

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

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| K.F., Appellant |) | |
| |) | |
| and |) | Docket No. 18-0839 |
| |) | Issued: November 19, 2018 |
| DEPARTMENT OF JUSTICE, FEDERAL |) | |
| CORRECTIONAL INSTITUTION, |) | |
| Edgefield, SC, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 13, 2018 appellant filed a timely appeal from a February 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated July 19, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined that appellant had abandoned her request for a telephone hearing before an OWCP hearing representative.

FACTUAL HISTORY

On August 16, 2016 appellant, then a 46-year-old case manager, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2016 she developed lower back pain at work while she attempted to open a file drawer that appeared to be tightly sealed.

OWCP received a letter dated August 17, 2016 from Kelly A. Blount, a physician assistant, an undated medical report and a report dated December 19, 2016 from Dr. Cynthia S. Murray, a Board-certified family practitioner, and reports dated August 16 and 23, 2016 from Dr. Franklin E. Payne, a Board-certified family practitioner, who diagnosed lumbar strain and addressed appellant's work capacity.

OWCP, by development letter dated June 15, 2017, advised appellant that when her claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the merits of the case, payment of a limited amount of medical expenses was administratively approved. It indicated that it had reopened the claim for consideration because her medical bills had exceeded \$1,500.00. OWCP requested additional medical evidence and afforded appellant 30 days to submit such evidence. It also requested that the employing establishment submit treatment notes if she was treated at an employing establishment medical facility. Neither appellant, nor the employing establishment responded in the allotted period.

By decision dated July 19, 2017, OWCP denied appellant's traumatic injury claim as the medical evidence of record did not contain a rationalized medical opinion explaining how her diagnosed lumbar condition was causally related to the accepted August 9, 2016 employment incident.

In an appeal request form dated July 24, 2017 and date stamped as received by OWCP on August 21, 2017, appellant requested a telephone hearing before an OWCP hearing representative. On August 21, 2017 OWCP acknowledged receipt of the hearing request.

OWCP received an August 16, 2016 authorization for examination and/or treatment (Form CA-16). It also received a work capacity evaluation (Form OWCP-5c) dated August 16, 2016, wherein Ms. Blount advised that appellant was able to perform her usual job eight hours a day with restrictions.

In a January 3, 2018 letter, a representative of OWCP's Branch of Hearings and Review advised appellant that a telephone hearing would be held on February 8, 2018 at 1:45 p.m. Eastern

Standard Time (EST).³ The hearing representative instructed her to call the provided toll-free number shortly before the hearing time and enter the passcode to gain access to the conference call. She advised appellant that postponement of the hearing would be permitted only upon receipt showing that her nonelective hospitalization or the death of a spouse, parent, or child prevented her attendance. The hearing representative mailed the hearing notice to her last known address of record.

At the appointed time of the scheduled telephone hearing, appellant neither called, nor contacted OWCP's Branch of Hearings and Review within the requisite 10 days thereafter.

By decision dated February 20, 2018, the same OWCP hearing representative found that appellant had failed to appear at the February 8, 2018 telephone hearing and had abandoned her request. She found that there was no evidence that appellant had contacted OWCP either prior to or subsequent to the scheduled hearing to explain her failure to appear.

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 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, OWCP's hearing representative will mail a notice of the time, place, and method of the oral 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 a claimant.⁶

A hearing before OWCP's Branch of Hearings and Review can be considered abandoned only under very limited circumstances.⁷ With respect to abandonment of hearing requests, Chapter

³ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days determined by postmark or other carrier's date marking and before the claimant has requested reconsideration. 20 C.F.R. § 10.616(a). However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing. 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981). As noted, appellant's July 24, 2017 telephone hearing request was date stamped as having been received by OWCP on August 21, 2017. The imaged copy of the envelope that is in the record before the Board does not have a legible postmark date. Where the postmark is illegible, the hearing request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record, Chapter 2.1601.4a* (October 2011). Although the evidence regarding date of delivery was more than 30 days after OWCP's July 19, 2017 decision, OWCP's hearing representative properly exercised her discretionary authority in granting a hearing.

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

⁵ *Id.* at § 10.617(b).

⁶ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁷ *Claudia J. Whitten*, 52 ECAB 483 (2001).

2.1601(g) of OWCP's procedures⁸ and section 10.622(f) of its regulations⁹ provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a 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.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant had abandoned her request for a telephone hearing before an OWCP hearing representative.

OWCP's Branch of Hearings and Review received appellant's July 24, 2017 request for a telephone hearing which it acknowledged by letter dated August 21, 2017. By letter dated January 3, 2018, the hearing representative with OWCP's Branch of Hearings and Review provided her 30 days written notice of her hearing, which was scheduled for February 8, 2018 at 1:45 p.m. EST.¹¹ OWCP mailed the January 3, 2018 notice of hearing to appellant's last known address of record. On appeal, appellant contends that she did not receive notice of the hearing. However, the record reflects that a copy of the January 3, 2018 hearing notice was mailed to the correct address of record and was not returned as undeliverable.¹² The Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹³ As the record reflects that OWCP properly mailed a hearing notice to appellant's address of record, it is presumed that it arrived at her mailing address.

Further, appellant did not call-in as instructed for the February 8, 2018 scheduled telephone hearing and there is no indication that she requested postponement of the hearing.¹⁴ Moreover, she did not submit a written request within the 10-day period following the scheduled hearing explaining her absence and requesting that another hearing be scheduled.¹⁵ The regulations provide that, where good cause for failure to appear is shown, another hearing will be scheduled

⁸ *Supra* note 4 at Chapter 2.1601.6(g) (October 2011).

⁹ 20 C.F.R. § 10.622(f).

¹⁰ *See supra* note 8.

¹¹ *See supra* note 5.

¹² *See K.F.*, Docket No. 17-1035 (issued August 24, 2017).

¹³ *See R.M.*, Docket No. 14-1512 (issued October 15, 2014).

¹⁴ *See* 20 C.F.R. § 10.622(c).

¹⁵ *Id.* at § 10.622(f).

and conducted by teleconference.¹⁶ Under the circumstances, OWCP's hearing representative properly found that appellant abandoned her hearing request.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant had abandoned her request for a telephone hearing before an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2018
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁶ *Id.*

¹⁷ The case record includes an August 16, 2016 authorization for examination and/or treatment (Form CA-16). When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003).