

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

RHONDA W. BARBER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 03-2062
Issued: January 30, 2004**

Appearances:
Rhonda W. Barber, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On August 19, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 11, 2003 which found that she had abandoned her request for a hearing. As more than one year has elapsed between the merit decision dated August 15, 2002 from which appellant requested a hearing and the filing of this appeal on August 19, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ISSUE

The issue is whether the Office properly found that appellant abandoned her request for a hearing. On appeal, appellant contends that she did not receive notice of the scheduled hearing.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office's June 15, March 17 and February 25, 1999 and November 18, 1998 decisions denying appellant's claims for recurrences of disability on July 23, September 1, October 7,

December 7 and December 31, 1998 and January 8, February 1 and 25 and March 13, 1999.¹ The Board further affirmed the Office's August 9, 1999 decision denying appellant's request for a hearing as untimely.²

On March 21, 2002 appellant filed a notice of recurrence of disability on March 9, 2002 causally related to her January 1, 1996 employment injury. Appellant stopped work on March 8, 2002 and returned to her limited-duty employment on March 21, 2002.³

By decision dated August 3, 2002, the Office denied appellant's claim for a recurrence of disability on April 8, 2002 due to her January 1, 1996 employment injury. In a decision dated August 15, 2002, the Office amended its August 3, 2002 decision to correct a typographical error regarding the date of the claimed recurrence of disability. The Office denied appellant's claim for a recurrence of disability on March 8, 2002 causally related to her accepted employment injury.

By letters dated September 2, 2002, appellant requested a hearing on the August 3 and 15, 2002 decisions. In a letter dated September 12, 2002, the Office acknowledged receipt of appellant's request for an oral hearing and provided procedural information regarding the hearing. On May 6, 2003 the Office set a notice of hearing to appellant. The notice stated that a hearing would be held on Thursday, June 12, 2003 at 10:30 a.m. Appellant did not appear for the proceeding.

By decision dated July 11, 2003, the Office determined that appellant had abandoned her request for a hearing.

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.

¹ Docket No. 00-533 (issued April 25, 2001).

² In a decision dated June 19, 2001, the Office denied modification of its October 11, 2000 decision denying appellant's claim for recurrences of disability on January 10, March 20 and May 19, 2000. In another decision dated June 19, 2001, the Office denied appellant's request for reconsideration of the April 25, 2001 Board decision on the grounds that the information submitted was insufficient to warrant review.

³ Appellant filed a claim for a recurrence of disability on June 4, 2002 causally related to her January 1, 1996 employment injury. Appellant further filed a claim for a recurrence of disability on August 9, 2002 due to her January 1, 1996 employment injury. By decision dated December 16, 2002, the Office denied appellant's claim for an employment-related recurrence of disability on August 9, 2002. Appellant has not appealed this decision and therefore it is not before the Board at this time.

“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]. In cases involving precoupment 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 [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.”⁴

ANALYSIS

In finding that appellant abandoned her September 2, 2002 request for a hearing, the Office noted that a hearing had been scheduled in New York on June 12, 2003, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain her failure to attend the hearing. On appeal, appellant asserts that she did not receive notice of the scheduled hearing date. However, the record reflects that, in a letter dated May 6, 2003, the Office mailed appropriate notice of the June 12, 2003 scheduled hearing to appellant’s last known address. 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.⁵

The record establishes that appellant did not request postponement of the hearing date, failed to appear at the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the criteria for abandonment as specified in Chapter 2.1601.6.e of the Office’s procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

CONCLUSION

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

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

⁵ *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2003 is hereby affirmed.

Issued: January 30, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member