

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARIE M. MILIUS and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Staten Island, NY

*Docket No. 99-1137; Submitted on the Record;
Issued July 13, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant abandoned her April 23, 1998 request for a hearing before a hearing representative of the Office of Workers' Compensation Programs.

In a decision dated March 25, 1998, the Office found that the evidence of record failed to establish that appellant sustained an emotional condition while in the performance of her duties.

On April 23, 1998 appellant requested a hearing before an Office hearing representative. On November 28, 1998 the Office notified appellant that her hearing was scheduled for December 30, 1998.

In a decision dated January 20, 1999, the hearing representative found that appellant abandoned her request for a hearing. The hearing representative noted that appellant failed to appear for the December 30, 1998 hearing, did not request cancellation at least three days prior to the hearing and had not shown good cause for her failure to appear.

Appellant's attorney requests that the Board review the Office's January 20, 1999 decision. He argues that on December 30, 1998, the date of the hearing, appellant experienced disabling anxiety and could not attend. The attorney asserts that appellant contacted the Office claims examiner, who assured her that he would handle the matter and take the necessary steps to adjourn the case. Appellant's attorney requests that another hearing be scheduled in the interest of justice.

The Board finds that appellant abandoned her April 23, 1998 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, sets 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

The regulations were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(a) provides that a claimant or representative may withdraw a hearing request. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request for postponement does not meet certain conditions. Alternatively, at the discretion of the hearing representative, a teleconference may be substituted for the oral hearing.

The regulations do not address what action the Office should take when a claimant neither withdraws the request for a hearing nor requests postponement but nonetheless fails to appear at the scheduled hearing without notice.

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 1999,² 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.

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

² The date of Chapter 2.1601.6(e) supports that the Office intended the provisions therein to be read in conjunction with the newly revised regulations, which became effective on January 4, 1999.

“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 pre-recoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(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

The record shows that appellant neither withdrew her request for a hearing nor requested postponement. The provisions of 20 C.F.R. § 10.622, therefore, do not apply in this case. The record also shows that appellant failed to appear at the scheduled hearing and that she failed to provide notification for such failure within 10 days of the scheduled date of the hearing. As this satisfies the criteria for abandonment specified in the Office’s procedure manual, the Board finds that appellant abandoned her request for a hearing before an Office hearing representative.

The Board’s jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.⁴ The Board therefore has no jurisdiction to review the reason offered on appeal for appellant’s failure to appear at the December 30, 1998 hearing. Nor may the Board review the assertion made on appeal that appellant contacted the Office claims examiner and that this claims examiner assured her that he would handle the matter and take the necessary steps to adjourn the case.

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

⁴ 20 C.F.R. § 501.2(c).

The January 20, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 13, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member