

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RACHEL G. CARILLO and DEPARTMENT OF THE ARMY,
FORT SAM HOUSTON, San Antonio, TX

*Docket No. 97-2256; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant abandoned her request for a hearing.

On May 14, 1986 appellant, then a 50-year-old clerk typist, filed a notice of traumatic injury alleging that on April 8, 1986 she slipped and fell in a parking lot injuring her back in the course of her federal employment. On June 16, 1986 the Office accepted that appellant sustained a herniated nucleus pulposus L5-S1, L4-5, L3-4. Appellant stopped working on May 8, 1986 and received compensation for total temporary disability. She underwent surgery on July 15, 1986 for a radical discectomy, a partial laminectomy and lumbar interbody fusion. Appellant was released for light duty on February 19, 1987, but she did not return to work.

On December 13, 1995 the Office issued a notice of proposed reduction of compensation on the basis that appellant was no longer totally disabled. The Office indicated that appellant was partially disabled and that she had the ability to earn wages as a telephone solicitor at an hourly rate of \$90.00 for 20 hours per week. The Office allowed appellant 30 days to submit additional argument or evidence.

By decision dated January 17, 1996, the Office reduced appellant's compensation effective February 4, 1996 because the position of telephone solicitor was suitable and represented appellant's wage-earning capacity.

In a letter dated February 12, 1996 and received by the Office on February 15, 1996, appellant requested a hearing and listed her address as “138 Beryl Drive, San Antonio, Texas 78213.”¹

In a letter dated April 12, 1997, the Office informed appellant that a hearing was scheduled for May 22, 1997 at 1:00 p.m. The address on the Office’s letter indicated that the notice was sent to appellant at 138 Beryl Street, San Antonio, Texas 78213, rather than the address that appellant listed of 138 Beryl Drive, San Antonio, Texas 78213.

Appellant did not appear at the hearing.

By letter decision dated June 10, 1997, the Office advised appellant that she was deemed to have abandoned her request for a hearing pursuant to 20 C.F.R. § 10.137. This letter was also sent to 138 Beryl Street, San Antonio, Texas 78213.

On appeal appellant contends that she did not receive the Office’s letter notifying her of the hearing.

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

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on June 17, 1997, the only decision before the Board is the Office’s June 10, 1997 decision finding that appellant abandoned her request for a hearing.

Section 8124 of the Federal Employees’ Compensation Act provides that a claimant not satisfied with a decision on her claim is entitled, upon timely request, to a hearing before a representative of the Office.³ Appellant made a timely request for a hearing before an Office hearing representative.

The Office’s regulations concerning abandonment of hearings provide:

“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,

¹ On both her notice of traumatic injury (Form CA-1) and on a July 8, 1986 claim for compensation on account of disability (Form CA-8) appellant gave an address of 138 Beryl, San Antonio, Texas 78213, without specifying whether she lived on a street or a drive. Nevertheless, on all of appellant’s remaining correspondence, she indicated that she lived on 138 Beryl Drive, San Antonio, Texas 78213.

² See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8124(b).

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.”⁴

The Office has the burden of proving that it mailed to claimant a 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.⁵

The record indicates that the Office sent an April 12, 1997 notice of the date and time of the scheduled hearing to an incorrect address of 138 Beryl Street, San Antonio, Texas 78213. The notice should have been sent to 138 Beryl Drive, San Antonio, Texas 78213, as appellant indicated in her February 12, 1996 request for a hearing. The Board finds that the Office’s failure to send the notice of the hearing to appellant’s correct address supports her contention on appeal that she did not receive notice of the hearing. The Board further finds that, under these circumstances, appellant’s failure to appear at the hearing or show cause for not appearing within 10 days after the scheduled date of the hearing, does not constitute abandonment of her request for a hearing.

The decision of the Office of Workers’ Compensation Programs dated June 10, 1997 is reversed and the case remanded to the Office for scheduling of appellant’s requested hearing before an Office hearing representative.

Dated, Washington, D.C.
December 13, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ 20 C.F.R. § 10.137(c).

⁵ *Samuel Smith*, 41 ECAB 226 (1989).