

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

S.M., Appellant)
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and)
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DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Los Angeles, CA, Employer)
)

**Docket No. 15-1303
Issued: August 3, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 22, 2015 appellant filed a timely appeal from a March 26, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days had elapsed from the last merit decision of July 11, 2014 to the filing of this appeal, pursuant to

¹ Appellant timely requested an oral argument before the Board. By order dated December 1, 2015 the Board, after exercising its discretion, denied appellant's request for oral argument as it did not have jurisdiction over the merits of the claim and the arguments on appeal could be adequately addressed by a decision based on the case record. *See Order Denying Request for Oral Argument*, Docket No. 15-1303 (issued December 1, 2015).

the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.³

ISSUE

The issue is whether appellant abandoned her request for an oral hearing before the Branch of Hearings and Review.

FACTUAL HISTORY

On May 1, 2014 appellant, then a 31-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that on April 22, 2014 she sustained chest pains, headaches, body aches, abdominal pain, and burning in her eyes as a result of smoke inhalation from an electrical fire. She stopped work.

Appellant was initially treated by Dr. Donna J. Asimont, a Board-certified family practitioner, who noted in an April 24, 2014 report that appellant was exposed to potentially hazardous chemicals. Dr. Asimont related appellant's complaints of injuries to the eyes, chest pain, and headache. She provided examination findings and diagnostic studies. Dr. Asimont opined that her findings were consistent with appellant's account of injuries. She advised appellant to remain off work until April 27, 2014.

In a letter dated May 21, 2014, OWCP advised appellant that the evidence submitted was insufficient to establish her traumatic injury claim. It requested additional evidence to substantiate the factual element of her claim and to demonstrate that she sustained a diagnosed condition causally related to the alleged employment incident.

Appellant was also treated by Dr. Chi K. Cheung, a Board-certified internist. In reports dated May 1 to 15, 2014, Dr. Cheung reviewed appellant's history and described the April 22, 2014 incident. He provided findings on examination and diagnosed exposure to potentially hazardous chemicals. On May 15, 2014 Dr. Cheung authorized appellant to return to full duty.

On May 27, 2014 appellant responded to OWCP's development letter. She explained that on April 22, 2014 she entered her office and immediately smelled an odor. When appellant's coworker opened the door to the group room, a bellow of smoke came out. She went door to door and knocked on doors in the office to make sure that other counselors and clients evacuated the building. Appellant explained that her symptoms included headache, eye irritation, chest pains, body aches, stomach discomfort, excessive fatigue, and migraines.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that on October 26, 2015 a Notice of Returned Mail was received by OWCP. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Rather, OWCP may review this document and determine its relevancy to the claim upon return of the claim file.

In a June 10, 2014 report, Dr. Julie M. Fuller, Board-certified in internal and occupational medicine, related that appellant's burning in the eyes and chest pain had resolved. She authorized appellant to return to full duty.

By decision dated July 11, 2014, OWCP denied appellant's traumatic injury claim based on the lack of sufficient medical evidence. It accepted that the April 22, 2014 incident occurred as alleged, but found that the medical evidence failed to establish that she sustained a diagnosed medical condition causally related to the accepted incident.

Appellant continued to receive medical treatment from Dr. Cheung. In July 22 and August 7, 2014 progress notes, Dr. Cheung provided examination findings and diagnosed adult respiratory distress syndrome. He advised that appellant could return to full duty.

On August 8, 2014 appellant requested a telephonic hearing before a hearing representative of the Branch of Hearings and Review. Her request included her address of record, from her Form CA-1, to which all prior claim documents had been mailed.

By letter dated February 5, 2015, OWCP notified appellant that a hearing date was scheduled for March 12, 2015 at 2:00 p.m. A toll-free telephone number and pass code were provided. Appellant was instructed to call the toll-free number a few minutes before the scheduled time of the hearing and, when prompted, enter the pass code. OWCP mailed this notice to appellant's last known address. Appellant neither called into the hearing at the appointed time, nor contacted OWCP within the requisite 10 days.

By decision dated March 26, 2015, an OWCP hearing representative determined that appellant abandoned her request for an oral hearing. She noted that a telephone hearing was scheduled for March 12, 2015, but she failed to appear and did not request another hearing within 10 days.

LEGAL PRECEDENT

Under FECA and its implementing regulations, 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.⁴ Unless otherwise directed in writing by the claims examiner, 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.⁵ OWCP has the burden of proving that it mailed notice of a scheduled hearing to the claimant and any representative.⁶

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.

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

⁵ 20 C.F.R. § 10.617(b).

⁶ *K.D.*, Docket No. 11-77 (issued August 18, 2011); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.⁷

Where it has been determined that a claimant has abandoned her request for a hearing, OWCP's Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned her request for a hearing.⁸

ANALYSIS

By decision dated July 11, 2014, OWCP denied appellant's traumatic injury claim. Appellant submitted a timely request for a telephone hearing. In a letter dated February 5, 2015, OWCP notified appellant of the time, telephone number, and access code for the March 12, 2015 scheduled hearing. The notice was mailed to her last known address. Appellant did not appear at the appointed time. She did not request a postponement of the hearing nor did she explain her failure to appear at the hearing within 10 days of the scheduled hearing date of March 12, 2015. In the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the mailbox rule.⁹ The record of evidence presently before the Board indicates that the notice of hearing was mailed to appellant's last known address.

As appellant did not telephone for the hearing at the appointed time, did not request a postponement, or explain her failure to appear within 10 days of the scheduled hearing, the Board finds that she abandoned her request for an oral hearing.

On appeal, appellant argues that she missed the oral hearing because she never received notice of the scheduled hearing. However, she failed to provide any evidence to rebut the presumption that she received the letter which OWCP properly mailed to her last known address.

Appellant also argues the merits of her claim. However, as previously noted, the Board lacks jurisdiction to review the merits of her claim.

CONCLUSION

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

⁷ 20 C.F.R. § 10.622(f).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

⁹ See *Larry L. Hill*, 42 ECAB 596, 600 (1991).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board