

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDIA J. WHITTEN and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, TELESERVICE CENTER, San Diego, CA

*Docket No. 99-2128; Submitted on the Record;
Issued August 22, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

On March 24, 1997 appellant, then a 45-year-old contact representative, filed an occupational disease claim for an injury to her left arm and hand related to computer keyboard use. By decision dated July 1, 1997, the Office found that the evidence contained no medically recognizable and acceptable diagnosis and that appellant had failed to establish fact of injury.

By letter dated July 29, 1997, appellant requested a hearing before an Office hearing representative. The Office scheduled a hearing for March 17, 1998 in San Diego, but appellant's authorized representative, by letter dated March 16, 1998, requested postponement of the hearing on the basis that appellant had been temporarily reassigned to an office in New York and was expected to return in June 1998. The Office postponed the hearing and rescheduled it for August 27, 1998, in San Diego. Appellant's representative called the Office hearing representative stating that appellant was still on her temporary assignment in New York. By letter dated August 11, 1998, the Office hearing representative postponed the hearing scheduled for August 27, 1998.

By letter dated January 29, 1999, the Office notified appellant and her representative that the hearing was scheduled for March 18, 1999 in San Diego. By decision dated March 31, 1999, the Office found that appellant had abandoned her request for a hearing, as she failed to appear and there was no indication that she contacted the Office prior to or subsequent to the scheduled hearing to explain the failure to appear.

The Board finds that the Office properly found that appellant abandoned her request for a hearing before an Office hearing representative.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

“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 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.”¹

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.² Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office’s procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

¹ 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

² 20 C.F.R. § 10.622(b) (1999).

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”³

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on March 18, 1999. The record shows that the Office mailed appropriate notice to the claimant at her last known address. The record also supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office’s procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

The March 31, 1999 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 22, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).