

FACTUAL HISTORY

On August 12, 2002 appellant, then a 63-year-old data technician, filed a traumatic injury claim alleging that she sustained a fracture to the small toe of her right foot on August 6, 2002 when a coworker ran over her foot with an all purpose container (APC). The employing establishment controverted the claim as appellant waited three days before reporting the injury and the coworker, Princess M. Tackie, did not recall striking appellant with the APC. Appellant was diagnosed with a fracture of the fifth metatarsal of the right foot.

In a decision dated December 6, 2002, the Office denied appellant's claim based upon her failure to establish that she sustained an injury as alleged. On December 31, 2002 appellant requested an oral hearing. By letter dated May 12, 2003, the Branch of Hearings and Review acknowledged receipt of appellant's hearing request. On September 9, 2003 the Branch of Hearings and Review notified appellant that her hearing was scheduled for October 31, 2003. Both the May 12 and September 9, 2003 letters were addressed to appellant at 2408 Fairlawn Street, Temple Hills, MD, 20748, which is the address appellant provided on the claims form as well as the return address she noted on her December 31, 2002 hearing request.

Appellant did not appear for the October 31, 2003 scheduled hearing. In a December 18, 2003 decision, the Office determined that appellant abandoned her request for an oral hearing.

LEGAL PRECEDENT

Section 10.137 of Title 20 of the Code of Federal Regulations, revised 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 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

¹ 20 C.F.R. §§ 10.137(a) and 10.137(c) (revised as of April 1, 1997).

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 is found in 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 [District Office]. In cases involving precoupment hearings, [hearings and review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the [district office].

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

ANALYSIS

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on October 31, 2003. The record shows that on September 29, 2003 the Office mailed appropriate notice to appellant at her address of record: 2408 Fairlawn Street, Temple Hills, MD, 20748.⁴ Although appellant alleges that she did not

² 20 C.F.R. § 10.622(b) (1999).

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

⁴ The Office's regulation provide 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.” 20 C.F.R. § 10.617(b) (1999).

receive the September 29, 2003 notice, 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.⁵ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁶ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office, will raise the presumption that the original was received by the addressee.⁷

The record also supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she 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 her request for an oral hearing.⁸

CONCLUSION

The Board finds that the Office properly determined that appellant abandoned her request for an oral hearing.

⁵ *Levi Drew Jr.*, 52 ECAB 442, 444 (2001).

⁶ *Id.*

⁷ *Id.*

⁸ *See Claudia J. Whitten*, 52 ECAB 483 (2001).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member