

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCET R. ROBERTS and U.S. POSTAL SERVICE,
POST OFFICE, Mesa, Ariz.

*Docket No. 98-11; Submitted on the Record;
Issued May 25, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on October 5, 1996; and (2) whether the Office of Workers' Compensation Programs properly found that appellant abandoned his request for a hearing.

On October 7, 1996 appellant filed a traumatic injury claim alleging that he sustained a headache on October 5, 1996 due to harassment from his supervisor. Appellant listed his address on his claim form as "709 S Oracle Street, Mesa, Arizona 85204."

By decision dated December 17, 1996, the Office denied appellant's claim on the grounds that the evidence did not establish fact of injury.

In a January 13, 1997 letter, appellant requested a hearing before an Office hearing representative.

In a June 28, 1997 notice addressed to appellant at "709 A Oracle Street, Mesa, Arizona 85204," the Office advised appellant that a hearing had been scheduled in his case for Wednesday, August 13, 1997 in Phoenix, Arizona.

By decision dated August 25, 1997, the Branch of Hearings and Review found that appellant failed to appear for his oral hearing, did not request cancellation three days prior to the scheduled date of the hearing and did not show good cause for his failure to appear within 10 days following the scheduled hearing date. The Branch of Hearings and Review addressed this letter to appellant at "709 S Oracle Street, Mesa, Arizona 85204."

On appeal, appellant contends that he did not receive the June 28, 1997 notice of hearing.

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

Section 8124(b) of the Federal Employees' Compensation Act provides claimants the right to a hearing if they request a hearing within 30 days of an Office decision.¹ Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to a postponement, withdrawal or abandonment of a hearing states in relevant part:

“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 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 assessment of costs against such claimant.”

* * *

“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.”²

In this case, appellant timely requested an oral hearing. The Office has the burden of proving that it mailed to 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. This presumption arises after it appears from the record that the notice was properly addressed and duly mailed.³ However, in this case, it does not appear from the record that the notice was properly addressed to appellant.

In his October 7, 1996 claim form, appellant listed his address as “709 S Oracle Street” in Mesa, Arizona. (Emphasis added.) However, in its June 28, 1997 notice of hearing, the Office listed appellant’s address as “709 A Oracle Street.” (Emphasis added.) Therefore, appellant cannot be presumed to have received the notice of hearing as it was incorrectly addressed. Thus, the case must be returned to the Office for the scheduling of another hearing for appellant.

In view of the Board’s determination regarding abandonment of a hearing, the Board finds that the case is not in posture for a decision on the first issue.

¹ 5 U.S.C. § 8124(b).

² 20 C.F.R. § 10.137(a), (c).

³ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The decision of the Office of Workers' Compensation Programs dated August 25, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
May 25, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member