

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JESUS J. PINA and U.S. POSTAL SERVICE,  
LOS ANGELES BULK MAIL CENTER, Bell, CA

*Docket No. 02-1293; Submitted on the Record;  
Issued June 11, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for a hearing.

On April 18, 1986 appellant, then a 44-year-old mailhandler, filed a claim for a traumatic injury to his left shoulder sustained on March 28, 1986 by lifting a mail sack.

The Office accepted that appellant sustained tendinitis and bursitis of the left shoulder as a result of the March 28, 1986 injury. On August 18, 1989 the Office issued appellant a schedule award for a 38 percent permanent loss of use of the left arm.

On July 30, 1998 appellant filed a claim for a recurrence of disability due to his March 26, 1986 employment injury. As appellant attributed his recurrence of disability to the light duty he had performed after his March 28, 1986 injury, the Office converted his claim to that of an occupational disease.

On March 1, 2000 appellant filed a claim for a schedule award.

By decision dated November 28, 2000, the Office found that appellant was not entitled to an increased schedule award for the reason that the medical evidence did not establish an impairment greater than that for which he received a schedule award.

By undated letter received by the Office on December 8, 2000 appellant requested a hearing.

By letter dated April 11, 2001, the Office notified appellant that a hearing would be held on May 24, 2001 at 9:00 a.m. at the Federal Building, 11000 Wilshire Boulevard, Room 8200, Los Angeles, CA 90024. This notice was addressed to appellant at 823 Abe Way, Monterey Park, CA 91755.

By decision dated June 13, 2001, the Office found that appellant had abandoned his request for a hearing on the basis that he had not appeared at the scheduled hearing and had not contacted the Office prior to or subsequent to the scheduled hearing to explain his failure to appear.

The only Office decision before the Board on this appeal is the Office's June 13, 2001 decision, finding that appellant abandoned his request for a hearing. Since more than one-year elapsed between the date of the Office's most recent merit decision on November 28, 2000 and the filing of appellant's appeal on April 15, 2002 the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

The Board finds that the Office properly determined 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.”

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“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.”<sup>2</sup>

These regulations, however, were again revised as of 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.<sup>3</sup> 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.

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

<sup>2</sup> 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

<sup>3</sup> 20 C.F.R. § 10.622(b) (1999).

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, [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 precoupment hearings, [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 DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [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 [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.”<sup>4</sup>

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on May 24, 2001. The record shows that the Office mailed appropriate notice to the claimant at his last known address.<sup>5</sup> The record also 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 Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

<sup>5</sup> Under the “mailbox rule,” 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. *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The June 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 11, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member