

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NELSON R. HUBBARD and U.S. POSTAL SERVICE,
POST OFFICE, Richmond, VA

*Docket No. 01-1567; Submitted on the Record;
Issued October 18, 2002*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he was totally disabled from November 6 through 13, 1997 causally related to his accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had abandoned his request for a hearing.

The Office accepted that on July 7, 1992 appellant, then a 36-year-old letter carrier, sustained a chronic meniscus tear of the right knee in the performance of duty.¹ The Office authorized a right total knee replacement, which was performed by Dr. Gurpal S. Bhuller, a Board-certified orthopedic surgeon, on May 6, 1997. He released appellant to sedentary work for six hours a day on August 11, 1997. On November 7, 1997 Dr. Bhuller reviewed a description of a November 5, 1997 full-time limited-duty assignment offered by the employing establishment and found the position suitable for appellant. He accepted the November 5, 1997 position "under protest."

On November 13, 1997 appellant filed a claim for compensation from November 8 through 13, 1997. He indicated on the form that an injury compensation specialist with the employing establishment told him that he could obtain workers' compensation for five days in order to see his physician.

By decision dated March 30, 1998, the Office reduced appellant's compensation to zero effective November 13, 1997 after finding that his modified position fairly and reasonably represented his wage-earning capacity.

¹ Appellant filed a claim for a recurrence of disability on July 7, 1992 causally related to his December 5, 1988 employment injury. The Office assigned appellant's claim for a December 5, 1988 injury, File Number A25-0332503, and accepted the claim for a sprain of the right knee and aggravation of preexisting arthritis of the right knee. In a decision dated June 12, 1989, the Office granted appellant a schedule award for a 40 percent permanent impairment of the right leg. The Office adjudicated appellant's claim for a July 7, 1992 recurrence of disability as a claim for a traumatic injury.

By decision dated August 4, 2000, the Office denied appellant's claim for compensation from November 6 through 13, 1997.

In a letter dated August 11, 2000, appellant requested a hearing before an Office hearing representative. He listed his address as P. O. Box 3537, Petersburg, VA 23805.

On September 9, 2000 the Office sent appellant a letter acknowledging receipt of his request for a hearing and providing information regarding the hearing. The Office addressed the letter to appellant's new address, P. O. Box 3537, Petersburg, VA 23805.

On March 15, 2001 the Office informed appellant that his hearing was scheduled for April 26, 2001. The Office sent the notice of hearing to appellant's previous street address, 1857 S. Sycamore Street, Petersburg, VA 23805, rather than his current address. A handwritten notation on the March 15, 2001 notice of hearing indicated that it had been "remailed March 22, [2001]" to "P.O. Box 3537," Petersburg, VA 23805.

By decision dated May 7, 2001, the Office found that appellant had abandoned his request for a hearing. On the decision, the Office listed appellant's address as P. O. Box 3527, Petersburg, VA 23805.

The Board finds that the Office improperly determined that appellant abandoned his request for a hearing.

Section 10.617(b) of the Office's implementing federal regulations provides that, unless otherwise directed in writing by the claimant, "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 With regard to a notice of hearing issued by the Office's Branch of Hearings and Review, the Board has held that the mailbox rule applies, stating:

"The Office has the burden of proving that it mailed to a claimant notice of the scheduled hearing. 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. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed."³

In this case, however, the record does not support that the notice of hearing was properly addressed and mailed to appellant in accordance with Office procedures. The Office mailed its March 15, 2001 notice of hearing to appellant's previous address rather than to the address provided in his August 11, 2000 request for an oral hearing and used by the Office to send him correspondence on September 1, 2000. While the letter contains a handwritten correction and a notation that the notice was "remailed March 22, [2001]" this is insufficient to constitute adequate evidence of proper mailing.⁴ The record does not contain a copy of the notice of

² 20 C.F.R. § 10.617(b).

³ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁴ *See Newton D. Lashmet*, 45 ECAB 181 (1993).

hearing with a correct address, evidence of actual mailing or the date and author of the handwritten notation. Additionally, the Office's May 7, 2001 decision finding that appellant abandoned his request for a hearing was also incorrectly addressed to P.O. Box 3527, Petersburg, VA 23805, rather than P.O. Box 3537, Petersburg, VA 23805. Under these circumstances, the presumption of receipt by appellant under the mailbox rule does not arise.⁵ As the record fails to demonstrate that appellant was properly notified of the scheduled hearing, the case will be remanded to the Office to provide appellant the opportunity for a hearing.⁶

The decisions of the Office of Workers' Compensation Programs dated May 7, 2001 and August 4, 2000 are set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
October 18, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ See *Michelle R. Littlejohn*, *supra* note 3.

⁶ In view of the Board's disposition of the second issue, it is premature to address the merits of whether appellant has established disability from November 6 to 13, 1997 causally related to his accepted employment injury.