

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

CONNIE L. SAUERWEIN, Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
MILITARY AIRLIFT COMMAND, SCOTT AIR)
FORCE BASE, IL, Employer)

**Docket No. 04-1227
Issued: June 13, 2005**

Appearances:
Raymond K. Schultz, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 6, 2004 appellant, through her representative, filed a timely appeal from a January 5, 2004 nonmerit decision of the Office of Workers' Compensation Programs finding that she abandoned her request for an oral hearing. The Office issued its last merit decision on February 7, 2003. As more than one year has elapsed between the last merit decision and the April 6, 2004 filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3. The Board has jurisdiction over the hearing abandonment decision.

ISSUE

The issue is whether the Office properly determined that appellant abandoned her hearing request. On appeal, appellant's representative contends that the Office failed to notify him of the hearing scheduled for December 17, 2003.

FACTUAL HISTORY

On November 6, 2002 appellant, then a 52-year-old international clearance specialist, filed an occupational disease claim alleging that she sustained heart ischemia and panic attacks due to factors of her federal employment.

By decision dated February 7, 2003, the Office denied appellant's claim on the grounds that she did not establish an injury in the performance of duty. The Office determined that appellant had not established any compensable employment factors.

By letter received by the Office on March 21, 2003, Raymond Schultz informed the Office that he was appellant's representative and requested an oral hearing on her claim. He enclosed an authorization form signed by appellant on March 7, 2003 authorizing a release of information in matters pertaining to her claim with the Office.

In a letter dated March 24, 2003, the Office acknowledged receipt of appellant's request for a hearing and notified appellant and her representative that they would receive at least 30 days advance notice of the date, time and location of the hearing.

The Office notified appellant, by letter dated November 6, 2003, that a hearing in her case would be held on December 17, 2003 at 4:00 p.m. at a designated location in Kansas City, Missouri.¹ The letter does not reflect that a copy was sent to appellant's representative.

Appellant did not appear for the December 17, 2003 scheduled hearing. In a January 5, 2004 decision, the Office determined that appellant abandoned her request for an oral hearing.

LEGAL PRECEDENT

A claimant may authorize an individual to represent her in any proceeding before the Office.² A properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing.³ The authority includes presenting or eliciting evidence, making arguments of facts or the law and obtaining information from the case file, to the same extent as the claimant.⁴ Any notice requirement contained in the regulation or the Federal Employees' Compensation Act⁵ is fully satisfied if served on the representative and has the same force and effect as if sent to the

¹ It appears that the Office's November 6, 2003 notice to appellant regarding the hearing was returned to the Office as undeliverable on November 25, 2003.

² 5 U.S.C. § 8127(a).

³ 20 C.F.R. § 10.700(c).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193.

claimant.⁶ Any letter intended for a claimant should be sent to the authorized attorney or legal representative.⁷

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.⁸ Unless otherwise directed in writing by the claimant, the Office 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.⁹

The Office has the burden of proving that it mailed to a claimant and her representative notice of a scheduled hearing.¹⁰ 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. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹¹

ANALYSIS

The Board finds that the record does not demonstrate that appellant’s representative was notified of the scheduled hearing. Therefore, appellant was denied a hearing to which she was entitled.

The record reflects that on March 21, 2003 Mr. Schultz informed the Office that he was appellant’s representative and enclosed a signed form completed by appellant on March 7, 2003. In the letter accompanying the form signed by appellant on March 7, 2003, Mr. Schultz requested an oral hearing. The Office acknowledged the hearing request by letter dated March 24, 2003 and sent both appellant and Mr. Schultz a notification regarding the hearing and stated that they would receive 30 days advance notice of the date, time and location of the hearing. The Office thus was required to send Mr. Schultz a copy of the notice of the scheduled hearing.¹²

The Board finds that the Office has failed to meet its burden of proving that it mailed a notice of the scheduled hearing to appellant’s representative. Under the “mailbox rule,” when it appears from the record that a notice was properly addressed and duly mailed to an individual in

⁶ See 20 C.F.R. § 10.700(c); see also *Sara K. Pearce*, 51 ECAB 517 (2000).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.12 (October 1998) which states, “Any letter intended for a claimant either directly or as the recipient of a copy, should be sent to the authorized attorney or other legal representative.”

⁸ 20 C.F.R. § 10.616(a).

⁹ 20 C.F.R. § 10.617(b).

¹⁰ See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹¹ *Michelle Lagana*, 52 ECAB 187, 189 (2000).

¹² 20 C.F.R. § 10.617(b).

the ordinary course of business, the presumption arises that it was received by that individual.¹³ In this case, however, the copy of the notice sent to appellant dated November 6, 2003 does not on its face reflect that a copy was sent to appellant's representative at his correct address. There is no indication in the record that the Office sent notice of the hearing to appellant's representative. Thus, the Board finds the evidence is not sufficient to establish that appellant's representative was notified of the date, time and place of the scheduled hearing as contemplated by 20 C.F.R. § 10.617(b); consequently, the Office has not triggered the presumption of receipt under the "mailbox rule."¹⁴

CONCLUSION

As the Office failed to notify appellant's representative of the hearing scheduled for December 17, 2003, the case is remanded to the Office for a hearing to be scheduled before an Office hearing representative with proper notice provided to all parties.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 5, 2004 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 13, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

¹³ See *Michele Lagana*, *supra* note 11.

¹⁴ See *Newton D. Lashmett*, 45 ECAB 181, 185 (1993) (where the Board remanded the case to provide appellant an opportunity for a hearing when the record failed to demonstrate that his representative was notified of the scheduled hearing).