United States Department of Labor
Employees' Compensation Appeals Board

JOSELYN I. STEWART, Appellant	)	
and	)	**Docket No. 06-345**
	)	**Issued: May 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Lexington, KY, Employer	)	

Appearances:
Joselyn I. Stewart, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 11, 2005 nonmerit decision determining that she abandoned her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's January 12, 2004 decision denying her claim that she sustained an employment-related right upper extremity condition. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

The issue is whether the Office properly determined that appellant abandoned her request for a hearing.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on March 9, 2001 remanding the case to the Office for further development of the medical evidence regarding appellant's claim that she sustained an employment-related right upper extremity condition.[2] In March 1998 appellant, then a 47-year-old flat sorter machine clerk, filed an occupational disease claim alleging that she sustained a right upper extremity condition due to the repetitive mail sorting duties of her job. She alleged that she sustained tendinitis and a partial rotator cuff tear of her right shoulder and an aggravation of her fibromyalgia. The Board found that the reports of Dr. Rita M. Egan, an attending Board-certified internist, were sufficient to require further development of the medical evidence. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office further developed the medical evidence and, by decision dated September 5, 2001, denied appellant's claim on the grounds that the medical evidence did not show that she sustained an employment-related right upper extremity condition. The case was again remanded for further development of the medical evidence. It was eventually determined that a conflict in the medical evidence arose and that the case should be referred to an impartial medical specialist for an examination and an opinion regarding whether appellant sustained an employment-related right upper extremity condition. By decision dated January 12, 2004, the Office denied appellant's claim on the grounds that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Daniel D. Primm, who determined that she did not sustain an employment-related right upper extremity condition.[3]

By letter dated February 3, 2004, appellant, through her attorney, requested an oral hearing before an Office hearing representative in connection with the Office's January 12, 2004 decision.[4] By letter dated August 23, 2004, counsel indicated that he was withdrawing his representation of appellant and requested that the oral hearing be held in Lexington, KY.

By notice dated October 6, 2004, the Office advised appellant that an oral hearing would be held before an Office hearing representative in Denver at 1:00 p.m. on November 17, 2004.[5]

In a letter dated October 22, 2004, appellant requested that the Office "cancel" the oral hearing scheduled for November 17, 2004 because she was not financially able to travel to Denver. She asked that a teleconference be scheduled for her.

By letter dated January 31, 2005, an Office hearing representative stated that he was responding to appellant's request for a teleconference. He indicated that he had attempted to reach

[2] Docket No. 00-988 (issued March 9, 2001).

[3] Dr. Primm was a Board-certified orthopedic surgeon.

[4] Appellant's attorney indicated that the hearing should be held in Denver, CO, or should be conducted telephonically. In a letter dated April 27, 2004, he requested that the hearing be held in Denver.

[5] The notice was sent to appellant's home address of record: 430 West 6th Street, Lexington, KY, 40508.

appellant at two telephone numbers which were no longer in service and stated that he needed to set a date, time and obtain a telephone number where she could be reached. The Office hearing representative requested that appellant contact him in 15 days or else her case would be returned to the district Office without scheduling a hearing.[6]

By decision dated April 11, 2005, the Office determined that appellant abandoned her request for a hearing.

LEGAL PRECEDENT

The Office's regulations at 5 C.F.R. § 10.622 provide guidance regarding a claimant's request to postpone a hearing:

> "(b) [The Office] will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and [the Office] has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.
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> "(c) Where the claimant is hospitalized for a reason which is not elective, or where the death of the claimant's parent, spouse, or child prevents attendance at the hearing, a postponement may be granted upon proper documentation."[7]

The Office procedure manual recognizes that claimants will continue to request postponement for an unspecified reason or for any other reason other than the extraordinary reasons described in 5 C.F.R. § 10.622(c). Where the request for postponement is received in sufficient time to contact the claimant prior to the scheduled hearing (*i.e.*, 10 days for mailing or through a documented telephone contact), the Office hearing representative should advise the claimant that the postponement will not be allowed pursuant to the regulations at 5 C.F.R. § 10.622(b). The claimant would then have the options to withdraw the hearing request, attend the scheduled hearing, reschedule the hearing at an available time within the same docket, opt for a review of the written record by the Office hearing representative, or have a telephone hearing, if the Office hearing representative wished to grant such a hearing within his or her discretion.[8]

[6] The letter was sent on February 1, 2005 to appellant's home address of record.

