

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

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W.Y., Appellant )  
and ) Docket No. 09-875  
DEPARTMENT OF THE NAVY, NAVAL ) Issued: November 23, 2009  
FACILITY ENGINEERING COMMAND, )  
Norfolk, VA, Employer )  
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*Appearances:*  
*Appellant, 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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On February 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 5, 2009 nonmerit decision denying his request for a hearing and an April 29, 2008 merit decision denying his schedule award claim. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

**ISSUES**

The issues are: (1) whether the Office properly found that appellant abandoned his request for a hearing; and (2) whether appellant established his entitlement to a schedule award.

**FACTUAL HISTORY**

On May 10, 2005 appellant, then a 50-year-old electrician, filed an occupational disease claim alleging that the factors of his employment caused carpal tunnel syndrome in his left hand. On May 23, 2005 the Office accepted the claim for left carpal tunnel syndrome.

On May 15, 2007 appellant filed a claim for schedule award. By decision dated April 29, 2008, the Office denied his schedule award claim on the grounds that the medical evidence did not demonstrate a measurable impairment of a scheduled member. On May 6, 2008 appellant requested an oral hearing.

On November 13, 2008 the Office advised appellant that a hearing would take place on December 12, 2008 at 9:45 a.m. at the Norfolk Federal Building in Conference Room 222 on the 2<sup>nd</sup> Floor.<sup>1</sup>

In a decision dated January 5, 2009, the Office hearing representative found that appellant abandoned his scheduled hearing. The hearing representative determined that appellant received written notification of the hearing 30 days in advance of hearing, but failed to appear. The hearing representative further found that there was no indication in the file that appellant contacted the Office either prior to or subsequent to the hearing to explain his 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.<sup>2</sup> 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.<sup>3</sup> It has the burden of proving that it mailed a notice of a scheduled hearing to appellant and his representative.<sup>4</sup>

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.<sup>5</sup>

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<sup>1</sup> The Office mailed the letter to appellant's address of record.

<sup>2</sup> 20 C.F.R. § 10.616(a).

<sup>3</sup> *Id.* at § 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).

<sup>4</sup> D.F., 58 ECAB \_\_\_\_ (Docket No. 06-1815, issued November 27, 2006); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>5</sup> Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.1601.6(e) (January 1999); see also G.J., 58 ECAB \_\_\_\_ (Docket No. 07-1028, issued August 16, 2007).

## **ANALYSIS -- ISSUE 1**

The Board finds that the Office improperly determined that appellant abandoned his request for a hearing. By decision dated April 29, 2008, the Office denied appellant's claim for a schedule award. Appellant timely requested an oral hearing. The Office has the burden of establishing that it mailed appellant a notice of the scheduled hearing at least 30 days before the scheduled date of the hearing as required by the regulations and its procedures.<sup>6</sup> It first provided him with written notice of the hearing scheduled for December 12, 2008 in a letter dated November 13, 2008. When the Office mailed a notice to appellant, no sooner than November 13, 2008, for a hearing to be held on December 12, 2008, it provided him with less than 30 days' notice of his scheduled hearing.<sup>7</sup> The Board finds that the Office failed to give him proper notice of his hearing as required under section 10.617(b). The case will be returned to the Office for the proper scheduling of another hearing.

## **CONCLUSION**

The Board finds that the Office improperly determined that appellant abandoned his request for a hearing. The case is remanded to the Office for scheduling a hearing before an Office hearing representative with proper notice to all parties.<sup>8</sup> Therefore, the case is not in posture for decision on the issue of whether he has established entitlement to a schedule award.

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<sup>6</sup> 20 C.F.R. § 10.617(b); Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.1601.6(e) (January 1999); *D.F.*, *supra* note 4.

<sup>7</sup> See *D.F.*, *supra* note 4.

<sup>8</sup> On appeal, appellant argues that he continues to suffer from carpal tunnel syndrome. As the Board is remanding the case for appellant to receive a hearing, it is premature to address his contention.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 5, 2009 is set aside and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: November 23, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board