

ISSUE

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

FACTUAL HISTORY

On July 18, 2011 appellant, then a 44-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained stress and mental trauma, that same day, due to loss of separation between aircraft under his control, which nearly resulted in a mid-air collision.

By decision dated August 30, 2011, OWCP denied the claim on the basis that appellant failed to establish fact of injury.

On September 9, 2011 appellant, through his representative, requested an oral hearing before an OWCP hearing representative arguing that the incident occurred as alleged.

In a December 16, 2011 notice, OWCP's Branch of Hearings and Review scheduled an oral hearing for 4:00 p.m. on February 13, 2012. It provided appellant with an address in New York, New York for the hearing. OWCP advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing his nonelective hospitalization or that the death of a spouse, parent or child prevented his attendance. The notice was mailed to appellant's address of record.

On February 13, 2012 appellant failed to appear at and participate in the hearing.

By decision dated February 27, 2012, an OWCP hearing representative found that appellant failed to appear at the hearing and had abandoned his request.

On appeal, appellant's representative indicated that appellant failed to appear for the scheduled hearing because he was not aware of the notice of hearing due to a communication issue at his home.

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 claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30

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

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

Section 10.622(f) of OWCP regulations provide that 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.⁷ Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. 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.⁸ Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned his request for a hearing.

The record establishes that, on December 16, 2011, in response to appellant's timely request for an oral hearing, the Branch of Hearings and Review mailed an appropriate notice of the scheduled hearing to be held on February 13, 2012 at 4:00 p.m. in New York, New York. The hearing notice was properly mailed to appellant's last known address of record. As 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.¹⁰ The Board finds that the notice was sent more than 30 days prior to the scheduled hearing date of February 13, 2012. The record establishes that appellant did not appear at the appointed time. Further, he did not request a postponement of the hearing prior to February 13, 2012 or explain his failure to appear at the hearing within 10 days of the scheduled hearing.

Based on the evidence of the record, appellant did not request postponement of the hearing date, failed to appear at the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Thus, the Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

⁵ 20 C.F.R. § 10.617(b).

⁶ See *M.B.*, Docket No. 10-1077 (issued March 17, 2011).

⁷ 20 C.F.R. § 10.622(f).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

¹⁰ See e.g., *Kenneth E. Harris*, 54 ECAB 502 (2003).

Appellant further argues the merits of his claim on appeal. As noted above, since more than 180 days have lapsed from the issuance of OWCP's last merit decision dated August 30, 2011 to the filing of the current appeal, on March 19, 2012, the Board has no jurisdiction over the merits of the case.¹¹

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ See *supra* note 2.