

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES P. SALLEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Fayetteville, AR

*Docket No. 02-449; Submitted on the Record;
Issued June 21, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant established that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant abandoned his request for a hearing.

On July 29, 2000 appellant, a 35-year-old housekeeping aide, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered from an emotional condition as a result of his federal employment. Appellant attributed his condition to a June 28, 1996 verbal exchange with a supervisor regarding his performance appraisal. As a result of the exchange, appellant was terminated, arrested and charged with two felony counts of terroristic threatening.¹ He was acquitted on October 21, 1999 and the employing establishment subsequently allowed appellant to return to work. Upon his return, appellant was allegedly harassed and subjected to verbal abuse, including racial slurs.

By decision dated January 16, 2001, the Office denied appellant's claim, finding that the evidence failed to demonstrate that the claimed emotional condition arose in and out of the performance of appellant's federal duties.

On February 6, 2001 appellant's representative, Chris D. Mitchell, Esq., requested an oral hearing on appellant's behalf. By letter dated March 19, 2001, the Office acknowledged receipt of appellant's request for an oral hearing and advised appellant of various procedural requirements with respect to scheduling of the hearing and requesting witness subpoenas. The letter further indicated that the Office forwarded a copy of the correspondence to appellant's counsel.

On June 27, 2001 the Office sent a notice of hearing to appellant. The notice stated that a hearing would be held on August 6, 2001 in Little Rock, Arkansas. The notice indicated that a

¹ Appellant allegedly threatened the lives of two employing establishment supervisors.

copy was sent to the employing establishment, but it did not indicate that any notice had been provided to appellant's representative, Mr. Mitchell.

By decision dated November 21, 2001, the Branch of Hearings and Review found that appellant abandoned his request for a hearing. The decision noted that appellant failed to appear at the August 6, 2001 hearing and there was no indication from the file that he contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear. Additionally, the decision indicated that a copy was sent to the employing establishment, however, a copy was not provided to appellant's representative.

The Board finds that the case is not in posture for decision on the issue of whether the Office abused its discretion in finding that appellant abandoned his request for a hearing.

Section 10.617(b) of Title 20 of the Code of Federal Regulations provides in relevant part that "the hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date."² In this instance, the record does not support that a copy of the June 27, 2001 notice of hearing was properly addressed and mailed to appellant's designated representative, Mr. Mitchell, in accordance with 20 C.F.R. § 10.617(b).

Consequently, appellant did not receive the hearing to which he was entitled. This error requires that the case be remanded to afford appellant an opportunity for a new hearing with proper notice being given to all parties involved.³

Because of the Board's disposition of the second issue, it is premature for the Board to address the first issue, which constitutes the merits of the case.

² 20 C.F.R. § 10.617(b) (2001).

³ See *Newton D. Lashmett*, 45 ECAB 181 (1993); *Melvina A. Smith*, 33 ECAB 1937 (1983).

The November 21, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further action in accordance with this decision.

Dated, Washington, DC
June 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member