

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

N.P., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MEDICAL COMMAND, Fort Carson, CO,
Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 10-168
Issued: August 6, 2010**

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 October 21, 2009 appellant filed a timely appeal from a May 12, 2009 nonmerit decision of the Office of Workers' Compensation Programs finding she abandoned her hearing request and a November 7, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant abandoned her request for an oral hearing; and (2) whether appellant has established that she sustained a recurrence of disability commencing January 4, 2007.

FACTUAL HISTORY

On January 22, 2007 appellant, a 59-year-old pharmacist, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2006 she sustained a head injury after slipping on ice-covered pavement.

Appellant submitted reports signed by a physician's assistant, results from diagnostic tests and a report dated January 9, 2007, signed by Dr. Theodore R. McNitt, a Board-certified internist, who presented findings on examination and diagnosed hyponatremia, hypertension and diabetes.

In a report dated January 4, 2007, Dr. Michael J. Starkey, a Board-certified diagnostic radiologist, reported findings following a computerized axial tomography (CAT) scan of appellant's head revealed no abnormality.

On January 9, 2007 Dr. John W. Evans, a radiologist, reported that a magnetic resonance imaging (MRI) scan of appellant's brain revealed no abnormality.

On January 22 and September 25, 2007 Dr. Joseph Pineau, a Board-certified internist, presented findings on examination and diagnosed "systemic hypertension" and diabetes.

On January 15, 2008 Dr. Theresa M. Gisi, a psychologist, presented findings on examination and diagnosed a "cognitive disorder," "postconcussion disorder" and "psychosocial stressors related to combined stress and cognitive disorder."

On February 11, 2008 appellant alleged that she sustained a recurrence of disability.

By decision dated November 7, 2008 the Office denied both claims because the evidence of record did not establish that her alleged injury occurred in the performance of duty.

Appellant disagreed and on December 5, 2008 requested an oral hearing. The appeal form and envelope containing appellant's hearing request listed her return address as: "2545 Verde Drive, Col. Springs, Col., 80910."

By letter dated February 20, 2009, the Office notified appellant that an oral hearing was scheduled for March 24, 2009 at 1:15 p.m. It instructed appellant that she or her representative should be present. This letter was mailed to: "1135 Cambridge Ave, Colo. Springs, 80916." Appellant did not appear for the hearing.

By decision dated May 12, 2009, the Office found that appellant abandoned her oral hearing request as she failed to appear at the hearing and did not contact the Office prior or subsequent to the hearing date to explain her absence.

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.¹ 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

¹ 20 C.F.R. § 10.616(a).

any representative at least 30 days before the scheduled date.² The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.³

The authority governing abandonment of hearings rests with the Office's procedure manual,⁴ which provides as follows:

“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].”⁵

ANALYSIS -- ISSUE 1

Appellant asserts on appeal that she did not abandon her hearing request because she never received notice of the scheduled hearing. The Board finds that the record establishes that the notice of hearing was not properly addressed and mailed to appellant. The Office has the burden of proving that it mailed to appellant notice of the scheduled hearing. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.⁶ As the notice was not properly addressed, there is no presumption that appellant received notice of her scheduled hearing.⁷

Appellant provided her return address on her December 5, 2008 appeal request form and on the postmarked envelope containing the December 5, 2008 hearing request. The Office, however, mailed the notice of oral hearing to her previous address of record.⁸ As the Office did

² *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).

³ See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

⁴ See *Claudia J. Whitten*, 52 ECAB 483 (2001).

⁵ Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 2.1601.6(e) (January 1999).

⁶ *Samuel Smith*, 41 ECAB 226 (1989).

⁷ See *Michelle R. Littlejohn*, *supra* note 3 (finding that a notice of hearing sent to an incomplete address did not constitute proper notice and, therefore, appellant's failure to appear did not constitute abandonment of her hearing request).

⁸ The record reflects that appellant had received some mail from the Office listing the incorrect address. However, this is insufficient to establish that all correspondence sent by the Office to the improper address reached appellant.

not use appellant's new address, it did not properly address the notice of hearing.⁹ The Board finds that the failure of the Office to send the notice of oral hearing to appellant's new address supports appellant's contention, on appeal, that she did not receive notice of the hearing.

The Board further finds that, under these circumstances, appellant's failure to appear at the hearing or show cause for not appearing within 10 days after the scheduled hearing does not constitute abandonment of her request for a hearing.¹⁰

CONCLUSION

The Board finds that the Office's decision of May 12, 2009 is reversed and the case will be remanded to the Office to schedule a hearing before an Office hearing representative with proper notice provided to appellant.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2009 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded to the Office for action consistent with this opinion of the Board.

Issued: August 6, 2010
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

⁹ See *Clara T. Norga*, 46 ECAB 473 (1995).

¹⁰ In light of the Board's decision, the merit issue is moot.