

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

J.C., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 09-1441
Issued: February 26, 2010**

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 May 21, 2009 appellant filed a timely appeal from a May 30, 2008 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim, and a December 23, 2008 nonmerit decision finding that he abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim and over the December 23, 2008 nonmerit decision.

ISSUES

The issues are: (1) whether appellant abandoned his request for an oral hearing; and (2) whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on April 18, 2008.

FACTUAL HISTORY

On April 22, 2008 appellant, then a 54-year-old training specialist, filed a traumatic injury claim alleging that he sustained injuries to his right hip, leg, thigh, knee and groin on April 18, 2008 when he stepped in a hole while leaving the employing establishment. He

submitted medical evidence, including an April 18, 2008 report from the employing establishment health facility and an April 25, 2008 report from Dr. Anthony Carter, a Board-certified orthopedic surgeon.

By decision dated May 30 2008, the Office denied appellant's claim on the grounds that the medical evidence did not provide a diagnosed condition which could be connected to the accepted incident.

On June 23, 2008 appellant requested an oral hearing. In a letter dated November 13, 2008, the Office informed appellant that a hearing had been scheduled at 2:00 p.m. on December 11, 2008. The notice was sent to appellant's address of record in Suffolk, VA.

The record contains a copy of a facsimile from appellant to the Office, dated and received on December 23, 2008.¹ Appellant stated:

"I just received your November 13, 2008 letter informing me about a hearing date in Norfolk, VA. Unfortunately the December 11, 2008 date has passed. I informed local HRO of my new address change noted in an email and submitted a letter dated November 12, 2008. to the OWCP London, KY office."

Appellant submitted a copy of a November 12, 2008 letter advising the Office of a change of address from his Suffolk, VA location to Chesapeake, VA. He also submitted a copy of an envelope, bearing the Office's return address, and an original date stamp of November 14, 2008. The envelope bears the following notation: "Notify Sender of New Address," and reflects that the document was forwarded by the post office on December 19, 2008 to appellant's Chesapeake, VA address. The envelope and the November 12, 2008 letter were received by the Office on December 23, 2008.

By decision dated December 23, 2008, the Office found that appellant had abandoned his request for an oral hearing, on the grounds that he had received proper notice of the scheduled hearing but did not appear. It stated that there was no indication in the file that appellant had contacted the Office prior to, or subsequent to, the scheduled hearing to explain his failure to appear.

On appeal, appellant asserts that he did not receive timely notification of the hearing, because the notice was first sent to his prior address. He contends that he contacted the Office, by fax and telephone, immediately upon his receipt of the notice in order to discuss the situation.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act and its implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.² Unless otherwise directed in writing by the claimant, the hearing

¹ The facsimile bears a machine verification indicating that it was sent on December 23, 2008.

² See 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.³ The Office has the burden of proving that it mailed notice of a scheduled hearing to a claimant.⁴

The authority governing abandonment of hearings rests with the Office's procedure manual, which provides that a hearing can be considered abandoned only when three conditions are present, namely: 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.⁵

As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,⁶ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.⁷ The Board has held that this principal applies with equal force when evidence is received by the Office the same day a final decision is issued.⁸

ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant abandoned his request for an oral hearing. In its December 23, 2008 decision, the Office found that appellant had abandoned his request, as he had received proper notice of the scheduled hearing but did not appear. The Office stated that there was no indication in the file that appellant had contacted the Office prior to or subsequent to the scheduled hearing to explain his failure to appear; however, the decision made no reference to the December 23, 2008 letter from appellant, or to the enclosed documents.

As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,⁹ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.¹⁰ In its final decision, the Office made no reference to appellant's December 23, 2008 letter or additional evidence received on December 23, 2008, the same day the decision was issued. Rather, it stated that he had not contacted the Office at all to explain his failure to appear at the hearing. Because it does not appear that the Office considered the December 23, 2008

³ 20 C.F.R. § 10.617(b).

⁴ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); see *R.C.*, 59 ECAB ____ (Docket No. 08-132, issued May 9, 2008).

⁶ 20 C.F.R. § 501.2(c).

⁷ See *William A. Couch*, 41 ECAB 548 (1990).

⁸ *Linda Johnson*, 45 ECAB 439 (1994).

⁹ 20 C.F.R. § 501.2(c).

¹⁰ See *William A. Couch*, *supra* note 7.

letter and supporting documents in reaching its decision, the Board cannot review such evidence for the first time on appeal.¹¹

The Board finds that this case is not in posture for a decision. Consequently, the case will be remanded for the Office to consider appellant's December 23, 2008 letter and supporting evidence. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant abandoned his hearing request.¹²

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2008 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for action consistent with this decision.

Issued: February 26, 2010
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

¹¹ *See id.* at § 501.2(c). The Office's obligation to address and consider relevant evidence that was properly submitted prior to the issuance of its final decision, applies with equal force when evidence is received by the Office the same day the final decision is issued. *Linda Johnson, supra* note 8.

¹² In light of the Board's decision, the merit issue is moot.