

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

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**KERRY J. KELLS, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, ME, Employer**

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**Docket No. 04-1365  
Issued: September 20, 2004**

*Appearances:*  
*Kerry J. Kells, 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 April 26, 2004 appellant filed an appeal of a March 30, 2004 decision of the Office of Workers' Compensation Programs that found that he abandoned his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the March 30, 2004 decision.<sup>1</sup>

**ISSUE**

The issue is whether appellant abandoned his request for a hearing.

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<sup>1</sup> The Board would also have jurisdiction to review the Office's May 12, 2003 decision addressing the merits of appellant's claim, but appellant's letter to the Board requesting an appeal of the March 30, 2004 decision finding he abandoned his request for a hearing addresses only that issue, and does not express a desire to appeal the May 12, 2003 merit decision.

## **FACTUAL HISTORY**

On October 10, 2002 appellant filed a claim for compensation for a traumatic injury to his back sustained on September 17, 2002 while loading a van. By letter dated April 2, 2003, the Office advised appellant of further evidence needed to establish his claim.

By decision dated May 12, 2003, the Office found that the evidence was insufficient to establish that the September 17, 2002 event occurred as alleged, and that there was no medical evidence that provided a diagnosis that could be connected to the claimed event.

By letter dated June 10, 2003, appellant requested an oral hearing, and submitted additional evidence.

By letter dated February 19, 2004, addressed to appellant at 3 Azalea Lane, Windham, ME 04062, the Office advised appellant that a hearing was scheduled for March 25, 2004 at 12:00 p.m. at the U.S. District Court House, 156 Federal Street, Courtroom 1, Portland, ME 04101. Appellant did not appear at the scheduled hearing.

By decision dated March 30, 2004, the Office found that appellant abandoned his request for a hearing, as he did not appear at the scheduled hearing and did not contact the Office prior or subsequent to the scheduled hearing to explain his failure to appear.

## **LEGAL PRECEDENT**

The legal authority governing abandonment of hearings rests with the Office's procedure manual.<sup>2</sup> 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, H&R [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, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.”<sup>3</sup>

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<sup>2</sup> The Office revised its regulations effective January 4, 1999, and the regulations, unlike the previous ones, now make no provision for abandonment. 20 C.F.R. § 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> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

**ANALYSIS**

In the present case, appellant timely requested a hearing following the Office's May 12, 2003 decision, and the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on March 25, 2004. The record shows that the Office mailed appropriate notice to the claimant at his last known address. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>4</sup>

Appellant did not appear for the hearing scheduled for March 25, 2004. The Office, however, issued its decision finding that appellant had abandoned his request for a hearing on March 30, 2004, only five days after the date of the scheduled hearing. As the Office's procedure manual provides that an explanation can be provided for failure to appear within 10 days of the scheduled date of the hearing, the Office's decision does not meet the conditions for abandonment specified in the Office's procedure manual.

**CONCLUSION**

The Office's decision that appellant abandoned his request for a hearing was issued prematurely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 20, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> *Clara T. Norga*, 46 ECAB 473 (1995).