

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

E.C., Appellant)

and)

DEPARTMENT OF JUSTICE, DRUG)
ENFORCEMENT ADMINISTRATION,)
Miami, FL, Employer)

Docket No. 10-1060
Issued: November 22, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2010 appellant timely appealed the February 19, 2010 nonmerit decision of the Office of Workers' Compensation Programs finding that she abandoned her request for an oral hearing. The most recent merit decision was issued on August 24, 2009, more than 180 days prior to the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant abandoned her request for a hearing.

FACTUAL HISTORY

On May 8, 1994 appellant, then a 36-year-old special agent/criminal investigator, was injured when she slipped and fell on her tailbone at work. She stopped work on May 16, 1994. The Office accepted the claim for subluxations at C3, T1, L3-4 and L5-S1. On December 20, 2007 it accepted cervical subluxation at C3, thoracic subluxation, T1, lumbar subluxation, L3-4, and L5-S1. On February 25, 2008 the Office accepted permanent aggravation of cervical degenerative disc disease at C4-C5 and C5-C6. On November 7, 2008 it accepted

cervicothoracic lumbar myofascial pain syndrome. Appellant received appropriate compensation benefits.

On June 4, 2009 the Office received a request to authorize physical therapy for the period June 4 to July 4, 2009.

In a letter dated June 9, 2009, the Office advised appellant that additional medical evidence was needed. It requested that she provide a report from her treating physician with an explanation regarding the need and extent of the requested treatment.

In a June 19, 2009 report, Dr. Bruce S. Zaret, a Board-certified internist and treating physician, noted the Office's request for additional information regarding the need for physical therapy. He opined that appellant was in need of a transcutaneous electrical nerve stimulation (TENS) unit and Botox, but did not offer any opinion regarding physical therapy.

By decision dated August 24, 2009, the Office denied appellant's request for additional physical therapy. It found that Dr. Zaret's report was insufficient to support authorization of any additional physical therapy.

On August 30, 2009 appellant requested a telephonic hearing and submitted additional evidence. In an undated letter, received on September 11, 2009, she advised the Office that she never received the June 9, 2009 letter requesting additional information from her physician. Appellant also noted that the Office did not address the TENS unit or Botox request from her physician.

On November 10, 2009 the Office notified appellant in writing that a hearing was scheduled for December 10, 2009 at 1:30 p.m. Eastern Standard Time. Appellant was given a toll-free number to call and a pass code. The notice was mailed to her address of record.

By decision dated February 19, 2010, the Office found that appellant abandoned her requested hearing. The decision noted that a hearing was scheduled for December 10, 2009, but she failed to appear as instructed. The decision found that there was no indication that appellant contacted the Office either prior or subsequent to the scheduled hearing to explain her failure to participate. The Office concluded that she abandoned her oral hearing request.

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.¹ Unless otherwise directed in writing by the claims examiner, the Office hearing representative will mail a notice of the time and place of the hearing to the

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

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

The authority governing the abandonment of hearings rests with the Office's procedure manual, which provides that a hearing can be 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 her request for a hearing and return the case to the district Office.⁴

ANALYSIS

By decision dated August 24, 2009, the Office denied appellant's request for additional physical therapy. Appellant timely requested a telephonic hearing. In a November 10, 2009 letter, the Office notified her that a hearing was scheduled for December 10, 2009 at 1:30 p.m. Eastern Standard Time. It instructed appellant to call a toll-free number and enter a provided pass code to connect to the hearing representative. Appellant did not telephone at the appointed time. She did not request a postponement of the hearing or explain her failure to appear at the hearing within 10 days of the scheduled December 10, 2009 hearing. The Board finds that appellant abandoned her request for a hearing.

On appeal appellant contends that she did not receive notice of the scheduled hearing. The record reflects that the November 10, 2009 hearing notice was mailed to appellant's address of record and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed received at the mailing address in due course. This is known as the mailbox rule.⁵ The Office properly mailed the hearing notice to appellant's address of record and it is presumed that she received the notice of hearing. Appellant also questioned why physical therapy had not been authorized by the Office. The Board only has jurisdiction to consider whether the Office properly found that she abandoned her hearing request.

CONCLUSION

The Board finds that the Office properly determined that appellant abandoned her request for an oral hearing.

² 20 C.F.R. § 10.617(b).

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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999). See *G.J.*, 58 ECAB 651 (2007).

⁵ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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