

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT J. VITELLO and U.S. POSTAL SERVICE,  
POST OFFICE, Youngstown, OH

*Docket No. 97-2257; Submitted on the Record;  
Issued December 20, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant abandoned his request for a hearing.

On March 27, 1996 appellant, then a 41-year-old clerk/carrier supervisor, filed a claim for an emotional condition alleging that he suffered from major depression as a result of his federal employment. Appellant stated that he became aware of the disease or illness and that it was caused or aggravated by his employment on March 15, 1996. Appellant stopped working on March 16, 1996.

By decision dated September 25, 1996, the Office denied appellant's claim inasmuch as the evidence failed to demonstrate that the claimed emotional condition arose out of the course of appellant's federal employment.

On October 3, 1996 appellant's representative requested an oral hearing.

On April 12, 1997 the Office sent a notice of hearing to appellant. The notice stated that a hearing would be held on May 22, 1997 in Cleveland, Ohio. The notice indicated that a copy was sent to the employing establishment, but it did not indicate that any notice had been provided to appellant's representative, John P. Lutseck.

By decision dated June 2, 1997, the Branch of Hearings and Review found that appellant abandoned his request for a hearing. It noted that appellant failed to appear at the May 22, 1997 hearing and that a cancellation was not requested at least three calendar days prior to the scheduled hearing. It also noted that appellant failed to show good cause for such failure to appear within 10 days after the date of the hearing as provided in 20 C.F.R. § 10.137(c).

The Board finds that the case is not in posture for decision on the issue of whether the Office abused its discretion in finding that appellant abandoned his request for a hearing.

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>1</sup>

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

In *Melvina A. Smith*,<sup>2</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 an 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 April 12, 1997 notice of hearing was formally addressed only to appellant and contained no evidence that a copy was also formally mailed to his attorney, Mr. Lutseck, at his correct address. 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.

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<sup>1</sup> 20 C.F.R. § 10.132.

<sup>2</sup> 33 ECAB 1937 (1983).

The decision of the Office of Workers' Compensation Programs dated June 2, 1997 is hereby set aside and the case is remanded to the Office for further action in accordance with this decision.

Dated, Washington, D.C.  
December 20, 1999

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member