

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. MINIFIELD and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Dallas, TX

*Docket No. 98-318; Submitted on the Record;
Issued January 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant abandoned his request for an oral hearing.

The Board has duly reviewed this case on appeal and finds that appellant abandoned his request for an oral hearing.

Appellant, a housekeeping aide, filed a claim on October 29, 1986 alleging that he injured his back moving a bed. The Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain and authorized compensation benefits. By decision dated November 4, 1993, the Office terminated appellant's compensation benefits effective October 29, 1986. Appellant, through his attorney requested an oral hearing on November 9, 1993. By letter dated September 7, 1994, the Branch of Hearings and Review scheduled an oral hearing on September 29, 1994. In a memorandum to the record dated September 29, 1994, the hearing representative noted that appellant's representative stated that he would not appear for the oral hearing, but that appellant would be present. The memorandum noted that appellant did not appear. By decision dated October 17, 1994, the hearing representative found that appellant had abandoned his request for an oral hearing. In a letter dated October 21, 1994, appellant's attorney stated that appellant had not received notice of the oral hearing as he was hospitalized. He requested that the hearing be rescheduled. By letter dated November 2, 1994, the Office requested documentation of appellant's hospitalization. Appellant requested review by the Board. In an order dated May 15, 1997, the Board remanded the case for reassemblage and an appropriate decision as the October 17, 1994 decision of the Branch of Hearings and Review was not included in the record.¹

By decision dated October 17, 1997, the Branch of Hearings and Review found that appellant did not appear for the September 29, 1994 oral hearing. The Branch of Hearings and

¹ Docket No. 95-687.

Review further found that appellant did not request postponement of the hearing nor that the hearing be rescheduled. Furthermore, appellant did not provide good cause for failing to appear.

Section 10.137 of Title 20 of the Code of Federal Regulations sets forth the criteria for abandonment:

“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 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 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.”²

Appellant did not request postponement at least three days prior to the scheduled date of the hearing. Neither did he 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 his failure to appear at the scheduled hearing, constituted abandonment of his request for a hearing and the Board finds that the Office properly so determined.

Appellant explained on appeal that he received no notice of the hearing. 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.³ This 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 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 has explained to the Board that he did not in fact receive the notice of hearing, but 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.⁴ 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

² 20 C.F.R. § 10.137(a), (c).

³ *Mike C. Geffre*, 44 ECAB 942, 943 (1993).

⁴ 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.

October 17, 1997, the record did not contain the explanation for appellant's failure to appear that appellant's house had burned.⁵ The Office's decision was therefore proper.

The decision of the Office of Workers' Compensation Programs dated October 17, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁵ Furthermore, the record contained no evidence in support of appellant's allegation of hospitalization at the time of the September 29, 1994 oral hearing.