

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

L.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Huntington Station, NY, Employer**

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**Docket No. 12-45
Issued: May 8, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated August 17, 2011 finding that he abandoned his request for a hearing. Because more than 180 days has elapsed between the last merit decision by OWCP dated March 30, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue of the case.

¹ An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e). The Board notes that appellant had until September 27, 2011 to timely file an appeal from the March 30, 2011 decision. Appellant's appeal filed October 11, 2011 and postmarked October 3, 2011 is after September 27, 2011 and, thus, is not timely for that decision.

² 5 U.S.C. §§ 8101-8193.

ISSUE

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

FACTUAL HISTORY

On January 12, 2011 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim alleging that on that day he missed a curb due to deep snow while delivering mail and this caused pain in the lower right side of his back and side of his chest. He had returned to work on January 3, 2011 from a nonwork-related back injury.

Evidence received with the claim included a January 12, 2011 supervisor's statement, a December 29, 2010 report from Dr. Gino A. Consigliere, a Board-certified family practitioner, containing diagnoses of herniated disc and indicating that appellant could return to full duty on January 3, 2011 and progress reports dated December 29, 2010, January 14 and 28, 2011; a January 17, 2011 physical therapist evaluation; duty status reports of January 14 and 29, 2011; and January 25, 2011 nurse's report.

In a January 31, 2011 letter, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim. Appellant submitted additional evidence.

In a March 30, 2011 decision, OWCP denied appellant's claim on the grounds that the evidence submitted did not establish that the event occurred as described and the medical evidence was insufficient to establish that a diagnosed medical condition was causally related to the claimed injury and/or event. It advised that medical treatment was not authorized and that any prior authorization was terminated.

On April 19, 2011 appellant requested an oral hearing before an OWCP hearing representative.

On June 15, 2011 OWCP advised appellant that an informal hearing would be held August 2, 2011 at 11:00 a.m. at a specified location. This notice was sent to appellant's address of record. It instructed that appellant or his representative be present and also informed him of the conditions under which a scheduled hearing could be postponed.

By decision dated August 17, 2011, OWCP found that appellant abandoned his request for a hearing. It found that he received a written notice of the hearing 30 days before the scheduled hearing but did not appear or explain his absence either before or after the scheduled hearing. The decision was sent to appellant's address of record.

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

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

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

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 the hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his request for a hearing and return the case to the district OWCP.⁵

ANALYSIS

By decision dated March 30, 2011, OWCP denied appellant's claim for a traumatic injury. Appellant timely requested an oral hearing. In a June 15, 2011 letter, it notified him of the time and place for his August 2, 2011 scheduled hearing. OWCP instructed appellant of the ways a postponement could be granted if he could not appear at the stated time and date. The letter was sent to appellant's address of record. Appellant did not appear at the hearing. 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 August 2, 2011. The Board therefore finds that appellant abandoned his request for a hearing.

On appeal appellant asserted that he had moved and his mail was being forward to an incorrect address. He indicated that he moved to Corie Court, but his mail was forwarded to a different number on Corie Court. As explained, appellant failed to request a postponement; failed to appear at a scheduled hearing; and failed to provide any notification for such failure within 10 days of the scheduled date and therefore abandoned his request for an oral hearing.⁶ There is no evidence of record prior to OWCP's August 17, 2011 decision that appellant had moved or that his mail was forwarded to an incorrect address.⁷ Appellant also asserted that he pulled muscles in his back and neck when he stepped off the curb due to 16 inches of snow. The Board notes, however, that it only has jurisdiction over whether OWCP properly determined that appellant abandoned his request for a hearing.

⁴ 20 C.F.R. § 10.617(b).

⁵ 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).

⁶ *Id.*

⁷ The June 15, 2011 notice of hearing was not returned to OWCP as undeliverable. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt. *Joseph R. Giallanza*, 55 ECAB 186 (2003).

CONCLUSION

The Board finds that appellant abandoned his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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