

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERBERT E. RALPH and U.S. POSTAL SERVICE,
POST OFFICE, Manchester, NH

*Docket No. 02-505; Submitted on the Record;
Issued November 25, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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

On October 15, 1992 appellant, then a 31-year-old letter carrier, claimed he injured his back on October 13, 1992 while in the performance of duty.

The Office accepted appellant's October 13, 1992 lumbar strain as work related. On May 25, 1995 the Office subsequently accepted that appellant sustained recurrences of disability on January 2 and 27, and March 16, 1993.

On July 8, 1998 the Office notified appellant that he would be placed on the periodic rolls.

On August 8, 2000 the Office notified appellant that he was scheduled for a second opinion evaluation.

On August 30, 2000 the Office proposed suspension of appellant's compensation benefits on the grounds that he failed to attend the second opinion evaluation. The Office provided 14 days from the date of the letter to respond to the proposed suspension. In a report received by the Office on September 9, 2000, appellant noted that he would not attend the medical evaluation. By decision dated September 19, 2000, the Office suspended appellant's compensation benefits until his "obstruction ceases."

In a letter received by the Office on October 19, 2000, appellant requested an oral hearing. On April 10, 2001 appellant changed his address to PO Box 245, Hillsboro, NH, 03244. On September 25, 2001 the Office scheduled a hearing for November 1, 2001 using appellant's PO Box 245, Hillsboro, NH, 03244 address.

By decision dated November 7, 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 November 1, 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.

The Board finds that the Office did not abuse its discretion in finding that appellant abandoned his request for a hearing.

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 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, the 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 [d]istrict Office. In cases involving

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).

prerecoupment hearings, [the Branch of Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [d]istrict [Office].

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] 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 [the Branch of Hearings and Review] 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

It is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁴ However, absent evidence of a properly addressed notice, the presumption cannot arise.⁵ By letter dated September 25, 2001, the Office notified appellant of the hearing for November 1, 2001, and used the Post Office Box 245, Hillsboro, NH, 03244 address. Thus, the presumption of receipt under the mailbox rule arises. The record establishes that appellant was notified of the scheduled hearing and appellant failed to attend the hearing.

The decision of the Office of Workers’ Compensation Programs dated November 7, 2001 is affirmed.

Dated, Washington, DC
November 25, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

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

⁴ *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁵ *Id.*