

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

N.S., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Lexington, SC, Employer**

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**Docket No. 10-1239
Issued: January 3, 2011**

Appearances:
David Proffitt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On March 5, 2010 appellant, through her attorney, filed a timely appeal of the February 1, 2010 nonmerit decision of the Office of Workers' Compensation Programs finding that she abandoned her hearing request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue in this case.¹

ISSUE

The issue is whether appellant abandoned her request for a hearing.

¹ The Board notes that appellant, through her attorney, is only appealing from the Office's February 1, 2010 nonmerit decision. Although the Board has jurisdiction over the Office's September 14, October 26 and November 4, 2009 merit decisions, appellant has not appealed these decisions which denied her claim for compensation and request for psychiatric treatment and terminated her medical benefits, respectively. Therefore, the Board has not addressed them on this appeal. *See* 20 C.F.R. § 501.3(a)(c).

On appeal, counsel contends that, neither he nor appellant received notice of the scheduled hearing. He requests that the Board remand the case to the Office for a hearing to determine her entitlement to compensation.

FACTUAL HISTORY

The Office accepted that on July 26, 2004 appellant, then a 33-year-old rural carrier associate, sustained cervical and lumbar strains, post-traumatic headaches and lumbar radiculopathy in the performance of duty.² On July 21, 2007 she returned to work as a modified rural carrier associate.³ Appellant stopped work on October 2, 2008 and filed a claim for compensation (Form CA-7) for the period commencing that date.

In a September 14, 2009 decision, the Office denied appellant's claim for compensation for the period commencing October 2, 2008⁴ finding medical evidence insufficient to establish that she was totally disabled during the claimed period due to the July 26, 2004 employment injuries.

By decision dated October 26, 2009, the Office denied appellant's request for psychiatric treatment. The medical evidence was insufficient to establish that she sustained an emotional condition as a consequence of the July 26, 2004 employment injuries.

In a November 4, 2009 decision, the Office terminated appellant's medical benefits with regard to her accepted employment injuries, effective that date as she failed to establish any continuing residuals causally related to the July 26, 2004 employment injuries.

On October 9, 2009 appellant, through her attorney, requested a telephone hearing with an Office hearing representative regarding the Office's September 14, 2009 decision. On December 1, 2009 counsel requested a telephone hearing regarding the Office's October 26 and November 4, 2009 decisions.

By letter dated December 15, 2009, the Office's Branch of Hearings and Review notified appellant that the hearing was scheduled for January 15, 2010 at 11:45 a.m. Eastern Time. It instructed her to call the provided toll-free number a few minutes before the hearing time and enter the passcode to gain access to the conference call. The notice was mailed to appellant's address of record. A copy of the notice was also mailed to her attorney's address of record.

Appellant did not participate in the telephonic hearing.

² The record reflects that appellant was involved in a work-related motor vehicle accident.

³ In an October 1, 2007 decision, the Office reduced appellant's compensation to zero as her actual earnings as a modified rural carrier associate fairly and reasonably represented her wage-earning capacity.

⁴ On September 14, 2009 the Office advised appellant that her Form CA-7 for the period commencing October 2, 2008 had been filed under the wrong claim number as it related to an accepted October 2, 2008 leg and knee condition under File No. xxxxxx557. It advised her to file a Form CA-7 under File No. xxxxxx557. The Office further advised appellant that doubling of the claims under File Nos. xxxxxx557 and xxxxxx011 was not warranted. The Board notes that appellant filed a Form CA-7 for the period commencing October 2, 2008 under File No. xxxxxx557. Her claim was denied by the Office on November 16, 2009.

In a February 1, 2010 decision, the Branch of Hearings and Review found that appellant abandoned her requested hearing. The decision noted that the telephone hearing was scheduled for January 15, 2010, but she failed to appear as instructed. The decision also found that there was no indication that appellant contacted the Office either prior or subsequent to the scheduled hearing to explain her failure to participate. Based on these factors, the Office concluded that appellant abandoned her oral hearing request.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act and its implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.⁵ Unless otherwise directed in writing by the claim, 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.⁶ The Office has the burden of proving that it mailed notice of a scheduled hearing to a claimant.⁷

The authority governing the abandonment of hearings rests with the Office's procedure manual, which provides that a hearing can be 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, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned her request for a hearing and return the case to the district Office.⁸

ANALYSIS

The record establishes that on December 15, 2009 in response to appellant's timely request for an oral hearing, the Branch of Hearings and Review mailed an appropriate notice of the scheduled telephonic hearing on January 15, 2010 at 11:45 a.m. Eastern Time. The hearing notice was mailed to appellant's and her attorney's address of record. The Board notes that the notice was sent more than 30 days prior to the scheduled hearing date of January 15, 2010. The record establishes that appellant did not call at the appointed time. Further, appellant did not request a postponement of the hearing or explain her failure to appear at the hearing within 10 days of the scheduled hearing. Therefore, the Board finds that she abandoned her request for a hearing.⁹

⁵ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

⁶ 20 C.F.R. § 10.617(b).

⁷ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). See also *G.J.*, 58 ECAB 651 (2007).

⁹ See *C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009).

On appeal, counsel contends that neither he nor appellant received notice of the scheduled hearing. The record reflects that the December 15, 2009 hearing notice was mailed to counsel's and appellant's address of record and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed received at the mailing address in due course. This is known as the mailbox rule.¹⁰ As the Office properly mailed a hearing notice to appellant and her attorney, it is presumed that they received the notice of hearing.

CONCLUSION

The Board finds that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2011
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

¹⁰ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).