

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

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**L.S., Appellant**

**and**

**DEPARTMENT OF LABOR, MINE SAFETY &  
HEALTH ADMINISTRATION, Norton, VA,  
Employer**

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**Docket No. 11-1628  
Issued: December 22, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 1, 2011 appellant filed a timely appeal from a February 24, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) finding that he abandoned his hearing request. Because more than 180 days elapsed between the last merit decision dated November 15, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case<sup>1</sup> pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>3</sup>

**ISSUE**

The issue is whether OWCP properly found that appellant abandoned his request for a hearing.

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<sup>1</sup> An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> On September 27, 2011 the Board denied appellant's request for an oral hearing.

## **FACTUAL HISTORY**

On October 13, 2009 appellant, then a 62-year-old coal mine safety and health inspector, filed a traumatic injury claim alleging that on October 2, 2009 he sustained a left knee injury when he twisted it while ascending a stairway. He submitted an October 9, 2009 left knee x-ray; an October 15, 2009 magnetic resonance imaging (MRI) scan of the left knee and October 22, 2009 work restrictions from Dr. Souhail Shamiyeh, a Board-certified internist.

In an October 14, 2010 letter, OWCP advised appellant of the deficiencies in his claim and requested additional evidence, including a medical report in which his physician provided a rationalized medical opinion as to how the work incident caused or aggravated the claimed injury. Appellant was accorded 30 days in which to provide the requested information. No additional evidence was submitted.

By decision dated November 15, 2010, OWCP denied appellant's claim on the basis that he did not submit medical evidence which diagnosed a medical condition in connection with the claimed event.

On November 22, 2010 appellant requested an oral hearing.

By letter dated January 12, 2011, OWCP's Branch of Hearings and Review notified appellant that a telephone hearing was scheduled for February 16, 2011 at 8:00 a.m. eastern time. It instructed him to call the provided toll-free number a few minutes before the hearing time and enter in the pass code when prompted.

On February 14, 2011 OWCP received a letter from appellant indicating that the hearing scheduled for February 16, 2011 was no longer necessary. Appellant stated that his insurance, BlueCross BlueShield, had accepted that his knee condition was not work related and had paid bills from Vanderbilt Hospital.

By decision dated February 24, 2011, OWCP's Branch of Hearings and Review found that appellant abandoned his requested hearing. It found that he received written notification of the hearing 30 days in advance, but failed to appear. The Branch of Hearings and Review further determined that nothing in the record established that appellant contacted or attempted to contact OWCP either prior to or subsequent to the scheduled hearing to explain his failure to participate. OWCP concluded that he abandoned his hearing 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 in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>4</sup> 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

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

before the scheduled date.<sup>5</sup> OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.<sup>6</sup>

OWCP's procedure manual provides that a hearing can be considered abandoned only under very limited circumstances.<sup>7</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, OWCP's hearing representative will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.<sup>8</sup>

Under 20 C.F.R. § 10.622 (a) a claimant and/or representative may withdraw the hearing request at any time up to and including the day the hearing is held or the decision issued. Withdrawing the hearing request means the record is returned to the jurisdiction of the district OWCP and no further requests for a hearing on the underlying decision will be considered.<sup>9</sup>

### ANALYSIS

The Board finds that appellant withdrew his request for a hearing; therefore, OWCP improperly determined that he abandoned his request for a hearing. OWCP scheduled a telephonic hearing before an OWCP hearing representative at 8:00 a.m. on February 16, 2011. The record shows that OWCP mailed appropriate notice to the claimant at his last known address. In a letter received by OWCP February 14, 2011, appellant requested that the February 16, 2011 hearing be cancelled as his private insurance accepted the claim and paid his medical bills. OWCP therefore improperly found that he abandoned his request for a hearing, as OWCP procedures provide that a finding of abandonment requires that three conditions be met: the claimant did not request a postponement; the claimant 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.<sup>10</sup> As appellant requested that the hearing be cancelled prior to the scheduled date of the hearing, the three conditions for abandonment have not been met.

Appellant requested that the February 16, 2011 hearing be cancelled in a letter which was received by OWCP on February 14, 2011. As noted, under OWCP's regulations at section 10.622, appellant may withdraw the hearing request at any time up to and including the day the hearing is held. Appellant timely withdrew the hearing scheduled for February 16, 2011. For this reason, no further requests for a hearing on the underlying decision will be considered.

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<sup>5</sup> 20 C.F.R. § 10.617(b).

<sup>6</sup> See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>7</sup> *Claudia J. Whitten*, 52 ECAB 483 (2001).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

<sup>9</sup> 20 C.F.R. § 10.622(a).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

On appeal, appellant references billing issues between BlueCross BlueShield and Vanderbilt Hospital with regard to his nonwork-related knee operation. The Board has no jurisdiction over this matter as it does not involve a determination with respect to claims of federal employees under FECA.<sup>11</sup> Furthermore, there are no provisions in FECA or the regulations for payment to an injured employee of medical and other expenses incurred but not actually paid by the employee.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant withdrew his request for a hearing and is therefore not entitled to a hearing before OWCP regarding the same issue. However, OWCP improperly determined that appellant abandoned his request for a hearing.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 24, 2011 is affirmed as modified.

Issued: December 22, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>11</sup> 5 U.S.C. § 8149; *Glenn E. Erickson*, 25 ECAB 9, 16 (1973).

<sup>12</sup> *See generally P.C.*, 59 ECAB 587 (2008).