

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNIE BENNY BOOTH and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

*Docket No. 99-583; Submitted on the Record;
Issued May 16, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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

On October 21, 1996 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that the arthritis and pain in his right foot were caused by factors of his federal employment.¹

By decision dated November 29, 1996, the Office accepted appellant's claim for temporary aggravation of preexisting degenerative arthritis of the right foot. The Office found, however, that the temporary aggravation was not related to appellant's July 1994 right foot injury claim.

By decision dated January 22, 1997, the Office found that appellant's temporary aggravation had ceased, and that several doctors released him to full-duty status. The Office further denied appellant's claim on the grounds that the medical evidence indicated that his right foot condition was related to an "underlying, nonindustrial degenerative condition," not the temporary aggravation accepted in its November 29, 1996 decision. The Office found that the medical evidence of record did not establish total disability.

By letter dated February 19, 1997, appellant requested an oral hearing.

By letter dated October 11, 1997, the Office notified appellant that an oral hearing before an Office hearing representative was scheduled for November 20, 1997.

¹ On the claim form, appellant alleged that he originally filed his claim on April 28, 1996, and that the claim form was misfiled or misplaced.

By letter dated November 17, 1997, appellant requested that the Office postpone the oral hearing scheduled for November 20, 1997 in order to allow him additional time to prepare. Appellant stated that, because he underwent knee surgery on September 25, 1997, did not receive notice of the hearing date until October 29, 1997, and did not return to work until one week prior to receiving notice, he was unable to prepare for the hearing due to physical, financial and time constraints.

By memorandum to the case file dated November 20, 1997, the Office stated that, during an informal conversation with appellant, it was determined that it would be in appellant's best interest to postpone the scheduled oral hearing in order for appellant to prepare for it.

By letter dated April 24, 1998, the Office notified appellant that an oral hearing before an Office hearing representative was scheduled for May 20, 1998. Appellant did not appear on the date of the scheduled hearing, nor did he contact the Office regarding his failure to appear.

By decision dated June 4, 1998, the Office found that appellant abandoned his hearing request because he failed to appear for his May 20, 1998 hearing without good cause.

On appeal, appellant alleged that he did not receive notice of the May 20, 1998 hearing because the Office's notification letter, dated April 24, 1998, was incorrectly addressed.

The Board finds that the Office improperly found that appellant abandoned his request for a hearing.²

Section 8124(b) of the Federal Employees' Compensation Act provides claimants a right to a hearing if they request a hearing within 30 days of an Office decision.³ The Office's regulations pertaining to postponement, withdrawal or abandonment of a hearing request provide in relevant part:

"A scheduled hearing may be postponed or cancelled 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."

* * *

"A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set forth for the hearing that another date be rescheduled. Where good cause for failure to appear is shown, another hearing

² The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of appeal. As appellant filed his appeal with the Board on November 9, 1998, the only Office decision before the Board is the Office's June 4, 1998 decision; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8124(b).

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.”⁴

The Office has the burden of proving that it mailed notification 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.⁵ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁶ The “mailbox rule” states that the appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.⁷ The Office’s finding of abandonment rests on the strength of that presumption.

In this case, the record shows that the Office had knowledge of appellant’s changed address, thereby rebutting the presumption that appellant received notification of the hearing scheduled for May 20, 1998.⁸ Specifically, the Office’s letters to appellant dated March 3 and March 7, 1997 listed appellant’s address as 7087 La Sena Avenue, San Diego, California.⁹ However, the Office’s letter dated April 24, 1998 notifying appellant of the time and place of the hearing scheduled May 20, 1998 listed his address as 6868 Quebec Court, Apartment 2, San Diego, California. The Board finds that the Office’s failure to send the April 24, 1998 hearing notice to appellant’s last known address supports appellant’s contention, on appeal, that he did not receive notice of the scheduled hearing. The Board further finds that appellant’s failure to appear or show cause for not appearing within 10 days of the hearing scheduled for May 20, 1998 does not constitute abandonment of his hearing request.

⁴ 20 C.F.R. §§ 10.137(a), (c).

⁵ *Clara T. Norga*, 46 ECAB 473, 487; *George F. Gidicsin*, 36 ECAB 175, 178 (1984).

⁶ *See Norga*, *supra* note 5 at 487; *Michelle F. Littlejohn*, 42 ECAB 463, 465 (1991).

⁷ *See Norga*, *supra* note 5 at 487; *Larry L. Hill*, 42 ECAB 596, 600 (1991).

⁸ *See Littlejohn*, *supra* note 6 at 465.

⁹ The Board notes that, prior to his letter dated November 17, 1997 requesting postponement of the hearing scheduled for November 20, 1997, appellant’s correspondence to the Office listed his address as 6868 Quebec Court, Apartment 2, San Diego, California.

The decision of the Office of Workers' Compensation Programs dated June 4, 1998 is reversed and the case is remanded to the Office for scheduling of a hearing before an Office hearing representative.

Dated, Washington, D.C.
May 16, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member