United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 06-1815**
	)	**Issued: November 27, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Hillsboro, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 16, 2005 merit decision denying her recurrence of total disability claim and the April 13, 2006 nonmerit decision finding that she abandoned her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether the Office properly found that appellant abandoned her request for a hearing; and (2) whether appellant met her burden of proof to establish that she sustained a recurrence of total disability between January 29 and March 29, 2005 due to her accepted employment injury.

FACTUAL HISTORY

On December 10, 2004 appellant, then a 40-year-old mail processor, filed an occupational disease claim alleging that she injured her neck, back and shoulders due to sorting

mail and pulling and stacking trays of mail. In early January 2005, appellant began working in a limited-duty position at the employing establishment. The Office accepted that she sustained a right shoulder strain and upper back strain.

Appellant stopped work between January 29 and March 29, 2005 and claimed that she sustained a recurrence of total disability for this period due to her accepted employment injury. She submitted numerous medical reports, dated between early and mid 2005, in which attending physicians detailed the treatment of her neck, back and shoulder problems.

By decision dated August 16, 2005, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability between January 29 and March 29, 2005 due to her accepted employment injury.

On September 9, 2005 appellant requested an oral hearing before an Office hearing representative in connection with the Office's August 16, 2005 decision.

By letter dated December 23, 2005, an Office hearing representative, advised appellant that a telephone hearing would be held on January 26, 2006 at 1:00 p.m. Eastern Standard Time.[1] He informed appellant that a few minutes before the scheduled time for the hearing, she should call the provided toll free number and, when prompted, enter the provided pass code which would connect them and a court reporter.

In a memorandum dated January 31, 2006, the hearing representative stated that, due to an invalid pass code, he was unable to access the appropriate telephone line between approximately 1:00 and 2:00 p.m. Eastern Standard Time on January 26, 2006. He later received a voice mail message from appellant indicating that she was unable to access the telephone line due to an invalid pass code. The hearing representative left several messages on appellant's voice mail asking her to contact him about rescheduling the hearing but she did not return his calls. He indicated that he left a message on appellant's voice mail which served to reschedule the hearing for January 30, 2006 at 12:00 p.m. Eastern Standard Time, but that appellant did not "attend the call" on that date and had not contacted him about rescheduling. Because the scheduling letter was incorrect, appellant was still entitled to a hearing. The hearing representative indicated that appellant would be informed by letter of the rescheduled date for the hearing.

In a March 20, 2006 letter, another Office hearing representative, advised appellant that he had spoken to her via telephone on March 16, 2006 and that she had agreed to have a telephone hearing on March 20, 2006 at 9:00 a.m. Pacific Time.[2] On March 20, 2006 around 9:00 a.m. Pacific Time he made multiple attempts to call appellant but it appeared that her cell phone had been switched off. The hearing representative advised appellant that a telephone hearing would be held on March 27, 2006 at 9:00 a.m. Pacific Time. He informed appellant that

[1] This letter was mailed to appellant's proper address of record.

[2] This letter was also mailed to appellant's proper address of record.

he would call her around that time and that she should be sure to have her cell phone switched on.

In a note dated March 27, 2006, the hearing representative stated that he called appellant four times on March 27, 2006 between 8:58 and 9:15 a.m. Pacific Time but only accessed her voice mail on each occasion. He left a message on her voice mail advising her that he was calling her regarding the hearing. The hearing representative indicated that he left his telephone number but that appellant did not respond to his message.

By decision dated April 13, 2006, the Office hearing representative found that appellant abandoned her request for a hearing. Appellant abandoned the hearing scheduled for March 27, 2006 because he was unable to contact her at the telephone number she provided despite several attempts. She had not contacted his office either prior or subsequent to the scheduled hearing to "explain her failure to appear."

LEGAL PRECEDENT -- ISSUE 1

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.[3] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.[4] The Office has the burden of proving that it mailed to appellant and her representative a notice of a scheduled hearing.[5]

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

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[3] 20 C.F.R. § 10.616(a).

[4] 20 C.F.R. § 10.617(b). Office procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (January 1999).

[5] *See Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

> overpayment, based on the available evidence, before returning the case to the DO.
>
> "(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.
>
> "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."[6]

ANALYSIS -- ISSUE 1

The Board finds that the Office improperly found that appellant abandoned her request for a hearing.

In this case, appellant made a timely request for an oral hearing. Accordingly, the Office had the burden of establishing that it mailed to appellant a notice of a scheduled hearing at least 30 days before the scheduled date.[7] The Office made several attempts to schedule a telephone hearing with appellant[8] but it was the telephone hearing scheduled for March 27, 2006 that the Office determined was abandoned.

The Office first provided appellant notice of the telephone hearing to be held on March 27, 2006 at 9:00 a.m. Pacific Time in a letter dated March 20, 2006. This letter was mailed to appellant at her proper address of record no sooner than March 20, 2006. When the Office mailed a notice to appellant no sooner than March 20, 2006 for a telephone hearing scheduled to be held on March 27, 2006, it provided her with less than 30 days notice of her scheduled hearing.[9] The Board finds that the Office failed to give appellant proper notice of her hearing under 20 C.F.R. § 10.617(b). Thus, the case must be returned to the Office for the proper scheduling of another hearing for appellant.[10]

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

[7] *See supra* note 5 and accompanying text.

[8] The first Office hearing representative, scheduled a telephone hearing for January 26, 2006 via a written notice but the hearing did not take place due to problems with pass codes. He noted that appellant remained entitled to a hearing and scheduled a telephone hearing for January 30, 2006 by leaving a message on her voice mail. The second Office hearing representative, scheduled a telephone hearing for March 20, 2006 by leaving a message on appellant's voice mail. After the hearing did not take place, he indicated that appellant remained entitled to a hearing and then scheduled a telephone hearing for March 27, 2006 via a written notice.

[9] *See Yoshica D. Pointdexter,* Docket No. 06-1012 (issued July 18, 2006).

[10] As the case must be remanded to the Office for scheduling of another hearing and other appropriate development, the Board finds that the case is not in posture for a decision on the second issue.

CONCLUSION

The Board finds that the Office improperly found that appellant abandoned her request for a hearing as it failed to provide proper notification to appellant of the hearing scheduled for March 27, 2006. The case is remanded to the Office for a hearing to be scheduled with an Office hearing representative with proper notice provided to all parties. The Board accordingly finds that this case is not in posture for a decision on the issue of whether appellant sustained a recurrence of total disability between January 29 and March 29, 2005 due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 13, 2006 decision is set aside and the case is remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: November 27, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board