a telephonic hearing for March 7, 2007 at 1:30 p.m. eastern time. The Branch of Hearings and Review sent this letter to the Meridan, MS, address. On March 9, 2007 the Office addressed a letter verifying that appellant's correct address was Dallas, GA. In a letter of the same date, properly addressed to Dallas, GA, the Branch of Hearings and Review rescheduled appellant's telephonic hearing for April 3, 2007. On March 30, 2007 the Branch of Hearings and Review again notified appellant by properly addressed letter that his telephonic conference was scheduled for April 3, 2007.

In a letter dated May 9, 2007, addressed to appellant's Dallas, GA, address, the Branch of Hearings and Review scheduled a telephonic hearing for June 5, 2007 at 1:30 p.m. eastern standard time. In a decision dated June 11, 2007, the Branch of Hearings and Review found that appellant had abandoned his request for a telephonic hearing. The hearing representative noted that he had informed appellant by telephone on May 4, 2007 that the hearing was scheduled for June 5, 2007 and that he provided written confirmation on May 9, 2007. The hearing representative stated: "[Y]ou failed to call into the hearing as required. Further, there is no indication in the file that you contacted the Office either prior or subsequent to the scheduled hearing to explain your failure to do so."

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 which a hearing is sought.² Unless otherwise directed in writing by the claimant, the Office

¹ Following the Office's August 30, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

² 20 C.F.R. § 10.616(a).

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.³ The Office has the burden of proving that it mailed to appellant a notice of a scheduled hearing.⁴

The authority governing abandonment of hearings rests with 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 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, [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 precoupment hearings, [Branch of Hearings and Review] 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, [Branch of Hearings and Review] 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 [Branch of Hearings and Review] 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

ANALYSIS

The Office issued a decision on August 30, 2006 denying appellant's claim for compensation due to intermittent total disability from September 2 through October 15, 2004.

³ 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).

⁴ See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

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

Appellant requested an oral hearing with an Office hearing representative regarding this matter on September 7, 2006 and listed his address as 3212 Northview Drive, Meridan, MS, 39305-1543. He then requested a telephonic hearing on January 16, 2007 and provided a new address, 39 Dallas Court, Dallas, GA 30157. The Branch of Hearings and Review scheduled the telephonic hearing for March 7, 2007 but mailed this notice to an incorrect address. The Branch of Hearings and Review corrected appellant's address and rescheduled the hearing for April 3, 2007 in a letter dated March 9, 2007. On May 9, 2007 the Branch of Hearings and Review rescheduled the telephonic hearing for June 5, 2007. The hearing representative stated that he had informed appellant by telephone on May 4, 2007 of the date of the telephonic hearing. By decision dated June 11, 2007, the hearing representative found that appellant had abandoned his request for a hearing.

The Office has the burden of establishing that it mailed to appellant a notice of a scheduled hearing at least 30 days before the scheduled date of the hearing. The Office first provided appellant with written notice of the oral hearing scheduled for June 5, 2007 in a letter dated May 9, 2007. This letter was mailed to appellant at his proper address of record no sooner than May 9, 2007 for a telephone hearing to be held on June 5, 2007. When the Office mailed a notice to appellant no sooner than May 9, 2007 for a telephone hearing to be held on June 5, 2007, it provided him with less than 30 days notice of his scheduled hearing.⁶ The Board finds that the Office failed to give appellant proper notice of his hearing under 20 C.F.R. § 10.617(b).⁷ Thus, the case will be returned to the Office for proper scheduling of another hearing for appellant.⁸

CONCLUSION

The Board finds that the Office improperly found that appellant had abandoned his request for a hearing as it failed to provide proper notification to appellant of the hearing scheduled for June 5, 2007. The case is remanded to the Office for a hearing to be scheduled with an Office hearing representative with proper notice to all parties. The Board accordingly finds that this case is not in posture for a decision on the issue of whether appellant sustained employment-related intermittent disability from September 2 to October 15, 2004.

⁶ *D.F.*, 58 ECAB ____ (Docket No. 06-1815, issued November 27, 2006).

⁷ The Board further notes that the Office issued the June 11, 2007 decision less than 10 days after the scheduled telephonic hearing on June 5, 2007 thereby depriving appellant of the full 10-day period following the scheduled hearing to provide notification of his reasons for failing to appear.

⁸ As the case must be remanded to the Office for scheduling of another hearing and other appropriate development, the Board finds that the case is not in posture for a decision on the second issue.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: December 20, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board