

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH M. RIDDELL and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Bend, OR

*Docket No. 98-162; Submitted on the Record;
Issued December 6, 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.

The Office accepted appellant's claim for tendinitis of the left thumb, left wrist sprain and aggravation of degenerative arthritis in the carpal joint of the left thumb. Appellant, then a 56-year-old laborer, sustained her employment injury on March 29, 1990. Appellant underwent training and returned to work for the employing establishment in 1991 as a modified clerk typist working eight hours a week. On February 20, 1994 the employing establishment increased her hours per week to 30. On May 3, 1995 the employing establishment terminated appellant for cause, stating in letters dated May 2 and 3, 1995, that appellant was terminated for disciplinary problems unrelated to her physical restrictions. By decision dated June 29, 1995, the Office found that the modified clerk-typist position appellant held prior to her termination fairly and reasonably represented her wage-earning capacity and adjusted appellant's compensation benefits accordingly.

By letter dated July 19, 1995, appellant requested an oral hearing before an Office hearing representative.

By letter dated June 14, 1996, the Office informed appellant that an oral hearing would be held on August 1, 1996 at 12:30 p.m. in Medford, Oregon.

By letter dated July 10, 1996, appellant stated that the distance involved in driving from her home to the hearing was approximately 180 miles and she requested that the place of the hearing be changed to Bend, Oregon. She stated that due to the chronic pain in her hand and intermittent chest pain, she was unable to drive as far as Medford but she would be able to drive to Bend.

By letter dated July 12, 1996, the Office informed appellant that there were no plans at the present time to have a hearing representative in Bend but if appellant was unable to attend the hearing in Medford, a hearing could be scheduled for her in Portland, Oregon. Further, the Office informed her that if she was unable to attend a hearing in either Medford or Portland, she could consider having a review of the written record in lieu of the oral hearing. The Office directed appellant to contact the Office as soon as possible if she wished to have a review of the written record.

By letter dated July 24, 1996, appellant requested that the hearing be postponed to a future date to a place nearer to Bend. She stated that she had no money to pay anyone to drive her to Portland or to Medford "as it would cost [her] for gas, food and their time." She stated that she would prefer to have an oral hearing.

By letter dated July 25, 1996, the Office referenced its July 12, 1996 letter and reiterated that there were no plans to have a hearing representative in Bend. The Office stated that if appellant supplied a statement from her doctor that she had a medical condition, which prevented her from driving to Medford or to Portland and that such condition was unlikely to improve within the next 12 months to enable her to drive to those sites, the Office might be able to reschedule a hearing for her in or near Bend, but that might involve a wait of a year or more. The Office gave appellant until August 15, 1996 to inform the Office of her decision.

By letter dated August 6, 1996, appellant's treating physician, Dr. Stewart Tuft, a Board-certified family practitioner, stated that appellant was unable to drive the three-hour plus trip from Bend to Portland or from Bend to Medford which is about 160 miles. He stated that she could not afford to pay a friend to drive her, nor could she afford the gas to make the trip. Dr. Tuft also stated that appellant would not agree to a written review of the case.

By letter dated May 1, 1997, an Office hearing representative informed appellant that he would be in Portland the third week of June 1997 and to inform him as soon as possible whether she wished to schedule a hearing at that time. He reiterated that it was unlikely that a hearing representative would be sent to Bend in the foreseeable future but he could schedule a telephone hearing.

By letter dated June 19, 1997, the hearing representative stated that since he did not receive a reply to his May 1, 1997 letter, he was going to proceed with a telephone hearing and scheduled the hearing for July 16, 1997 at 12:30 p.m.

In an undated letter received by the Office on July 11, 1997, appellant stated that she did not receive the Office's May 1, 1997 letter. She stated that she did not want a telephone hearing, that she could not come to Portland and could only attend an oral hearing in or near Bend.

By decision dated July 15, 1997, the Office found appellant had abandoned her request for a hearing, holding that while appellant had established that she was unable to drive to the hearing, she did not establish that she was unable to travel to the hearing and her reason that she could not afford to travel to the hearing was not good cause.

The Board finds that the Office improperly found that appellant had abandoned her request for a hearing.¹

Section 8124(b) of the Federal Employees' Compensation Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.² Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

“(a) A scheduled hearing may be postponed or canceled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in the assessment of costs against such claimant.”

* * *

“(c) 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, 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.³ Where good cause is shown for failure to appear at the second scheduled hearing, another hearing will be scheduled. Unless extraordinary circumstances such as hospitalization, a death in the family, or similar circumstances which prevent the claimant from appearing are demonstrated, failure of the claim to appear at the third scheduled hearing shall constitute abandonment of the request for a hearing.”⁴

In the present case, the initial scheduled hearing was to be in Medford, Oregon on August 1, 1996. When appellant stated she was unable to attend that hearing, in its July 12, 1996 letter the Office provided appellant with an opportunity to have the hearing in Portland. When appellant stated she could not attend the hearing in Portland, in its July 25, 1996 letter the Office stated that if appellant submitted appropriate medical documentation, possibly an oral hearing could be scheduled in Bend within a year or more. Appellant subsequently submitted medical documentation from Dr. Tuft which stated that appellant could not drive to Medford or Portland. In its May 1, 1997 letter, the Office gave appellant another opportunity to attend a hearing in

¹ The Board lacks jurisdiction to render a decision on the merits addressed by the Office's June 29, 1995 decision because that decision was issued more than one year before appellant filed her October 15, 1997 appeal; *see Samuel Smith*, 41 ECAB 226, 228 (1989).

² 5 U.S.C. § 8124(b).

³ 20 C.F.R. §§ 10.137(a), (c).

⁴ 20 C.F.R. § 10.137; *Mark A. Norton*, 45 ECAB 898, 900 (1994).

Portland and when appellant did not respond, in its June 19, 1997 letter the Office gave appellant the opportunity to have a telephone hearing which appellant refused. When appellant refused to have the telephone hearing but still indicated that she wanted an oral hearing, the Office was obligated under the Act to schedule an oral hearing for appellant.

Under section 20 C.F.R. § 10.137, the Office can find that a claimant has abandoned a request for a hearing if he or she has actually failed to appear or give adequate notice at three scheduled hearings. The regulation does not provide a penalty where the Office, after consideration of the reasons given by a claimant, permits a postponement or suggests an alternative as in offering to schedule a telephone hearing. The Office, therefore, acted improperly in this case, in finding that appellant abandoned her request for a hearing when she rejected the Office's offer to have a telephone hearing. The Office could only find that appellant has not shown good cause for the requested postponement, informed appellant prior to the scheduled date of the hearing of such a finding and then invoke a penalty if appellant failed to appear at the scheduled time for the hearing.⁵ Appellant's rejection of the Office's offer to hold a telephone hearing cannot be considered a failure to appear under section 10.137.⁶ The case must, therefore, be remanded for the Office to schedule a hearing for appellant.

The decision of the Office of Workers' Compensation Programs dated July 15, 1997 is reversed.

Dated, Washington, D.C.
December 6, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ See *Mark A. Norton*, *supra* note 4 at 902; *Susan Brown*, 43 ECAB 872, 875 (1992).

⁶ See *Menodora Newbauer (Kenneth Newbauer)*, 43 ECAB 395, 398-99 (1992).