

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

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<b>L.G., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 09-560</b>
	)	<b>Issued: September 29, 2009</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>KIRTLAND AIR FORCE BASE, NM, Employer</b>	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 23, 2008 appellant filed a timely appeal from a July 10, 2008 merit decision of the Office of Workers' Compensation Programs denying her traumatic injury claim and a November 21, 2008 nonmerit decision finding that she abandoned her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues in this case.

**ISSUES**

The issues are: (1) whether the Office properly found that appellant abandoned her request for a telephone hearing; and (2) whether she sustained an injury on April 1, 2008 in the performance of duty.

**FACTUAL HISTORY**

On March 15, 2008 appellant, then a 49-year-old safety specialist, filed a recurrence of disability claim on April 1, 2008 causally related to an October 24, 2006 work injury. She

related that on April 1, 2008 she felt a pull in her arm muscle when she caught a falling fire extinguisher.

On June 6, 2008 the Office informed appellant of the definitions of a recurrence of disability, a traumatic injury and an occupational disease. Based on her description of the work incident, it would adjudicate her claim as a traumatic injury.

By decision dated July 10, 2008, the Office denied appellant's claim on the grounds that she failed to establish that the April 1, 2008 work incident occurred at the time, place and in the manner alleged. On July 29, 2008 appellant requested a telephone hearing.

On October 9, 2008 the Office advised appellant that a telephone hearing would be held on November 5, 2008 at 11:00 a.m. Eastern Time.<sup>1</sup> It informed her 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 to be connected to the hearing representative and a court reporter.

In a decision dated November 21, 2008, the Office hearing representative found that appellant abandoned her scheduled telephonic hearing. She determined that appellant failed to call in for the hearing and that there was no indication in the file that she contacted the Office either prior to or subsequent to the 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.<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> The Office has the burden of proving that it mailed a notice of a scheduled hearing to appellant and her 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

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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> 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).

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

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>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office improperly determined that appellant abandoned her request for a hearing. By decision dated July 10, 2008, the Office denied her claim after finding that she did not establish the occurrence of the alleged April 1, 2008 work incident. Appellant timely requested a telephone 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> The Office first provided her with written notice of the telephone hearing scheduled for November 5, 2008 in a letter dated October 9, 2008. When the Office mailed a notice to appellant no sooner than October 9, 2008 for a telephone hearing to be held on November 5, 2008, it provided her with less than 30 days’ notice of her scheduled hearing.<sup>7</sup> The Board finds that the Office failed to give her proper notice of her hearing as required under section 10.617(b). The case will be returned to the Office for the proper scheduling of another hearing.<sup>8</sup>

### **CONCLUSION**

The Board finds that the Office improperly determined that appellant abandoned her request for a telephonic hearing. Therefore, the case is not in posture for decision on the issue of whether she has established that she sustained an injury on April 1, 2008 in the performance of duty.

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<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).

<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 contends that the employing establishment did not provide her with the proper form for filing a claim as retaliation against her for filing a grievance. As the Board is remanding the case for appellant to receive a telephone hearing, however, it is premature to address her contentions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 21 and July 10, 2008 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 29, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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