

FACTUAL HISTORY

On May 6, 2002 appellant, then a 56-year-old secretary, filed a claim for traumatic injury alleging that on September 11, 2001 she experienced anxiety, stress and severe depression as a result of the terrorist attack on the Pentagon where she worked. She indicated that she was terrified when the airplane hit the Pentagon and she ran out and away from the building. Appellant also stated that she was unable to sleep without medication. She returned to work on or about September 16, 2001 and worked intermittently thereafter until she retired on medical disability in January 2003. The Office accepted appellant's claim for post-traumatic stress disorder on April 15, 2003.

On May 14, 2003 appellant filed a Form CA-7 claim for wage-loss compensation for specific dates claimed during the period from July 26, 2002 through January 10, 2003. In a time analysis form dated May 15, 2003, appellant claimed a total of 52 hours of leave without pay (LWOP) comprised of: 1 hour on July 26, 2002; 1 hour on October 17, 2002; 8 hours on October 18, 2002; 4 hours on December 25, 2002; 8 hours on December 26, 2002; 8 hours on December 27, 2002; 6 hours on January 8, 2003; 8 hours on January 9, 2003; and 8 hours on January 10, 2003. She submitted a May 6, 2003 attending physician's report and a May 12, 2003 medical note from Dr. Mehdi Ghazinoor-Naini, a Board-certified psychiatrist. On May 6, 2003 Dr. Ghazinoor-Naini noted appellant's diagnoses and indicated that she was partially disabled from September 12 through 14, 2001 and was able to resume light duty effective September 17, 2001. He indicated that she retired on January 10, 2003 and was permanently disabled. On May 12, 2003 Dr. Ghazinoor-Naini noted appellant's diagnoses, the medication she was under and that she had been under treatment since November 23, 2001.

In a letter dated June 23, 2003, the Office advised appellant that the evidence submitted was insufficient to establish that she was disabled for work for the period claimed as a result of her work injury and requested additional medical evidence. Appellant submitted treatment notes from Dr. Ghazinoor-Naini dated November 23, 2001 through July 7, 2003.

By decision dated July 24, 2003, the Office denied the claim for wage-loss compensation from July 26, 2002 through January 10, 2003 on the grounds that the medical evidence failed to establish that appellant was totally disabled from work on the dates claimed.

On August 6, 2003 appellant requested an oral hearing. She submitted additional medical evidence, which included evidence previously of record.

By letter dated March 17, 2004, the Office advised appellant that the oral hearing would be held on April 28, 2004 at 10:45 a.m. at the U.S. Department of Labor, 200 Constitution Avenue, N.W., Room N4437-B, Washington, D.C.

Appellant did not appear for the scheduled hearing.

By decision dated April 30, 2004, the Office found that appellant abandoned her request for an oral hearing before an Office hearing representative for failure to appear at the hearing or

to contact the Office prior to or subsequent to the hearing date to explain her failure to appear.¹

LEGAL PRECEDENT -- ISSUE 1

Section 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.² Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The legal authority governing abandonment of hearings is set forth in the Office Federal procedure manual. Chapter 2.1601.6(e), 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 [d]istrict Office. In cases involving prerecoupment 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

¹ The Board notes the record contains additional evidence submitted subsequent to the Office’s most recent merit decision. However, 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). The Board further notes that the record contains a July 9, 2004 Office decision denying modification of its July 24, 2003 decision, which was issued subsequent to appellant’s appeal to the Board. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office’s July 9, 2004 decision, issued while the Board had jurisdiction over the matter in dispute, is null and void. *Linda Thompson*, 51 ECAB 694 (2000); *Cathy B. Millin*, 51 ECAB 331 (2000).

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

ANALYSIS

The record establishes that the Office sent a notice dated May 17, 2004 to appellant's address of record that advised her of an oral hearing scheduled for April 28, 2004 in Washington, D.C. She did not request a postponement and she failed to appear for the hearing. The Branch of Hearings and Review issued its April 30, 2004 decision, finding that she had abandoned her hearing request. The Office's procedures noted that appellant must meet the three required conditions for abandonment before the Branch of Hearings and Review will issue a formal decision on the issue of whether the claimant has abandoned his or her request for a hearing.⁴ As the Branch of Hearings and Review issued its decision on April 30, 2004, there is no way to determine whether appellant provided any notification regarding her failure to appear at the April 28, 2004 scheduled hearing within the requisite 10 days of such hearing or May 10, 2004.⁵ Since the Branch of Hearings and Review failed to wait the requisite 10 days after the scheduled date of the hearing to allow appellant the opportunity to provide notification for her failure to appear, the Board finds that the decision dated April 30, 2004 was prematurely issued and thus, must be set aside.

CONCLUSION

The Board finds that the April 30, 2004 determination that appellant had abandoned her hearing request must be reversed as it was erroneous at the time it was issued. The Office failed to afford her the requisite 10 days in which to provide notification for her failure to appear at the scheduled date of the hearing. Due to the disposition of this issue, the Office must reevaluate whether appellant had abandoned her scheduled hearing of April 28, 2004 and it is not necessary for the Board to address the merits of the second issue regarding her entitlement to wage loss from July 26, 2002 to January 10, 2003 causally related to her accepted post-traumatic stress disorder. In order to preserve her appeal rights, the Office will reissue its decision on appellant's entitlement to wage loss for the requisite period after it determines whether she had abandoned her scheduled hearing of April 28, 2004.

⁴ *Id.*

⁵ *Id.*

ORDER

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

Issued: March 16, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member