

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

C.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
CENTRAL TEXAS VETERANS)
ADMINISTRATION HEALTH CARE,)
Waco, TX, Employer)

Docket No. 07-43
Issued: March 26, 2007

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 9, 2006 merit decision denying his claim for compensation and the July 28, 2006 nonmerit decision finding that he abandoned his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly found that appellant abandoned his request for a hearing; and (2) whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 13, 2005 appellant, then a 49-year-old air condition equipment operator, filed a claim for compensation alleging that on November 24, 2005 he had worked 12 hours of overtime and when he went to the boiler room to sign out Shawn Hobbs, a coworker, would not let him inside. He indicated that he suffered migraine headaches, sleeplessness and feelings of helplessness and uselessness as a result of the November 24, 2005 incident.

By letter dated February 2, 2006, the Office advised appellant that additional factual and medical information were needed. In response, appellant submitted a February 7, 2006 attending physician's form report and a blank work restriction form.

By decision dated March 9, 2006, the Office denied appellant's claim on the grounds that the evidence failed to establish that his claimed condition arose in and out of the performance of his federal duties.

On March 29, 2006 appellant requested an oral hearing before an Office hearing representative in connection with the Office's March 9, 2006 decision. He indicated that a telephone hearing was acceptable to him. Appellant submitted an April 5, 2006 statement along with treatment notes from Dr. C. Andrea Ross, a psychiatrist, dated April 24 and November 4, 2004 and October 13, 2005.¹

By letter dated June 28, 2006, an Office hearing representative advised appellant that a telephone hearing would be held on July 27, 2006 at 3:15 p.m. Eastern Standard Time.² The hearing representative informed appellant that a few minutes before the scheduled time for the hearing, he should call the provided toll free number and, when prompted, enter the provided pass code which would connect them and a court reporter.

By decision dated July 28, 2006, the Office hearing representative found that appellant abandoned his request for a hearing. Appellant failed to call in for the hearing and there was no indication in the file that he contacted her 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 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

¹ Appellant also submitted evidence pertaining to case, file number 160204950, which the Office accepted for bilateral carpal tunnel condition and release.

² This letter was mailed to appellant's address of record.

³ 20 C.F.R. § 10.616(a).

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. 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, H&R [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 prerecoupment hearings, H&R 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, H&R 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 H&R 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.”⁶

ANALYSIS

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

In this case, appellant made a timely request for an oral hearing. In finding that he abandoned his request for a hearing, the Office noted that a telephone hearing had been scheduled for July 27, 2006. The record shows that the Office mailed appellant appropriate notice of the hearing to his last known address. However, when the Office mailed its notice of

⁴ *Id.* at § 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 Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

the hearing on June 28, 2006, it provided appellant with less than 30 days notice of his scheduled July 27, 2006 hearing.⁷ The Board finds that the Office failed to give appellant proper notice of his hearing under 20 C.F.R. § 10.617(b).⁸ Thus, the case must be returned to the Office for the proper scheduling of another hearing for appellant.⁹

CONCLUSION

The Board finds that the Office improperly found that appellant abandoned his request for a hearing as it failed to provide proper notification to appellant of the hearing scheduled for July 27, 2006. The case is remanded to the Office for a hearing to be scheduled with an Office hearing representative with proper notice provided to all parties. The Board accordingly finds that the issue of whether appellant sustained an emotional condition in the performance of duty is moot.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: March 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

⁷ Only 29 days of notice was provided. *See D.F.*, 58 ECAB ___ (Docket No. 06-1815, November 27, 2006).

⁸ The Board additionally notes that the Office issued its July 28, 2006 decision prior to the statutory 10-day period allowed appellant to provide his notification for failure to appear from the July 27, 2006 hearing. 20 C.F.R. § 10.616(a).

⁹ As the case must be remanded to the Office for scheduling of a second hearing and other appropriate development, the Board finds that the case is not in posture for a decision on the second issue.