

After developing the claim, the Office, on January 31, 2003, accepted the claim for aggravation of avascular necrosis of the femoral heads. In a report dated February 19, 2003, Dr. David Rosenberg, a Board-certified orthopedic surgeon, stated that appellant had work-related thoracic and low back pain and restricted him to a 4-hour work shift with a 40-pound lifting restriction. On March 11, 2003 he accepted a limited-duty assignment that restricted him to sitting during a 4-hour shift with walking to get mail and a lifting restriction of no more than 40 pounds.

Appellant then filed several claims for wage-loss compensation for intermittent leave without pay from February 21 to May 16, 2003. He worked a four-hour shift during this time and claimed compensation for an additional four hours per day. On April 14, 2003 the Office referred appellant, a copy of his records, a statement of accepted facts and specific questions to Dr. Alan H. Wilde, a second opinion physician and a Board-certified orthopedic surgeon, to determine whether his work-related duties aggravated the preexisting avascular necrosis and whether he was able to work more than a four-hour shift.

In a report dated April 30, 2003, Dr. Wilde stated that appellant's complaints of pain were common in patients who had bilateral hip replacement surgery and that it was not caused by employment factors. On June 23, 2003 Dr. Rosenberg stated that he agreed with Dr. Wilde that appellant would have intermittent pain after hip replacement surgery. He further opined that he could not work as a mail handler but could work a light-duty 8-hour shift with a 20-pound lifting restriction and no repetitive bending or climbing. Dr. Rosenberg recommended that appellant's four-hour shift be increased over two months to an eight-hour shift. On July 14, 2003 he again noted that appellant's work could have aggravated temporarily his underlying condition. Dr. Rosenberg then repeated his February 19, 2003 opinion that appellant should be limited to a four-hour shift, increasing to an eight-hour shift with appropriate restrictions over time.

On August 27, 2003 Dr. Wilde stated that appellant could perform the 8-hour limited-duty assignment that allowed him to sit while taping torn mail with a lifting restriction of more than 10 pounds.

By decision dated September 10, 2003, the Office denied appellant's claims for wage-loss compensation from February 21, 2003 on the grounds that the medical evidence failed to support that he was unable to perform his limited-duty assignment for an eight-hour shift.

On September 27, 2003 appellant requested an oral hearing. On September 24, 2004 the Office advised him that a hearing would be held on October 27, 2004 at the Federal Building in Cleveland, Ohio. The Office mailed the notice to appellant's address of record.

By decision dated November 12, 2004, the Branch of Hearings and Review found that appellant had abandoned his request for an oral hearing. The decision noted that he failed to appear at the October 27, 2004 hearing and there was no indication in the file that he contacted the Office either 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. 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.

“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 prerecoupment 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.”¹

ANALYSIS

In finding that appellant abandoned his request for a hearing, the Office noted that a hearing had been scheduled in Cleveland, Ohio, on October 27, 2004, that appellant received written notification of the hearing 30 days in advance, that he failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to attend the hearing. On appeal, he asserts that he did not receive the notice of the scheduled hearing date. However, the record reflects that, in a letter dated September 24, 2004, the Office mailed appropriate notice of the October 27, 2004 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.² The record

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999). See also *Chris Wells*, 52 ECAB 445 (2001).

² *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

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 FECA Procedure Manual, the Office properly found that he abandoned his request for an oral hearing before an Office hearing representative.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2004 is affirmed.

Issued: May 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member