

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

LAURA J. BROWN, Appellant

and

**U.S. POSTAL SERVICE, HANOVER POST
OFFICE, Hanover, MN, Employer**

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**Docket No. 05-16
Issued: March 2, 2005**

Appearances:

*Charles M. Cochrane, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated September 1, 2004, finding that appellant had abandoned her request for an oral hearing.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this hearing abandonment decision.

ISSUE

The issue is whether the Office abused its discretion in finding that appellant abandoned her request for a hearing.

FACTUAL HISTORY

On November 16, 1998 appellant, then a 39-year-old postmaster, filed an occupational injury claim (Form CA-2) alleging that she suffered injuries to her left arm and hand as a result

¹ It should be noted that appellant's appeal relates only to the Office's September 1, 2004 nonmerit decision. Although the Board has jurisdiction over the Office's April 22, 2004 decision, appellant has not appealed this schedule award decision.

of her employment duties. The Office accepted her claim for left wrist tendinitis on December 16, 1998, for left carpal tunnel syndrome on June 16, 1999 and ultimately for right lateral epicondylitis and right carpal tunnel syndrome.

Appellant filed a CA-2a form for recurrence of disability on March 26, 2001 alleging that she was still having pain in her wrists, arms and hands, which was accepted by the Office. A functional capacity evaluation was performed on April 3, 2001.

On June 15, 2001 appellant authorized Charles M. Cochrane to represent her in matters pertaining to her claim with the Office. Shortly thereafter, on July 11, 2001 appellant's representative requested copies of all documents in claimant's file, which request was repeated on September 18, 2001. By letter dated October 10, 2001, the Office notified appellant that it deemed the modified job offer dated October 4, 2001 was suitable. Appellant's representative advised the Office that he had not been sent a copy of the October 10, 2001 letter, and further on April 17, 2002 advised the Office that he had not been sent a copy of the March 20, 2002 job offer letter. The Office apologized to appellant's representative for failing to send him copies of correspondence and assured him that "all future correspondence" would be forwarded to him.

Appellant accepted a limited-duty job offer and returned to work on September 8, 2002. Appellant requested a schedule award, for which the Office medical adviser determined that appellant had a 12 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity. By letter dated April 22, 2004, the Office granted appellant a schedule award in accordance with the report of the district medical adviser. The letter included an explanation of appellant's appeal rights, including the right to request a hearing.

Appellant's representative by letter dated April 28, 2004, requested an oral hearing "in regard to the April 22, 2004 Award of Compensation" and requested a copy of the report of the Office medical adviser.

By letter dated May 11, 2004, 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. Appellant's attorney followed up with the Office on June 30, 2004, as to why he had received no response to his request for an oral hearing and again requested a copy of the medical adviser's report.

The Office notified appellant, by letter dated July 7, 2004, that a hearing in his case would be held on August 16, 2004 at 10:00 a.m. at the federal courthouse in Minneapolis, Minnesota. The letter does not reflect that a copy was sent to appellant's representative.

On July 14, 2004 the Office forwarded a copy of the Office medical adviser's report to appellant's representative and thereafter, by letter dated August 25, 2004, appellant's representative advised the Office that he had not received the notice of the August 16, 2004 hearing and asked that another hearing be scheduled.

By decision dated September 1, 2004, the Office found that appellant's failure to appear at the August 16, 2004 hearing constituted abandonment of her request.²

LEGAL PRECEDENT

A claimant may authorize an individual to represent him in any proceeding before the Office.³ 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.⁴ This 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. 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 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

² The Board notes correspondence in the file, which was submitted after the Office rendered its September 1, 2004 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

³ 5 U.S.C. § 8127(a).

⁴ 20 C.F.R. § 10.700(c) (1999).

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *Id.*

⁷ See (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.12 (October 1998) stating: "Any letter intended for a claimant ... should be sent to the authorized attorney or other legal representative" and Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3c(1) (April 1993) stating: "The [Office] must provide information about procedures involved in establishing a claim, including detailed instructions for developing the required evidence to all interested parties (the claimant, the employing agency and the representative, if any)."

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).

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 June 15, 2001 appellant authorized her representative, Mr. Cochrane, to represent her. There is no document in the record whereby appellant withdraws her authorization; however, there are numerous pieces of correspondence between the Office and appellant's representative, indicating the Office's recognition of said representation. As her duly authorized representative, the Office was required to send him 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 the ordinary course of business, the presumption arises that it was received by that individual. However, in this case, the copy of the notice sent to appellant dated July 7, 2004 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.¹³ Thus, the Board finds that the evidence of notification of appellant's representative, with respect to the date, time and place of the scheduled hearing contemplated by 20 C.F.R. § 10.617(b), is insufficient to trigger the presumption of receipt by the attorney under the "mailbox rule."¹⁴

CONCLUSION

The Board finds that the failure of the Office to notify appellant's representative of record of the hearing scheduled for August 16, 2004, deprived appellant of the assistance of counsel which she had informed the Office that she wanted and resulted in her not receiving the hearing to which she was entitled. In light of this error, the case is remanded to the Office for a scheduling hearing before an Office hearing representative, with proper notice being given to appellant's representative.

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

¹² 20 C.F.R. § 10.617(b).

¹³ The Board notes that on several occasions appellant's attorney advised the Office that he did not receive copies of letters that had been sent by the Office to appellant.

¹⁴ See *Newton D. Lashmett*, 45 ECAB 181, 185 (1993) (Case must be remanded to provide appellant opportunity for hearing when record failed to demonstrate appellant's representative was notified of scheduled hearing.); see also *Melvin A. Smith*, 33 ECAB 1937, 1938 (1983).

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2004 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings as outlined above.

Issued: March 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member