

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

N.S., Appellant)

and)

**DEPARTMENT OF THE NAVY, PACIFIC)
FLEET SHIPYARDS, Pearl Harbor, HI,)
Employer)**

**Docket No. 08-1514
Issued: December 22, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2008 appellant timely appealed an April 15, 2008 decision of the Office of Workers' Compensation Programs finding that he abandoned his request for a hearing. Because more than one year has elapsed between the last merit decision dated February 6, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant abandoned his hearing request.

FACTUAL HISTORY

On August 15, 2005 appellant, then a retired 73-year-old health physicist, filed an occupational disease claim alleging a bilateral hearing loss to noise exposure from the repair of ships and submarines while employed by the employing establishment. He stated that he was first aware and realized that his condition was employment related on January 18, 1988.

By letter dated September 12, 2005, the Office requested additional information from appellant. It noted that 5 U.S.C. § 8122 required that the original claim for compensation be filed within three years of the date of injury or date of awareness of a relationship between the claimed condition and the employment, unless the immediate supervisor had actual knowledge of a work-related medical condition within 30 days.

On September 26, 2005 appellant responded to the Office's inquiries.

By decision dated February 6, 2006, the Office denied appellant's claim on the grounds that it was untimely filed.

On February 15, 2006 appellant requested an oral hearing.

By notice dated February 21, 2008, the Office advised appellant that a hearing was scheduled for March 24, 2008 and provided the place and time. The notice was sent to his address of record. It was not returned to the Office as undeliverable. Appellant did not appear for his scheduled hearing.

By decision dated April 15, 2008, the Office found that appellant had abandoned his request for a hearing.

LEGAL PRECEDENT

The statutory right to a hearing under the Federal Employees' Compensation Act, 5 U.S.C. § 8124(b)(1), follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary [of Labor] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

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]."¹

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also G.J.*, 58 ECAB ____ (Docket No. 07-1028, issued August 16, 2007); *see also Claudia J. Whitten*, 52 ECAB 483 (2001).

ANALYSIS

The record establishes that, on February 21, 2008, in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the March 24, 2008 hearing. The Board notes that the notice was sent more than 30 days prior to the scheduled hearing.² Appellant asserts that he did not appear for the scheduled hearing because he never received a copy of the hearing notice. However, the record reflects that a copy of the February 21, 2008 hearing notice was mailed to the correct address of record and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.³ This is known as the mailbox rule. The record reflects that the Office properly mailed a hearing notice to appellant's address of record and it is presumed that it arrived at his mailing address. The record shows that appellant did not request a postponement of the hearing and failed to provide an explanation for his failure to attend within 10 days of the scheduled date of the hearing. As the circumstances of this case meet the criteria for abandonment, the Board finds that appellant abandoned his request for a hearing.

CONCLUSION

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

² See 20 C.F.R. § 10.617(b) (provides that the Office will mail a notice of the time and place of the oral hearing to the claimant at least 30 days before the scheduled date).

³ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2008 is affirmed.

Issued: December 22, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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