

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUBY BARBER and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 98-741; Submitted on the Record;
Issued August 18, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant abandoned her request for a hearing on her claim assigned file number A13-1077857; and (2) whether appellant has established that she was disabled from June 12 through 17, 1996 due to residuals of her December 14, 1995 employment injury.

On August 8, 1995 appellant, then a 59-year-old distribution clerk, filed a traumatic injury claim alleging that on December 19, 1974 she sustained an injury to her lower back in the performance of duty. The Office assigned the case file number A13-1077857. By decision dated March 22, 1996, the Office denied appellant's claim on the grounds that it was not timely filed.

In a March 29, 1996 letter, appellant requested a hearing before an Office hearing representative. By letter dated November 2, 1996, the Office advised appellant that a hearing in her case would be held on December 18, 1996 at the address specified. On December 17, 1996 appellant requested rescheduling of the hearing. By letter dated August 1, 1997, the Office informed appellant that the hearing had been rescheduled for July 17, 1997. On July 17, 1997 appellant requested that the July 17, 1997 be rescheduled. In a letter dated September 10, 1997, the Office informed appellant that a hearing in her case was scheduled for November 18, 1997 at 4:00 p.m. at the address specified. The record shows that the letter was properly addressed to appellant.

By decision dated December 3, 1997, the Branch of Hearings and Review found that appellant failed to appear for her oral hearing, did not request cancellation 3 days prior to the scheduled date of the hearing and did not show good cause for her failure to appear within 10 days following the scheduled hearing date.

Because more than one year has elapsed between the issuance of the Office's March 22, 1996 decision which denied appellant's claim for benefits and January 5, 1998, the date

appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 22, 1996 decision.¹ The Office's December 3, 1997 decision, which found that appellant had abandoned her request for a hearing, was issued within one year prior to appellant filing her claim with the Board and, therefore, is within the Board's jurisdiction.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants the right to a hearing if they request a hearing within 30 days of an Office decision.² Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to a postponement, withdrawal or abandonment of a hearing states in relevant part:

"A scheduled hearing may be postponed or canceled 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 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 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, 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."³

In the present case, after two postponements, the Office advised appellant in a notice dated September 10, 1997 of the time and place of the hearing scheduled for November 18, 1997. Appellant did not request postponement at least three days prior to the scheduled date of the hearing. Neither did she request within 10 days after the scheduled date of the hearing that another hearing be scheduled. Appellant's failure to make such requests, together with her failure to appear at the scheduled hearing, constituted abandonment of her request for a hearing and the Board finds that the Office properly so determined.

On appeal, appellant contends that she did not know that a hearing in her case was scheduled for November 18, 1997.

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.⁴ The presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8124(b).

³ 20 C.F.R. § 10.137(a), (c).

⁴ *Mike C. Geffre*, 44 ECAB 942 (1993).

custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. The Office's finding of abandonment in this case rests on the strength of this presumption.

Appellant explained to the Board that she was not aware of the hearing scheduled in her case. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.⁵ The Board may, therefore, not consider whether appellant's explanation is sufficient to rebut the presumption of receipt raised by the "mailbox rule." When the Office issued its decision on December 3, 1997, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

The Board further finds that, regarding Office file number A13-1083805, appellant has not established that she was disabled from June 12 through 17, 1996 due to residuals of her December 14, 1995 employment injury.

The Board has given careful consideration to the issue involved, the contentions of appellant on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated June 13, 1997 and finalized June 16, 1997 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.

The decisions of the Office of Workers' Compensation Programs dated December 3, 1997 and dated June 13, 1997 and finalized on June 16, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 18, 2000

Willie T.C. Thomas
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁵ 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.