United States Department of Labor
Employees' Compensation Appeals Board

V.F., Appellant	)	
	)	**Docket No. 09-101**
and	)	**Issued: August 10, 2009**
DEPARTMENT OF VETERANS AFFAIRS, HARRY S. TRUMAN MEMORIAL VETERANS HOSPITAL, Columbia MO, Employer	)	

Appearances:
Barbara J. Baney, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 25, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office followed proper procedures when denying appellant's request for continuance of a prerecoupment hearing; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of $5,231.93; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby, precluding waiver of recovery.

FACTUAL HISTORY

The Office accepted appellant's February 28, 2002 occupational disease claim for right carpal tunnel syndrome and right shoulder impingement. On February 13, 2006 it granted her a

schedule award for four percent permanent impairment of her right shoulder. The period of the award was from November 9, 2005 through February 18, 2006; however, the Office continued making payments to appellant after the expiration of the award.

On November 21, 2006 the Office made a preliminary determination that appellant had been overpaid in the amount of $5,231.93, and was at fault in the creation of the overpayment, because she erroneously received and accepted schedule award payments to which she was not entitled. On April 21, 2007 it finalized its preliminary determination. Appellant appealed the overpayment decision to the Board.

By order dated December 5, 2007, the Board found that the Office had failed to give proper notice of its November 21, 2006 preliminary overpayment determination or its April 10, 2007 final overpayment decision, to appellant's representative. Accordingly, the case was remanded so that the preliminary overpayment determination could be properly issued.[1]

On March 3, 2008 the Office reissued its preliminary determination that appellant had been overpaid in the amount of $5,231.93, and was at fault in the creation of the overpayment, because she erroneously received and accepted schedule award payments to which she was not entitled. Appellant was advised of rights she could exercise in an attempt to overturn the preliminary finding, including the right to request a prerecoupment hearing.

On March 28, 2008 appellant requested a prerecoupment hearing. She submitted numerous documents supporting her contention that she was not at fault in the creation of the overpayment and that she should be granted a waiver, including a completed overpayment recovery questionnaire dated December 16, 2006; personal statements; correspondence to and from the Office and numerous financial documents. By letter dated June 27, 2008, appellant and her representative, Barbara Baney, were notified that a hearing had been scheduled for 9:15 a.m. on August 7, 2008 in St. Louis, MO.

The record contains a July 23, 2008 memorandum from Karen S. Hunt, hearing representative, reflecting telephone requests by appellant and her representative that the hearing scheduled for August 7, 2008 be either postponed, or changed to a telephonic hearing, due to her inability to appear on the scheduled date. The hearing representative stated that on July 11, 2008 appellant requested a telephone hearing in lieu of the oral hearing scheduled for August 7, 2008 in St. Louis, MO. She advised appellant that she would not reschedule the hearing as a telephone hearing. On July 16, 2008 Lynn Williams, who was identified by appellant as a union representative "subbing" for Ms. Baney, who was incapacitated due to surgery, "insisted" that the hearing representative reschedule the matter as a telephone hearing. Ms. Hunt informed her that the hearing remained as scheduled. In a July 17, 2008 telephone conversation, appellant's representative explained to the hearing representative that she had recently undergone knee replacement surgery and would not be able to attend the scheduled hearing. Appellant offered to provide documentation of Ms. Baney's incapacity. The hearing representative told Ms. Baney that that was not an acceptable basis for postponement of the hearing, and she would not reschedule the hearing as a telephone hearing. Ms. Baney argued that the hearing representative

[1] Docket No. 07-1854 (issued December 5, 2007).

was being unreasonable, noting that appellant was unable to travel to the hearing, and there is no one who could appear in her stead. The hearing representative advised Ms. Baney that she should submit any additional evidence she wished to be considered, in the event that she was required to proceed with a record review.

The record contains a July 22, 2008 facsimile from appellant's representative to the Office hearing representative advising her that she had undergone total knee replacement. The facsimile included July 21, 2008 medical reports from a Dr. B. Bal reflecting treatment for "total knee protocol."

