

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

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**M.B., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Charlotte, NC,  
Employer**

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**Docket No. 10-1077  
Issued: March 17, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 10, 2010 appellant filed a timely appeal from an October 22, 2009 nonmerit decision of the Office of Workers' Compensation Programs. Because more than 180 days elapsed between the Office's last merit decision dated April 24, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether appellant abandoned a hearing scheduled for October 6, 2009.

**FACTUAL HISTORY**

On January 26, 2009 appellant, then a 41-year-old mail processing clerk, filed an occupational disease claim alleging that she sustained severe left shoulder and moderate right shoulder pain as a result of lifting mail trays weighing up to 30 pounds over her head for 8 to 12 hours each workday. She became aware of her condition on November 25, 2008 and its

relationship to her federal employment on December 3, 2008. Appellant did not stop work. She noted that she previously injured her left shoulder in 2004 or 2005 while performing the same task at the employing establishment.

Appellant submitted 2006 medical reports from several physicians regarding her left shoulder condition. In a December 3, 2008 report, Dr. James Fleischli, a Board-certified orthopedic surgeon, noted that appellant presented with bilateral shoulder pain and finger numbness stemming from a November 25, 2008 work injury. He noted examination findings and diagnosed bilateral shoulder impingement, left acromioclavicular arthritis and right bicep tendinitis and opined that appellant's condition was due to repetitive lifting at work.

On February 2, 2009 the Office informed appellant that the evidence was insufficient and advised her about the evidence needed to establish her claim.

In a February 9, 2009 report, Dr. Fleischli noted that appellant sustained left shoulder impingement and acromioclavicular arthritis as a result of repetitive reaching and use of the upper extremity at the workplace. He advised an arthroscopy with subacromial decompression and distal clavicle excision. Dr. Fleischli pointed out that appellant's right shoulder improved after receiving a cortisone injection.

By decision dated April 24, 2009, the Office denied appellant's claim, finding that the medical evidence was insufficient to demonstrate that work factors caused or aggravated a preexisting left shoulder or right shoulder condition.

On May 22, 2009 appellant requested an oral hearing. In a September 3, 2009 notice, the Office's Branch of Hearings and Review scheduled a telephonic hearing for 11:00 a.m. on October 6, 2009. It provided appellant with the telephone number and the pass code for accessing the hearing. The Office advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing her nonelective hospitalization or that the death of a spouse, parent or child prevented her attendance. The notice was mailed to her address of record.

By decision dated October 22, 2009, the Office hearing representative found that appellant failed to appear at the hearing and had abandoned her request. There was no evidence that she contacted the Office prior to or subsequent to the scheduled hearing.

### **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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> The Office has the burden of proving that it mailed notice of a scheduled hearing to a claimant.<sup>3</sup>

The Office's procedure manual provides that a hearing can be considered abandoned only under very limited circumstances.<sup>4</sup> All three of the following conditions must be present: (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. Under these circumstances, the Office hearing representative will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.<sup>5</sup>

### ANALYSIS

The record shows that the Office scheduled an October 6, 2009 telephonic hearing before an Office hearing representative and mailed proper written notice to appellant on September 3, 2009 to her address of record. In its September 3, 2009 notice, the Office noted the time of the hearing and provided appellant the telephone number and pass code for accessing the scheduled hearing. Appellant did not telephone at the appointed time. The record also shows that she did not request postponement or explain her failure to appear at the hearing within 10 days of the scheduled hearing date. The Board finds that, under these circumstances, appellant abandoned her request for a hearing.

Appellant argues on appeal that she was unable to participate in the October 6, 2009 oral hearing "due to mitigating circumstances." As noted, she provided no reason for her nonattendance at the hearing within 10 days of the scheduled hearing nor did she request a postponement of the hearing. The Office properly found that she abandoned her hearing request. Appellant also asserts that she frequently had shoulder pain due to her job and that her claim should be accepted. The Board only has jurisdiction to consider whether the Office properly determined that she abandoned her hearing request.

### CONCLUSION

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

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<sup>2</sup> 20 C.F.R. § 10.617(b).

<sup>3</sup> See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>4</sup> *Claudia J. Whitten*, 52 ECAB 483 (2001).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2011  
Washington, DC

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

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

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