

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

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R.E., Appellant	)	
	)	
and	)	<b>Docket No. 09-2247</b>
	)	<b>Issued: May 11, 2010</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>FEDERAL PROTECTIVE SERVICE,</b>	)	
<b>Portland, OR, 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:  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 8, 2009 appellant timely appealed the July 24, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which found that he abandoned his request for a hearing. The latest merit decision was issued on February 27, 2009, more than 180 days prior to the filing of the instant appeal.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board does not have jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant abandoned his hearing request.

**FACTUAL HISTORY**

On January 14, 2008 appellant, then a 43-year-old inspector, filed a traumatic injury claim (Form CA-1) for a low back injury that allegedly occurred on June 13, 2007 while moving

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<sup>1</sup> The application for review (Form AB-1) was signed and dated August 18, 2009. Although sent *via* United States Mail, the envelope does not bear a U.S. Postal Service postmark. The appeal was received by the Board on September 8, 2009. Because of the absence of a postmark or any other evidence of the mailing date, the receipt date serves as the date of filing. 20 C.F.R. § 501.3(f)(1) (2009).

a 300- to 400-pound metal detention bench. He was diagnosed with left sciatica. Imaging studies revealed a right paracentral protrusion at L4-5 and a disc extrusion at L5-S1. After undergoing physical therapy and an epidural steroid injection appellant was released to resume full duty effective March 21, 2008.

By decision dated April 23, 2008, the Office denied the claim because appellant failed to establish a causal relationship between his diagnosed condition and the June 13, 2007 employment incident. On December 24, 2008 the Branch of Hearings & Review set aside the Office's April 23, 2008 decision and remanded the case for further medical development. The Office obtained additional medical evidence as directed, but again denied the claim in a decision dated February 27, 2009. It found that the medical evidence failed to establish that the June 13, 2007 employment incident either caused, accelerated, precipitated or aggravated appellant's back condition.

On March 6, 2009 appellant requested an oral hearing. On June 1, 2009 the Branch of Hearings & Review notified appellant in writing that a telephonic hearing was scheduled for June 29, 2009 at 2:30 p.m. eastern time.

By decision dated July 24, 2009, the Branch of Hearings & Review found that appellant abandoned his requested hearing. The decision noted that the hearing was scheduled for June 29, 2009 and appellant had been provided advance written notice and clear instructions on how to call in to participate, but he failed to call as instructed. The decision also noted that there was no indication that appellant contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to participate. Based on these factors, the Office concluded that appellant abandoned his requested oral hearing.

### **LEGAL PRECEDENT**

A claimant dissatisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office.<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 oral 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 the claimant a notice of the date and time of the scheduled hearing.<sup>4</sup> Assuming proper notice has been provided by the Office, a hearing is considered to have been abandoned when the following conditions have been met: (1) the claimant has not requested a postponement; (2) the claimant has failed to appear at a scheduled hearing; and (3) the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. § 8124(b) (2006); 20 C.F.R. § 10.616(a).

<sup>3</sup> 20 C.F.R. § 10.617(b).

<sup>4</sup> *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

**ANALYSIS**

The applicable regulations require the Office to provide “at least 30 days” advance written notice of the scheduled hearing date.<sup>6</sup> The June 1, 2009 hearing notification indicated that a telephonic hearing was scheduled for June 29, 2009, which was less than 30 days from the date of the notice. The Branch of Hearings & Review did not provide appellant “at least 30 days” advance notice as mandated. Because the June 1, 2009 hearing notification was insufficient, the July 24, 2009 decision is set aside and the case is remanded to the Branch of Hearings & Review in order to schedule another oral hearing.

**CONCLUSION**

The Branch of Hearings & Review improperly found that appellant abandoned his requested hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 24, 2009 decision of the Office of Workers’ Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 11, 2010  
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

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<sup>6</sup> 20 C.F.R. § 10.617(b).