

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

H.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Ann Arbor, MI, Employer**

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**Docket No. 11-1938
Issued: April 2, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 25, 2011 appellant filed a timely appeal from an August 1, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) finding that he abandoned his hearing request. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. As more than 180 days has elapsed between the last merit decision dated February 18, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² An appeal of adverse 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.

FACTUAL HISTORY

On April 1, 2010 appellant, then a 39-year-old housekeeping aid, filed a traumatic injury claim alleging that he sustained an injury on March 15, 2010 in the performance of duty. OWCP accepted the claim for lumbar and thoracic sprain. Appellant stopped work on March 15, 2010 and received compensation for total disability.

By decision dated February 18, 2011, OWCP terminated appellant's compensation and authorization for medical treatment effective that date. It determined that the weight of the medical evidence established that he had no further disability or condition requiring treatment as a result of his March 15, 2010 work injury.

On March 15, 2011 appellant timely requested a telephone hearing. By letter dated June 6, 2011, OWCP notified him that it had scheduled a telephone hearing for July 12, 2011 at 12:15 p.m. eastern time. It instructed appellant to call the provided toll-free number a few minutes before the hearing time and enter in the pass code when prompted. OWCP mailed the notice to his address of record.

By decision dated August 1, 2011, OWCP determined that appellant had abandoned his requested hearing. It found that he received written notification of the hearing 30 days in advance but failed to appear. OWCP further indicated that there was no evidence that appellant contacted OWCP either prior to or after the scheduled hearing to explain his failure to participate. Consequently, it concluded that he abandoned his telephone hearing request.

On appeal appellant related that he fell asleep the day of his scheduled hearing due to his sleep disorder. When he awoke he telephoned OWCP. The receptionist instructed appellant to telephone the hearing representative but he was unsuccessful.

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.³ 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.⁴ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.⁵

OWCP's procedure manual provides that a hearing can be considered 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

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

⁴ 20 C.F.R. § 10.617(b).

⁵ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991). It is presumed in absence of evidence to the contrary that a notice mailed to an individual in the ordinary course of business was received.

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 his or her request for a hearing.⁶

ANALYSIS

By decision dated February 18, 2011, OWCP terminated appellant's compensation and medical benefits. Appellant timely requested a telephone hearing. By letter dated June 6, 2011, OWCP notified appellant that it had scheduled a telephone hearing on July 12, 2011 at 12:15 p.m. eastern time. It instructed him to telephone a toll-free number and enter a pass code to connect with the hearing representative. Appellant did not telephone at the appointed time. He did not request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing date of July 12, 2011.⁷ The Board therefore finds that he abandoned his request for a hearing.⁸

On appeal, appellant submitted an undated letter explaining that he fell asleep the date of the hearing as a result of his sleep disorder. He telephoned OWCP and the hearing representative when he awoke but could not get through to the hearing representative. Appellant submitted evidence in support of his contention. The Board, however, lacks jurisdiction to consider this evidence as it was not before OWCP at the time of its decision.⁹ Appellant may submit this evidence to OWCP with a request for reconsideration pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant abandoned his request for a telephone hearing.

⁶ 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).

⁷ *Id.*

⁸ *See G.J.*, *supra* note 6.

⁹ *See* 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board