

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

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**K.D., Appellant**

**and**

**U.S. POSTAL SERVICE, BRIDGEPORT  
PROCESSING & DISTRIBUTION,  
Wallingford, CT, Employer**

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**Docket No. 11-77  
Issued: August 18, 2011**

*Appearances:*  
*Alexander H. Schwartz, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 13, 2010 appellant, through her attorney, filed a timely appeal of a July 26, 2010 nonmerit Office of Workers' Compensation Programs' (OWCP) decision finding that she had abandoned her request for an oral hearing. OWCP issued its last merit decision on February 19, 2010. As more than 180 days elapsed between that merit decision and the October 13, 2010 filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly determined that appellant abandoned her hearing request.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 23, 2000 appellant, then a 47-year-old manual clerk filed an occupational disease claim alleging that she developed right shoulder impingement due to reaching while sorting mail.<sup>2</sup> OWCP accepted her claim for right shoulder impingement syndrome on September 12, 2000. Appellant underwent right shoulder acromioplasty on October 11, 2001. OWCP accepted the additional conditions of calcifying tendonitis of the right shoulder. On September 10, 2003 it granted appellant a schedule award for 18 percent impairment of the right upper extremity.

Appellant filed a claim for recurrence of disability beginning on November 30, 2009 alleging that she was disabled due to the May 23, 2000 employment injury. In a decision dated February 19, 2010, OWCP denied her claim, finding that appellant experienced a withdrawal of the modified position under the National Reassessment Process. Appellant requested an oral hearing on March 16, 2010. In a letter dated June 4, 2010, sent to appellant's address of record, the Branch of Hearings and Review informed appellant that her telephonic hearing would take place on July 12, 2010 at 11:15 am eastern time and provided appellant with the toll free number and the pass code.

By decision dated July 26, 2010, the Branch of Hearings and Review informed appellant that she had failed to appear at the scheduled hearing, that there was no indication that she contacted OWCP either prior or subsequent to the scheduled hearing to explain her failure to appear. The Branch of Hearings and Review determined that appellant had abandoned her request for a hearing.

## **LEGAL PRECEDENT**

A claimant who has received a final adverse decision by OWCP 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.<sup>3</sup> Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and

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<sup>2</sup> Appellant has two claim numbers in the record before the Board. On December 30, 1996 she, then a 34-year-old flat letter sorter machine operator, filed a traumatic injury claim alleging that the repeated motion of lifting in the performance of duty caused left shoulder and arm pain. Appellant later filed an occupational disease claim for the same injury. OWCP accepted her claim for left shoulder strain and on May 1, 1997 authorized excision of the outer distal end of the left clavicle. OWCP File No. xxxxxx716. On November 17, 1997 appellant underwent arthroscopic acromioplasty with debridement of subacromial space of the left shoulder. By decision dated September 18, 1998, OWCP found that appellant's employment as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. On March 2, 1999 it granted appellant a schedule award for 15 percent impairment of her left upper extremity.

<sup>3</sup> 20 C.F.R. § 10.616(a).

any representative at least 30 days before the scheduled date.<sup>4</sup> OWCP has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.<sup>5</sup>

The authority governing abandonment of hearings rests with OWCP's procedure manual,<sup>6</sup> 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].”<sup>7</sup>

### ANALYSIS

The record establishes that on June 4, 2010, in response to appellant's request for an oral hearing, the Branch of Hearings and Review mailed an appropriate notice of the scheduled telephonic hearing to appellant's address of record. The Board notes that the notice was sent more than 30 days prior to the hearing and that there is no contention that she did not receive it.<sup>8</sup> The issue is thus, whether OWCP properly found that appellant had abandoned the hearing.

The record establishes that appellant failed to telephone the hearing representative as instructed on July 12, 2010 and that she did not request a postponement prior to that date. The record does not contain evidence that she contacted OWCP within 10 days after the scheduled hearing to explain her failure to appear. As appellant failed to comply with all of the three of the circumstances set forth in OWCP's procedure manual, the Branch of Hearings and Review properly found that appellant abandoned her request for an oral hearing.

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<sup>4</sup> *Id.* at § 10.617(b). OWCP 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).

<sup>5</sup> See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

<sup>6</sup> See *Claudia J. Whitten*, 52 ECAB 483 (2001).

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

<sup>8</sup> 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. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michele Lagana*, 52 ECAB 187 (2000); *Levi Drew, Jr.*, 52 ECAB 442 (2001).

**CONCLUSION**

The Board finds that appellant abandoned her oral hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** July 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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