

**United States Department of Labor
Employees' Compensation Appeals Board**

JERRY L. SNELL, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Huntington Beach, CA, Employer**

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**Docket No. 04-1586
Issued: December 6, 2004**

Appearances:
Jerry L. Snell, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 4, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated May 11, 2004, which found that he had abandoned his request for a hearing. The last merit decision in this case was issued on March 18, 2003, which found that appellant has a 38 percent wage-earning capacity. As more than one year has elapsed between the merit decision of March 18, 2003 and the filing of this appeal on June 4, 2004, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly found that appellant abandoned his request for a hearing. On appeal appellant contends that he did not abandon his request for an oral hearing and had informed the Office by telephone on April 26, 2004 that he would not be able to attend

the hearing scheduled for April 28, 2004. Appellant contended that he requested that a decision be made on the written record.¹

FACTUAL HISTORY

On July 28, 1998 appellant, a mail carrier, filed an occupational disease claim alleging that on July 11, 1998 he first realized his acute thoracic strain syndrome and degenerative disc disease at T11-12 was due to his carrying heavy mail.² The Office accepted the claim for degenerative disc disease at T11-12.³ Appellant stopped work on August 29, 1998 and was subsequently placed on the periodic rolls for temporary total disability. On August 30, 1999 the Office authorized back surgery, discectomy, decompression laminectomy and fusion, which occurred on October 5, 1999. Appellant was unable to return to work at the employing establishment and was referred for vocational rehabilitation.

On February 11, 2003 the Office issue a proposed notice to reduce his compensation based on his ability to perform the duties of the constructed position of an optometric assistant. In a decision dated March 18, 2003, the Office finalized its determination that appellant had a 38 percent wage-earning capacity as an optometric assistant. The Office informed appellant that the reduction of his compensation benefits was effective March 23, 2003.⁴

By letters dated March 25, 2003, appellant, through his representative, requested a hearing on the March 18, 2003 decision. In a letter dated April 8, 2003, the Office acknowledged receipt of appellant's request for an oral hearing and provided procedural information regarding the hearing. On March 12, 2004 the Office sent a notice of hearing to appellant and his representative. The notice stated that a hearing would be held on Wednesday, April 28, 2004 at 10:00 a.m. in Las Vegas, NV.⁵ Neither appellant nor his representative appeared for the hearing.

By decision dated May 11, 2004, the Office found that appellant had abandoned his request for a hearing since he failed to appear. The Office noted that appellant received written verification 30 days prior to the date of the hearing, that he failed to appear and that the record contains no evidence that appellant contacted the Office either prior to the scheduled hearing or subsequently to explain his failure to appear.

¹ The Board notes that on appeal appellant submitted a copy of his telephone bill with a call to Washington, DC on April 26, 2004 circled. The Board cannot consider new evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422 (1997).

² This was assigned claim number 13-1167098. The record contains evidence of seven other claims, which the Office accepted and consolidated into the master file number.

³ The Office informed appellant that this claim was combined with the master file number.

⁴ Appellant subsequently elected to receive benefits under the Civil Service Retirement Act in lieu of the compensation benefits under the Federal Employees' Compensation Act effective April 30, 2003.

⁵ The record reflects that in August 2003 appellant relocated from Garden Grove, California to Las Vegas, Nevada. The notice was sent to appellant's address of record.

LEGAL PRECEDENT

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

“(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 [district 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.”⁶

ANALYSIS

In finding that appellant abandoned his March 25, 2003 request for a hearing, the Office noted that a hearing had been scheduled in Las Vegas, NV on April 28, 2004. Appellant and his representative received written notification of the hearing 30 days in advance but they failed to appear for the hearing. The record contains no evidence that he contacted the Office to reschedule the hearing or explain his failure to attend the hearing. On appeal, appellant contends that he called the Office on April 26, 2004 to request that the Office perform a review of the written record. Contrary to appellant's contention, the record contains no evidence that he contacted the Office on April 26, 2004 or at any time prior to the hearing scheduled for April 28, 2004.

The Board finds that the record is devoid of evidence that appellant or his representative establishes requested postponement of the hearing date. They failed to appear at the scheduled hearing or to provide any notification for such failure within 10 days of the scheduled hearing. As this meets the criteria for abandonment as specified in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also Claudia J. Whitten*, 52 ECAB 483, 484-85 (2001).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2004 is affirmed.

Issued: December 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member