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<b>D.H., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 10-349</b>
	)	<b>Issued: August 2, 2010</b>
<b>DEPARTMENT OF THE INTERIOR, BATTLE</b>	)	
<b>MOUNTAIN FIELD OFFICE, Reno, NV,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

On November 18, 2009 appellant filed a timely appeal from a June 8, 2009 nonmerit decision of the Office of Workers' Compensation Programs that found he had abandoned his request for an oral hearing. As more than 180 days have elapsed since the last merit decision in this case, dated December 9, 2008, and the filing of this appeal, dated November 18, 2009, the Office lacks jurisdiction over the merits of this case.<sup>1</sup>

The issue is whether the Office properly found appellant abandoned his request for an oral hearing.

<sup>1</sup> An appeal of Office decisions issued on or after November 19, 2008, must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

### **FACTUAL HISTORY**

On January 17, 2008 appellant, a 46-year-old ranger, filed a traumatic injury claim (Form CA-1) in which he alleged that on January 8, 2008 during a training session on an “active shooter tactical course,” he was shot in the leg with a paint ball and sustained a swollen right calf muscle as well as lower leg, ankle and foot pain.

By decision dated December 9, 2008, the Office denied the claim because appellant had not demonstrated that the established employment incident caused a medically-diagnosed injury.

On December 23, 2008 appellant requested an oral hearing.

By letter dated April 13, 2009, the Office notified appellant that a telephonic hearing was scheduled for May 19, 2009, at 11:15 am. It provided appellant a telephone number to call to participate in the hearing and advised that appellant or his representative should be present.

Appellant did not participate in the telephonic hearing.

By decision dated June 8, 2009, the Office found appellant abandoned his hearing request because he failed to attend and did not contact the Office prior to or subsequent to the hearing to explain his failure to participate.

### **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.<sup>2</sup> 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 any representative at least 30 days before the scheduled date.<sup>3</sup> The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.<sup>4</sup>

The authority governing abandonment of hearings rests with the Office’s procedure manual,<sup>5</sup> which provides as follows:

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

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<sup>2</sup> 20 C.F.R. § 10.616(a).

<sup>3</sup> *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).

<sup>4</sup> See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

<sup>5</sup> See *Claudia J. Whitten*, 52 ECAB 483 (2001).

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, the 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 district Office.<sup>6</sup>

### **ANALYSIS**

The record establishes that on April 13, 2009 in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the scheduled May 19, 2009 telephonic hearing. The Board notes that the notice was sent more than 30 days prior to the hearing and that there is no contention that appellant did not receive it. The issue is, thus, whether the Office properly found that appellant abandoned the hearing request.

The record establishes that appellant failed to participate at the scheduled May 19, 2009 hearing, as instructed, and that he did not request a postponement prior to that date. The record contains no evidence that appellant contacted the Office seeking postponement or inquiring on the status of his hearing request. The record contains no evidence that appellant contacted the Office within 10 days to reschedule the hearing or explain his failure to participate in the scheduled telephonic hearing.

On appeal, appellant states that he was unable to attend the May 19, 2009 hearing "due to his work schedule." The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case.<sup>7</sup> Any request for postponement of the hearing would have to be filed with the Branch of Hearings and Review within 10 days of the scheduled hearing.

As the circumstances of this case meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned his request for an oral hearing.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant abandoned his request for an oral hearing.

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

<sup>7</sup> 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB \_\_\_\_ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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