By decision dated September 25, 2008, the Office hearing representative found that appellant had abandoned her request for a hearing because she had failed to appear on the scheduled date. The representative further found that appellant had received an overpayment of compensation in the amount of $5,231.93, for which she was at fault, due to her receipt of schedule award benefits to which she was not entitled. As appellant was found to be at fault, the representative found that she was not entitled to waiver of the overpayment amount. The hearing representative further found that the record contained insufficient evidence as to appellant's current financial status to allow her to determine an equitable repayment schedule. Therefore, she stated that the overpayment amount was due and payable in full.

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.[2]

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.

[2] 20 C.F.R. § 10.616(a).

"(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."[3]

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 10 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 option of withdrawing the hearing request, attending the scheduled hearing, rescheduling the hearing at an available time within the same docket, opting for a review of the written record by the Office hearing representative, or having a telephone hearing, if the Office hearing representative wished to grant such a hearing within her discretion.[4]

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the Federal (FECA) 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.

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.

(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.

[3] 20 C.F.R. § 10.622(b), (c).

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

> 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.[5]"

ANALYSIS -- ISSUE 1

In this case, appellant made a timely request for an oral hearing but, due to the medical situation of appellant's representative, requested to postpone the hearing. The hearing representative denied her request for continuance and rendered a decision on the record. The Board finds, however, that the Office did not properly follow procedures associated with the denial.

The record reflects that appellant and her representative requested a postponement of the prerecoupment hearing, which was originally scheduled for August 7, 2008. In her July 23, 2008 memorandum, the Office hearing representative acknowledged several telephone conversations in which both appellant and her representative requested that the hearing be either postponed or changed to a telephone conference, due to Ms. Baney's physical incapacity. Appellant's representative offered and provided evidence of her physical condition. The hearing representative documented her denial of the request for postponement both in her July 23, 2008 memorandum and in the September 25, 2008 decision.

Clearly, under the regulations, the hearing representative has full discretion on deciding whether to grant an extension of time for a hearing, or whether to convert the oral hearing into a telephonic hearing. In this case, the hearing representative, within her right, determined that the oral hearing would go on as scheduled. That decision, however, brought with it some procedural requirements under Office procedures. The hearing representative stated:

> "However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the hearing representative] should advise the claimant that such a request has the effect of converting the format from an oral hearing into a review of the written record. This course of action is correct even if the [hearing representative] 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]"

There is a memorandum of telephone calls in the record, dated July 23, 2008, that reflects the hearing representative's statement to appellant upon her decision on the oral hearing and states:

> "I explained that another union representative could appear with claimant, the claimant could appear without a representative or I could do a record review.... I

[5] *Id.* at Chapter 2.1601.6(e) (January 1999).

[6] *Id.*

advised her that they should submit any additional evidence they wished to be considered in the event that I must proceed with a record review."

The Board notes that the hearing representative did not follow proper Office procedures when it failed to unequivocally notify appellant that her denied request for postponement had the effect of converting the format from an oral hearing to a review of the written record.[7] Consequently, appellant was deprived of the opportunity to choose among all the options which should have been available to her, namely 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 engage in a teleconference at the discretion of the Office hearing representative.[8] Further, had appellant opted for a review of the written record, the Office was required to provide her written notice that she had 15 days in which to submit any information or evidence she wanted to be considered in the review of the record.[9] For these reasons, the case will be remanded to the Office, so that appellant will have the opportunity to exercise her options pursuant to Office procedures. After such development as the Office deems necessary, the hearing representative should issue an appropriate decision.[10]

CONCLUSION

The Board finds that the Office failed to follow proper procedures when it denied appellant's request to reschedule the oral hearing. The case is remanded to the Office for further development in accordance with this decision. The Board accordingly finds that this case is not in posture for a decision on the remaining issues.

[7] *Id.*

[8] *See* 20 C.F.R. § 10.622(b) and *supra* note 4.

[9] *Supra* note 4.

[10] As the case must be remanded to the Office for appropriate development, the Board finds that the case is not in posture for a decision on the remaining issues.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 25, 2008 decision is set aside and the case is remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: August 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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