

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

E.C., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOREST)
SERVICE, WOLF CREEK JOB CORPS)
CENTER, Glide, OR, Employer)**

**Docket No. 11-510
Issued: September 8, 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 December 27, 2010 appellant filed a timely appeal from a December 1, 2010 decision of the Office of Workers' Compensation Programs (OWCP) finding that she abandoned her request for a hearing. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit hearing request issue.

ISSUE

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

On appeal, appellant asserted that she did not receive notice of the scheduled telephonic hearing due to difficulties with the post office box she used as her address of record. She contended that she paid the annual fee for the post office box but was wrongfully denied access and that the post office returned her mail to sender rather than delivering it.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 26, 2010 appellant, then a 68-year-old former contract arts and crafts instructor, filed a traumatic injury claim (Form CA-1) for a right hip fracture sustained on May 6, 2001 when she fell on a cement floor.² She submitted a January 6, 2010 letter from her attorney arguing that she was a federal employee and entitled to FECA benefits. The employing establishment contended in an April 13, 2010 letter and on the reverse of the claim form that appellant was a contract worker and not a federal employee.

In an April 15, 2010 letter, OWCP advised appellant of the evidence needed to establish her claim, including documentation that she was a federal employee at the time of the claimed injury. Appellant was afforded 30 days in which to submit such evidence. In response, she submitted contracts from July 1997 through June 2001 contending that she was hired as a contract arts and crafts instructor and required to supply all materials required for performance of the contract. She was to instruct the students in the manner she chose. The contracts did not incorporate FECA coverage.

By decision dated May 28, 2010, OWCP denied appellant's claim, finding that she was not a federal civil employee and not covered by FECA.

On June 14, 2010 appellant requested an oral hearing. She submitted a June 15, 2010 statement and various medical records.

By notice dated October 4, 2010 and addressed to appellant at her address of record, OWCP advised her that a telephonic hearing would be held in her case on November 3, 2010 at 2:00 p.m., eastern time. It instructed appellant to call the provided toll free number a few minutes before the scheduled hearing time and enter a specified pass code to gain access to the conference call. OWCP also addressed this notice to appellant's attorney. It misspelled the name of the street on which the attorney's office was located.

In an envelope postmarked October 5, 2010 and received by OWCP on October 28, 2010, the notice of oral hearing sent to appellant was returned to OWCP bearing the notation "box closed, unable to forward, return to sender."

By decision dated December 1, 2010, OWCP found that appellant had abandoned her request for a hearing. It acknowledged that the notice addressed to appellant had been returned but found that her attorney was "properly put on notice" yet failed to respond. As neither appellant nor her attorney appeared or explained her absence either before or after the scheduled hearing, OWCP determined that she abandoned her request.

LEGAL PRECEDENT

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified

² Appellant worked under a contract/purchase order from 1997 to 2001. She previously filed an administrative claim under the Federal Tort Claims Act (FTCA) for the same injury. This claim was denied on April 17, 2009.

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, OWCP's 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

OWCP has the burden of proving that it mailed a notice of a scheduled hearing to a claimant.⁵ 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.⁶ However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.⁷ Also, it is axiomatic that the presumption of receipt does not apply where a notice is sent to an incorrect address.⁸

The authority governing the abandonment of hearings rests with OWCP'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 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 appropriate OWCP district office.⁹

ANALYSIS

The Board finds that OWCP improperly determined that appellant abandoned her request for a telephonic hearing. OWCP found that she received adequate notice of the scheduled hearing. The evidence of record establishes that notice of the November 3, 2010 hearing was sent to appellant's address of record. However, the record demonstrates that the notice was returned to OWCP 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 FECA and to OWCP when it is established that the mailing was in the ordinary

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

⁴ 20 C.F.R. § 10.617(b).

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

⁶ *Michelle Lagana*, 52 ECAB 187 (2000).

⁷ *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-526 (issued September 14, 2009).

⁸ *W.A.*, Docket No. 06-1452 (issued November 27, 2006); see also *Clara T. Norga*, 46 ECAB 473 (1995).

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

course of the sender's business practices.¹⁰ However, receipt will not be presumed when there is evidence of nondelivery.¹¹ The record demonstrates that the notice of hearing mailed to appellant was returned to OWCP as undeliverable. Although properly addressed to her address of record, the notice of hearing was returned. OWCP received the returned envelope on October 28, 2010. As the evidence supports nondelivery of the notice of hearing, the mailbox presumption does not apply.

Regarding the copy of the notice of hearing addressed to appellant's attorney, the Board finds that it was misaddressed. OWCP misspelled the street on which the attorney's office was located. As the notice sent to appellant's attorney was not sent to his correct address, the mailbox rule's presumption of receipt does not apply.¹²

Moreover, OWCP's notice of hearing was insufficient. OWCP regulations provide that a written notice of hearing will be mailed to a claimant at least 30 days before a scheduled hearing.¹³ As stated, appellant did not receive the October 4, 2010 notice. The Board finds that OWCP failed to give appellant proper notice of her hearing under 20 C.F.R. § 10.617(b). Therefore, OWCP improperly found that she abandoned her request for hearing.

On appeal, appellant asserts that she did not receive proper notice of hearing due to difficulties with her post office box. As stated, OWCP did not provide her with proper notice of hearing. The case will be remanded to OWCP to schedule a hearing.

CONCLUSION

The Board finds that OWCP failed to provide proper notification to appellant of the hearing scheduled for November 3, 2010.

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

¹¹ *C.O.*, *supra* note 7; *M.U.*, *supra* note 7.

¹² *W.A.*, Docket No. 06-1452 (issued November 27, 2006); *see also Clara T. Norga*, 46 ECAB 473 (1995).

¹³ 20 C.F.R. § 616(a).

ORDER

IT IS HEREBY ORDERED THAT the decision dated December 1, 2010 of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: September 8, 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