United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 10-1796**
	)	**Issued: March 23, 2011**
U.S. POSTAL SERVICE, POST OFFICE, West Covina, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2010 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 18, 2010 finding that she abandoned her request for a hearing.[1] Pursuant to the Federal Employees' Compensation Act[2] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue of the case.

ISSUE

The issue is whether the Office properly determined that appellant abandoned her request for a hearing.

On appeal, appellant clarifies each of the attempts she made to ascertain the correct information for the hearing. She argues that she did not receive adequate notice of her hearing and did not abandon her hearing.

[1] The Board notes that on April 8, 2010 the Office issued a decision granting appellant a schedule award. Appellant did not appeal this decision to the Board.

[2] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 24, 2006 appellant, then a 37-year-old letter carrier, filed an occupational disease claim alleging that she developed sciatica and lumbar strain as a result of performing repetitive work duties. The Office accepted her claim for lumbosacral strain and expanded it to include disc protrusion at L5-S1, L4-5 and L5 radiculopathy. Appellant did not stop work but returned to a light-duty position.

After appellant began vocational rehabilitation, she was offered a position as part-time bank teller, four hours a day, with an hourly rate of $11.00 a hour or $220.00 a week. Appellant accepted the position and returned to work on June 2, 2009.

By decision dated August 26, 2009, the Office found that the position of part-time bank teller fairly and reasonably represented appellant's wage-earning capacity.

On September 15, 2009 appellant requested an oral hearing.

The Office, by letter dated December 24, 2009 and addressed to appellant's current address of record, advised her that a telephone hearing would be held January 28, 2010 at 1:00 p.m., Eastern Time. It instructed her to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call.

In an envelope postmarked January 14, 2010 and received by the Office on January 19, 2010, the notice of oral hearing was returned to the Office bearing the notation "return to sender insufficient address unable to forward."[3]

By decision dated February 18, 2010, the Office found that appellant had abandoned her request for a hearing. It acknowledged that the original notice had been returned to the Office but found the Office's telephonic reminder and letter of January 26, 2010 to be sufficient notice. As appellant did not appear and she did not explain her absence either before or after the scheduled hearing, it determined the hearing had been abandoned.

[3] In a telephone call log dated January 26, 2010, the Office contacted appellant and advised her that the notice of oral hearing was returned to the Office as undeliverable. The claims examiner read part of the letter to appellant noting that she was scheduled for a telephone hearing on January 28, 2010 at 1:00 p.m. and that she should call the toll free number a few minutes before the hearing and when prompted enter the pass code to connect her to the hearing. The claims examiner noted that a letter would be sent to appellant but that she would not receive it before January 28, 2010 and to call her if she had questions. On January 26, 2010 the claims examiner confirmed in writing and reiterated that the letter from the Office's Branch of Hearings and Review had been returned as undeliverable. The claims examiner noted enclosing a copy of the returned document. On January 28, 2010 appellant telephoned the claims examiner and left a message noting that she was unable to access the hearing because "it was east coast time." The claims examiner returned the call and advised that the Office's Branch of Hearings and Review did not have the correct address for appellant. The claims examiner indicated that she would send appellant a copy of the letter and suggested that she call the telephone number on the back of the letter and inform the Office's Branch of Hearings and Review that she did not receive the notice and request to reschedule the hearing. In a February 17, 2010 Office telephone log, appellant stated that she was unable to reach the Office's Branch of Hearings and Review as she left messages and sent a fax but received no response. The claims examiner provided appellant with a telephone number for the Office's Branch of Hearings and Review.

LEGAL PRECEDENT

Under the 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.[4] 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.[5]

The Office has the burden of proving that it mailed a notice of a scheduled hearing to a claimant.[6] Under the mailbox rule, 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.[7] However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.[8]

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.[9]

ANALYSIS

The Board finds that the Office improperly found that appellant abandoned her request for an oral hearing. The Office's determination that appellant abandoned her request for hearing is premised on the basis that she received adequate notice of the scheduled hearing. The evidence of record does establish that the notice was sent to her address of record; however, the record reflects that the notice was returned to the Office as undeliverable.

The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under the Act and to the Office when it is established that the mailing was in the

[4] 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

[5] 20 C.F.R. § 10.617(b).

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

[7] *Michelle Lagana*, 52 ECAB 187, 189 (2000).

[8] *M.U.*, Docket No. 09-526 (issued September 14, 2009).

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

ordinary course of the sender's business practices.[10] It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. It is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be presumed when there is evidence of nondelivery.[11] The record reflects that the notice of hearing was returned to the Office as undeliverable. Although properly addressed to her address of record, the notice was returned. The returned envelope was received by the Office on January 19, 2010.[12]

The record reflects that she did not receive the notice of hearing, evidenced by the returned envelope. In light of this evidence, which evidences nondelivery, the mailbox presumption does not apply. The Board finds that Office's notice of hearing was insufficient. The Office regulations contemplate that a notice of hearing shall be in writing and that it will be mailed at least 30 days before the scheduled hearing.[13] As noted, the December 24, 2009 notice was not received by appellant.

The verbal notice that was telephonically communicated on January 26, 2010 was not in writing and was made less than 30 days before the scheduled hearing and therefore is insufficient notice. The resending of the written notice on January 26, 2010 is also insufficient because it was mailed less than 30 days before the scheduled January 28, 2010 hearing and admittedly did not reach appellant prior to the scheduled hearing. The Board finds that the Office failed to give appellant proper notice of her hearing under 20 C.F.R. § 10.617(b).

CONCLUSION

As the Office failed to provide proper notification to appellant of the hearing scheduled for January 28, 2010, the case is remanded to the Office for a hearing to be scheduled before an Office hearing representative with proper notice provided to all parties.

[10] *Kenneth Harris*, 54 ECAB 502, 505 (2003).

[11] *Supra* note 8.

[12] On January 26, 2010 the claims examiner verbally informed appellant that she was scheduled for a telephone hearing on January 28, 2010 at 1:00 p.m. and provided a telephone number and a pass code. The record also shows that the Office, on the same date, resent the notice of the scheduled January 28, 2010 hearing to her new address of record.

[13] *See supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2010 is set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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