

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

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C.D., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**TRANSPORTATION SECURITY** )  
**ADMINISTRATION, Atlanta, GA, Employer** )

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**Docket No. 13-377**  
**Issued: May 1, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On December 6, 2012 appellant timely appealed the June 11, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As the last merit decision, dated January 4, 2012, was issued more than 180 days prior to the filing of this appeal pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant abandoned his hearing request.

**FACTUAL HISTORY**

Appellant, a 56-year-old transportation security screener, sustained an employment-related back injury on February 13, 2003. OWCP accepted his claim for lumbar annular tear,

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

sciatica and aggravation of lumbar spinal stenosis. Appellant received wage-loss compensation beginning April 20, 2003, and has been on the periodic compensation rolls since July 13, 2003.

By decision dated January 4, 2012, OWCP reduced appellant's wage-loss compensation based on his ability to earn wages in the constructed position of cashier 2.<sup>2</sup> It found that the selected position was both medically and vocationally suitable. Accordingly, OWCP adjusted appellant's wage-loss compensation effective January 15, 2012 based on his ability to earn weekly wages of \$322.00 as a cashier 2.

On January 26, 2012 appellant requested an oral hearing. He also indicated his preference for a telephone hearing.

Appellant retained counsel on January 31, 2012 and advised OWCP accordingly. OWCP acknowledged counsel's appointment by correspondence dated February 7, 2012. On March 7, 2012 it provided him with a complete copy of the case record.

On April 4, 2012 OWCP provided both appellant and his counsel 30 days' advance notice of the hearing which was scheduled for May 8, 2012.<sup>3</sup> The hearing notice further advised that he and/or his representative should be present and ready to proceed at the designated time and date. OWCP also explained the circumstances under which a scheduled hearing could be postponed and rescheduled pursuant to 20 C.F.R. § 10.622.

By letter dated April 25, 2012, counsel advised OWCP that he no longer represented appellant.

On April 26, 2012 appellant telephoned OWCP inquiring about his case status and the upcoming hearing. OWCP returned his call on April 27, 2012. The Form CA-110 notes indicated that appellant had called about his attorney and there was a discussion about a pending fee request submitted by counsel. There was no further mention of the upcoming hearing.

A May 8, 2012 memorandum to the file indicated that OWCP's hearing representative and the court reporter waited on the line until 1:12 p.m. eastern time, but appellant did not call.

Appellant contacted OWCP on May 10 and 11, 2012 regarding issues with pain medication. He also requested a change in medical providers. The Form CA-110 notes make no mention of the May 8, 2012 hearing.

On May 14, 2012 OWCP received medical treatment notes dated May 8, 2012 from Dr. Carissa H. Stone, a pain management specialist. Appellant had a 1:15 p.m. appointment with Dr. Stone, who complained of severe, throbbing back pain which he rated as 9 on a scale of 1 to 10. The treatment notes also indicated that he exhibited inconsistent behavior for over four hours. Appellant was noted to be confused, agitated and disoriented. He also exhibited signs of

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<sup>2</sup> *Dictionary of Occupational Titles* (DOT), No. 211.462-010 (4<sup>th</sup> ed., Rev. 1991).

<sup>3</sup> OWCP scheduled a telephone hearing as requested and advised appellant of the time (1:00 p.m., eastern time), the toll-free number and the pass code necessary to access the telephone hearing.

intoxication, withdrawal and possible hallucinations, which were either drug induced or psychiatric.

On May 10, 2012 Dr. Stone advised both OWCP and appellant that she was no longer willing to serve as his pain management physician.

During the subsequent two-week period, appellant contacted OWCP on numerous occasions regarding authorization for pain medication and a change of physicians. There were no specific conversations or correspondence regarding the May 8, 2012 hearing.

In a June 11, 2012 decision, OWCP's hearing representative found that appellant abandoned his hearing request which had been scheduled for May 8, 2012. Appellant failed to appear at the designated time, and according to the hearing representative, there was no indication in the file that appellant contacted OWCP either before or after the scheduled hearing explaining his failure to appear.

Appellant currently seeks review of OWCP's January 4, 2012 loss of wage-earning capacity (LWEC) determination. He also challenged OWCP's June 11, 2012 finding that he abandoned his request for a hearing.

### **LEGAL PRECEDENT**

A claimant dissatisfied with a decision on his claim is entitled, upon timely request, to a hearing before an OWCP representative.<sup>4</sup> Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.<sup>5</sup> A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date of the hearing that another hearing be scheduled.<sup>6</sup> Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.<sup>7</sup> The claimant's failure to request another hearing within 10 days shall constitute abandonment of the hearing request.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 8124(b); 20 C.F.R. § 10.616(a) (2012).

<sup>5</sup> *Id.* at § 10.617(b).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (October 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

### ANALYSIS

OWCP's January 4, 2012 LWEC determination is not currently before the Board. Appellant filed the instant appeal more than 180 days after OWCP issued its January 4, 2012 decision. Accordingly, the Board does not have jurisdiction over that particular decision.<sup>9</sup>

With respect to OWCP's hearing representative's June 11, 2012 finding of abandonment, appellant currently argues that he was unable to represent himself at the May 8, 2012 hearing because at the time he suffered from severe paranoia, anxiety and withdrawal symptoms from prescribed narcotic pain medication. His previous counsel withdrew his representation less than two weeks prior to the scheduled hearing.

Appellant does not dispute having received 30 days' advance written notice of the May 8, 2012 scheduled hearing. There is no indication in the record that he requested postponement of the hearing in accordance with 20 C.F.R. § 10.622. OWCP's hearing representative's May 8, 2012 memorandum indicated that he and the court reporter waited on the telephone line until 1:12 p.m., but appellant failed to call. Appellant attended a medical appointment at the time of the scheduled hearing. Dr. Stone's May 8, 2012 treatment notes lend support to appellant's above-noted description of his condition at the time.

On appeal, in the first instance where appellant advanced this, or any other argument, as justification for his absence. He contacted OWCP on several occasions in May 2012, however, he did not address his failure to appear at the hearing. Appellant also did not submit a written request within the 10-day period following the scheduled hearing explaining his absence and/or requesting that the hearing be rescheduled. The Board is precluded from reviewing evidence which was not in the record before OWCP issued its decision.<sup>10</sup> Under the current circumstances, OWCP's hearing representative properly found that appellant abandoned his hearing request.

### CONCLUSION

The Board finds that appellant abandoned his hearing request.

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<sup>9</sup> Appellant may request modification of a wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

<sup>10</sup> 20 C.F.R. § 501(c)(1).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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