United States Department of Labor
Employees' Compensation Appeals Board

N.P., Appellant	)	
and	)	**Docket No. 09-2263**
	)	**Issued: May 17, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Flushing, NY, Employer	)	

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 10, 2009 appellant filed a timely appeal from the April 30, 2009 merit decision of the Office of Workers' Compensation Programs denying her traumatic injury claim and the August 25, 2009 nonmerit decision finding that she had abandoned her request for an oral hearing.[1] 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 determined that appellant abandoned her request for an oral hearing; and (2) whether she established that she sustained a traumatic injury on December 10, 2008 in the performance of duty.

[1] Appellant's May 17, 2006 traumatic injury claim (File No. xxxxxx386) was accepted for neck sprain, contusions of the chest wall, lateral epicondylitis of the left elbow and lumbar and thoracic back sprains. On October 14, 2008 the Office terminated compensation and medical benefits. Appellant's appeal of the Office's October 15, 2008 termination decision is currently pending a decision by the Board in Docket No. 09-1837.

FACTUAL HISTORY

On March 27, 2009 appellant, then a 36-year-old security screener, filed a traumatic injury claim alleging that on December 10, 2008 she sustained injuries to her lower back as a result of teaching trainees how to perform a full-body pat down and hand wand, and carrying a heavy load of uniforms for 30 minutes while waiting for a shuttle bus. She also alleged that she injured her left hand while using scissors to remove badges from her uniforms. The employing establishment controverted appellant's claim stating that she was not responsible for any training on the date in question, nor did she perform any function during the training session that could possibly have caused an injury.

The record contains a copy of a Form CA-2a dated February 4, 2009 alleging a recurrence of disability as of December 10, 2008. Appellant stated that her supervisor, John Kolk, instructed her to leave the premises immediately on that date because she was complaining about her head and hand injury.

In a letter dated March 30, 2009, the Office advised appellant that the evidence submitted was insufficient to establish her claim and requested additional factual and medical evidence.

The record contains statements from appellant's supervisor, Mr. Kolk, and her instructors indicating that she did not conduct any training, hand-wanding or full-body pat down procedures on December 10, 2008; that she was seated directly in front of the training instructor at all times and that she did not perform any activity that could have resulted in the claimed injury. Appellant alleged that Mr. Kolk was challenging her traumatic injury claim in retaliation for her filing of an Equal Employment Opportunity complaint against him. The record also contains a February 5, 2009 statement from employee Veda Mahray noting appellant's complaint that she was unable to write on December 8, 2008 because her hand hurt; a December 10, 2008 statement from Heliva Sanches confirming that appellant picked up uniforms on December 9, 2008; a receipt dated December 10, 2008 for 51 badges, 10 patches and 1 jacket; and a notice of appellant's right to file a formal complaint alleging discrimination on the basis of race by her supervisor on December 10, 2008.

Appellant submitted an April 2, 2009 report from Dr. Fidel Rodriguez, a Board-certified physiatrist, who stated that she had injured her left hand and exacerbated her lower back syndrome condition with lumbar disc bulges and possible radiculopathy on December 10, 2008 while training new employees, carrying bags and using scissors. He opined that her condition was directly related to the December 10, 2008 accident.

Additional medical evidence of record included reports dated August 14 and 21, 2008 from Dr. William B. Head, Jr., a Board-certified neurologist, who diagnosed symptom-magnification syndrome;[2] a November 26, 2008 report from Dr. Leo E. Batash, a physiatrist, who opined that appellant had no residuals of her May 17, 2006 injury; an April 6, 2009 report from Dr. Nelson W. Castro, a chiropractor, who stated that appellant felt pain in her back while bending and injured her thumb while using a pair of scissors; March 26, 2009 magnetic

[2] Dr. Head served as an impartial medical examiner in appellant's May 17, 2006 traumatic injury case.

resonance imaging (MRI) scans of the cervical and lumbar spines; and an April 2, 2009 report of an x-ray of the left hand.

By decision dated April 30, 2009, the Office denied appellant's traumatic injury claim on the grounds that she had failed to establish the fact of injury.

On May 5, 2009 appellant requested an oral hearing. She submitted additional medical evidence, which included evidence previously of record.

By letter dated July 15, 2009, the Office advised appellant that the oral hearing would be held on August 17, 2009 at 12:30 p.m. at 201 Varick Street, Room 638B, New York, NY 10014. Appellant did not appear for the scheduled hearing.

The record contains a memorandum of a telephone call from appellant to the Office dated August 20, 2009. Appellant informed the Office that she missed the hearing due to illness. The memorandum contains the notation, "No to rescheduling."

By decision dated August 25, 2009, the Office found that appellant had abandoned her request for an oral hearing before an Office hearing representative due to her failure to appear at the hearing or to contact the Office prior to or subsequent to the hearing date to explain her failure to appear.

LEGAL PRECEDENT

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.[3] 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.[4] The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.[5]

The authority governing abandonment of hearings rests with the Office's procedure manual,[6] 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.

[3] 20 C.F.R. § 10.616(a).

[4] *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).

[5] *See Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

[6] *See Claudia J. Whitten*, 52 ECAB 483 (2001).

"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]."[7]

ANALYSIS

The record establishes that, on July 15, 2009, in response to appellant's request for an oral hearing, the Office mailed an appropriate notice of the scheduled August 17, 2009 hearing. The Board notes that the notice was sent more than 30 days prior to the hearing and that there is no contention that appellant did not receive it. The issue is, thus, whether the Office properly found that she abandoned the hearing.

The record establishes that appellant failed to appear at the scheduled August 17, 2009 hearing, as instructed, and that she did not request a postponement prior to that date. However, it does contain evidence that she contacted the Office within 10 days of the scheduled hearing to explain her failure to participate. On August 20, 2009 appellant informed the Office by telephone that she missed the scheduled hearing due to illness. The Office denied appellant's request to reschedule the hearing. In its decision finding that she had abandoned her hearing, the Office did not acknowledge appellant's August 20, 2009 communication.

The Board notes initially that appellant's telephone call was made within 10 days of the scheduled hearing. Appellant's communication indicating that she failed to participate in the hearing because of illness, qualifies as notification to the Office of her failure to appear.[8] Because it was received within 10 days of the scheduled hearing, the Board finds that appellant provided adequate notification of her failure to participate.

The Board also finds that the August 25, 2009 decision was prematurely issued and therefore must be set aside. Office procedures provide that appellant had 10 days following the scheduled hearing to notify the Office of any reasons for her failure to appear.[9] By issuing its decision prior to the expiration of the 10-day period, the hearing representative denied appellant the opportunity to submit additional evidence justifying her failure to appear.

As the circumstances of this case do not meet the criteria for abandonment as provided in Chapter 2.1601.6(e) of the Office's procedure manual, the Board finds that appellant did not abandon her request for an oral hearing.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[8] *See A.B.*, 58 ECAB 546 (2007) (the Board found that appellant's letter, which was received by the Office within 10 days of the scheduled hearing, constituted notification of his failure to appear at the hearing and precluded a finding of abandonment).

[9] *See supra* note 7 and accompanying text.

CONCLUSION

The Board finds that the Office did not properly determine that appellant abandoned her hearing request. Due to the disposition of this issue, it is not necessary for the Board to address the merits of the second issue regarding whether she sustained a traumatic injury on December 10, 2008. In order to preserve her appeal rights, the Office will reissue its decision on appellant's traumatic injury claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2009 is reversed.

Issued: May 17, 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