

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. DALTON and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, SANTA FE NATIONAL FOREST, Santa Fe, N.M.

*Docket No. 97-233; Submitted on the Record;
Issued June 10, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had abandoned his request for a hearing.

On July 19, 1988 appellant, then a 46-year-old forester, sustained a lumbar strain in the performance of duty when he slipped and fell onto a log. Appellant received appropriate compensation benefits.

By decision dated February 3, 1995, the Office terminated appellant's compensation benefits on the grounds that the evidence of record established that his July 19, 1988 employment injury had resolved.

By letter dated February 24, 1995, appellant requested an oral hearing before an Office hearing representative.

By letter dated July 18, 1995, appellant's attorney noted that appellant had provided him with a copy of a June 21, 1995 notice from the Office indicating that a hearing was set for July 25, 1995. The attorney stated that he would be unable to attend the hearing because he was a member of the Air National Guard and had been assigned duty during the week of July 24 through 28, 1995. He requested a postponement.

By letter dated June 19, 1996, the Office advised appellant and his attorney that a hearing was scheduled for July 18, 1996 at 10:00 a.m.

By letter dated July 15, 1996, which was faxed to the Office at 3:28 p.m. on that date the attorney advised that he would be unable to attend the July 18, 1996 hearing due to his "unavailability" and he requested that the hearing be postponed. He stated that his calendar was typically booked out more than the three weeks that had been provided in the notice of hearing from the Office.

By decision dated July 29, 1996, an Office hearing representative advised appellant that he was found to have abandoned his request for a hearing as he did not appear for the scheduled hearing and did not show good cause for such failure to appear. The hearing representative stated that appellant failed to appear for the July 18, 1996 and did not request cancellation at least three calendar days prior to the scheduled hearing. The hearing representative stated that on July 15, 1995 less than 72 hours prior to the scheduled hearing, appellant's representative faxed a letter to the Office indicating that he was unavailable. The hearing representative stated that the request for postponement was made less than three days prior to the hearing and that a statement from appellant's representative that he was unavailable for the hearing did not constitute good cause for postponing the hearing. He stated that there was no explanation as to why the representative was unavailable or why an associate could not have accompanied appellant to the hearing.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on September 30, 1996, the only decision properly before the Board is the Office's July 29, 1996 decision in which the Office found that appellant had abandoned his request for a hearing. The Board has no jurisdiction to consider the Office's February 3, 1995 decision terminating appellant's compensation benefits.²

The Board finds that the Office improperly found that appellant had abandoned his request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants a right to a hearing if they request a hearing within 30 days of an Office decision.³ Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

"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 the 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 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,

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

³ 5 U.S.C. § 8124(b).

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. Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claimant to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing.”⁴

In the present case, appellant timely requested on February 24, 1995 that an oral hearing be held before an Office hearing representative in connection with the Office’s February 3, 1995 decision terminating his compensation benefits. The Office informed appellant and his attorney, by notice dated June 21, 1995 that a hearing before an Office hearing representative had been scheduled for July 25, 1995. In a letter dated July 18, 1995, appellant’s attorney requested that the hearing scheduled for July 25, 1995 be postponed and rescheduled at another time because the attorney was assigned to national guard duty at that time. By notice dated June 19, 1996, the Office advised appellant and his attorney that a hearing had been scheduled for July 18, 1996. By letter dated July 15, 1996 and faxed to the Office on that date, appellant’s attorney stated that he would be unable to attend the July 18, 1996 hearing due to his “unavailability” and he requested that the hearing be postponed and rescheduled. Without considering appellant’s request for postponement of the hearing scheduled for July 18, 1996 prior to the scheduled date of the hearing, the Office determined, in a July 26, 1996 decision, that appellant had abandoned his request for a hearing on the grounds that he had failed to timely request a postponement and had failed to provide good cause for his failure to appear at the hearing scheduled for July 18, 1996.

The Board finds that appellant’s request for a postponement of the hearing scheduled for July 18, 1996 was timely filed. The record shows that the Office received a written request for postponement three days prior to the hearing scheduled for July 18, 1996 as the request for postponement was faxed to the Office on July 15, 1996.

The Board also notes that the Office has misinterpreted the regulations at 20 C.F.R. § 10.137 pertaining to abandonment of a hearing request. Section 10.137 allows postponement of hearings without penalty so long as they are requested in a timely fashion and provide good cause.

The regulations impose penalties only for failure to appear at a hearing without any notice or with less than three days notice. Under section 10.137 the Office can find that a claimant has abandoned a request for a hearing if he or she has actually failed to appear or give adequate notice at three scheduled hearings. As noted above, appellant requested postponement of the hearing scheduled for July 18, 1996 three days prior to the scheduled date of the hearing. The Office could only find that appellant had not shown good cause for postponement, inform appellant prior to the scheduled date of the hearing of such finding and then invoke a penalty if

⁴ 20 C.F.R. § 10.137.

appellant failed to appear at the scheduled time for the hearing.⁵ The Office therefore, acted improperly when it determined that appellant had abandoned his hearing request when he requested postponement of the second scheduled hearing. The case must be returned to the Office for scheduling of another hearing for appellant.

The decision of the Office of Workers' Compensation Programs dated July 29, 1996 is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
June 10, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Mark A. Norton*, 45 ECAB 898, 901-02 (1994).