

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of KENNETH D. McCLURE and GENERAL SERVICES ADMINISTRATION,  
TRAFFIC MANAGEMENT DIVISION, Fort Worth, Tex.

*Docket No. 96-147; Submitted on the Record;  
Issued January 15, 1998*

---

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an aggravation of a preexisting emotional condition causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant abandoned his request for an oral hearing.

On May 6, 1993 appellant, then a 48-year-old warehouse laborer, filed a claim for compensation alleging that harassment at work exacerbated his preexisting anxiety condition.

In a notice signed by appellant on June 10, 1993 and received by the Office on June 24, 1993, appellant appointed Mr. Virgil Lamar Skelton as his representative in connection with any claim before the federal government.

On August 25, 1993 the Office, in a decision, denied appellant's claim for compensation on the grounds that the evidence submitted failed to establish that appellant had sustained an injury as alleged.

On September 6, 1993 appellant requested an oral hearing.

On March 3, 1994 the Office's Branch of Hearings and Review notified appellant that his request for an oral hearing on Claim Number A16-225371 was scheduled for March 29, 1994 in Dallas, Texas.

On April 12, 1994 the Branch of Hearings and Review notified appellant that because he failed to appear for the March 29, 1994 oral hearing, it found that he had abandoned his request for an oral hearing and that his case file was returned to the district office.<sup>1</sup>

On April 14, 1994 appellant requested reconsideration of the Office's April 12, 1994 decision denying his request for an oral hearing. Appellant stated that the Branch of Hearings and Review failed to contact either his representative or himself regarding the scheduled date of the oral hearing. Appellant then requested that the hearing be scheduled for Cincinnati, Ohio, to accommodate his ongoing hospitalization which began on February 12, 1994.

By decision dated December 22, 1994, the Office denied appellant's request for reconsideration, after reviewing the case on its merits, on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The decision also noted that because appellant and his representative failed to appear at the March 24, 1994 oral hearing, that he was considered to have abandoned his right to an oral hearing.

In a second petition for reconsideration dated May 12, 1995, appellant raised several issues among them was his contention that the Office improperly denied him his right to an oral hearing.<sup>2</sup>

On September 25, 1995 the Office, in merit decision, denied appellant's request for reconsideration. In that decision, the Office stated that appellant "testified at a hearing held on September 13, 1993. He is not entitled to a second hearing."<sup>3</sup>

Section 10.132 of Title 20 of the Code of Federal Regulations provides:

"The Office representative shall set the time and place of the hearing and shall mail written notice thereof to the claimant, the claimant's representative, and the employing agency at least 15 days prior to the hearing."<sup>4</sup>

In the present case, appellant alleges that this proper notification did not occur.

---

<sup>1</sup> On April 28, 1994 appellant's representative notified the Office that he was filing a request for reconsideration of the Office's August 25, 1993 decision which denied appellant's claim for compensation, and the Branch of Hearings and Review's decision, date unknown, which found that appellant had abandoned his request for an oral hearing.

<sup>2</sup> On August 11, 1995 the Office advised a congressional office, in response to a facsimile transmitted copy of the petition for reconsideration, that it had not received the petition from appellant, but that it would assign the matter to a senior claims examiner.

<sup>3</sup> On September 13, 1993 an oral hearing was held on Claim No. A16-209575, a separate claim in which appellant's representative was present. In that case, the issue was whether appellant had a continuing disability from an accident sustained at work. The hearing representative noted that the medical evidence in that claim was the same as the medical evidence contained in the current claim, Claim No. A16-225371.

<sup>4</sup> 20 C.F.R. § 10.132.

The Board has held that the mailbox rule applies regarding a notice of hearing, and explains:

“The Office has the burden of proving that it mailed to a claimant notice of the scheduled 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. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.”<sup>5</sup>

The Board notes that, although appellant claims that he never received the notice of hearing, the record reveals that it was properly addressed to appellant and presumed mailed in the ordinary course of business, and therefore the presumption of receipt arises.

However, the record does not support that a copy of the notice of hearing was likewise properly addressed and mailed to appellant’s designated representative, V. Lamar Skelton, in accordance with 20 C.F.R. § 10.132.

In *Melvina A. Smith*,<sup>6</sup> the Board found that the failure of the Office to notify appellant’s attorney of record of the hearing deprived appellant of the assistance of counsel which he had informed the Office he wanted. The Board stated that this resulted in appellant not receiving the hearing to which he was entitled. The Board explained that this was error which required that the case be remanded to give appellant an opportunity for a new hearing with proper notice being given to all parties involved.

In the present case, the March 3, 1994 notice of hearing was formally addressed to appellant and contained no evidence that a copy was addressed and mailed to appellant’s representative. As the record does not demonstrate that appellant’s representative was notified of the scheduled hearing, appellant was denied a hearing to which he was entitled. Therefore, this case must be remanded for appellant to be given the opportunity for his requested hearing.

Because of the Board’s disposition of the second issue, it is premature for the Board to address the first issue, which constitutes the merits of the case.

---

<sup>5</sup> *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>6</sup> 33 ECAB 1937 (1983).

The decisions of the Office of Workers' Compensation Programs dated September 25, 1995 and December 22, 1994 are hereby set aside and the case is remanded to the Office for further action in accordance with this decision.

Dated, Washington, D.C.  
January 15, 1998

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member