

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEVI DREW, JR. and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 99-1453; Submitted on the Record;
Issued July 12, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant abandoned his request for an oral hearing before an Office of Workers' Compensation Programs hearing representative.

In a decision dated May 22, 1998, the Office reduced appellant's compensation based on his capacity to earn wages as a gate guard. On June 10, 1998 he requested an oral hearing before an Office hearing representative. On December 13, 1998 the Office issued a notice advising that a hearing would be held at a specific time and place on January 27, 1999.

In a decision dated February 9, 1999, the Office found that appellant abandoned his request for a hearing. The Office noted that he failed to appear at the hearing and that the record gave no indication that appellant had contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear.

Appellant asks the Board to review the Office's finding of abandonment.

The Board finds that appellant abandoned his request for an oral 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 once again revised, 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 2.1601.6e 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 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.

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).

“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 January 27, 1999. The record shows that the Office mailed appropriate notice to the claimant at his last known address. Although appellant urges on appeal that he at no time received any such notification, 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.⁴ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁵ 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.⁶

The record supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he 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 Board finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

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

⁴ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

⁵ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁶ See *Larry L. Hill*, 42 ECAB 596 (1991). See generally Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

The February 9, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 12, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member