[7] 5 C.F.R. § 10.622(b), (c).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.d (January 1999).

The authority governing abandonment of hearings rests with the Office's procedure manual. 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.
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> "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 prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R 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.
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> "This course of action is correct even if H&R 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."[9]

ANALYSIS

Appellant claimed that she sustained a right upper extremity condition due to the repetitive duties of her job. By decision dated January 12, 2004, the Office denied appellant's claim based on the opinion of Dr. Primm, a Board-certified orthopedic surgeon who served as an impartial medical specialist. By decision dated April 11, 2005, the Office determined that appellant abandoned her request for a hearing in connection with the January 12, 2004 decision.

The Office scheduled an oral hearing before an Office hearing representative in Denver at 1:00 p.m. on November 17, 2004. The record shows that the Office mailed appropriate notice to the claimant at her last known address.[10] The record also supports that appellant requested postponement of the hearing. In an October 22, 2004 letter, appellant requested that the Office postpone the oral hearing scheduled for November 17, 2004 and that the format of the hearing be

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[10] Appellant was represented by an attorney when the hearing request was initially made in February 3, 2004. However, the attorney withdrew from appellant's case in August 2004.

changed to a teleconference because she could not afford to travel to Denver.[11] The Office therefore improperly found that appellant abandoned her request for a hearing, as Office procedure provides that a finding of abandonment requires that three conditions: 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.[12] As appellant requested a postponement, all three conditions for abandonment have not been met.

Appellant requested postponement of the November 17, 2004 hearing in a letter which was received by the Office hearing representative, on October 22, 2004, a period of more than three weeks prior to the date of the scheduled hearing. Despite the fact that the request for postponement was received in sufficient time to contact the claimant prior to the scheduled hearing (which according to Office procedure would be 10 days for mailing or through a documented telephone contact), the Office hearing representative did not comply with Office procedure by contacting appellant prior to the hearing and advising her that the postponement will not be allowed pursuant to the regulations at 5 C.F.R. § 10.622(b) and (c).[13] The Office hearing representative did not contact appellant until he sent a January 31, 2005 letter discussing the possibility of a teleconference. Consequently, appellant was deprived of the opportunity to choose among all the options which should have been available to her: withdraw the hearing request; attend the scheduled hearing; reschedule the hearing at an available time within the same docket; opt for a review of the written record by the Office hearing representative; or have a teleconference, if the Office hearing representative wished to grant such a hearing within his or her discretion.[14]

The Board notes that appellant did not request to withdraw the hearing request and that the opportunity has passed to attend the hearing scheduled for November 17, 2004 or to reschedule the hearing at an available time within the same docket. For these reasons, the case will be remanded to the Office so that appellant will have the opportunity to opt for a review of the written record by an Office hearing representative concerning her claim of an employment-related right upper extremity condition. Appellant would also have the opportunity to request a teleconference regarding this issue and, if the Office hearing representative exercised his or her discretion to deny this request, he or she should conduct a review of the written record. After such development deemed necessary, the Office hearing representative should issue an appropriate decision.

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[11] Although appellant used the work "cancel" in connection with the November 17, 2004 oral hearing, the effect of her letter was to request a postponement or rescheduling of her hearing and to request a change in the format.

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[13] *See* 5 C.F.R. § 10.622(b), (c); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.d (January 1999). There is no indication that appellant's request for postponement was for one of the extraordinary reasons described in 5 C.F.R. § 10.622(c). The Office hearing representative later indicated that he had attempted to reach appellant at two telephone numbers which were no longer in service, but the record reveals that he had appellant's proper home address.

[14] *See* 5 C.F.R. § 10.622(b) and *supra* note 13 at Chapter 2.1601.6.d.

The case will be remanded to the Office. After such development as deemed necessary, the Office hearing representative should issue an appropriate decision.

CONCLUSION

The Board finds that the Office improperly determined that appellant abandoned her request for a hearing. The Board further finds that the case should be remanded to the Office to provide appellant the additional above-described opportunities for consideration of the merit issue of the present case to include the issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 11, 2005 decision is reversed. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board