



## ISSUE

The issue is whether the employee abandoned his request for an oral hearing before an OWCP hearing representative.

## FACTUAL HISTORY

On May 31, 2013 the employee, then a 47-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that on May 30, 2013 he sustained a head and back injury when he passed out and fell on the floor. He notified his supervisor and first sought medical treatment on May 31, 2013. The employing establishment controverted the claim and noted that the employee had a history of fainting spells and seizures at work.

On May 31, 2013 the employing establishment issued appellant a properly completed Form CA-16, authorization for examination, which authorized the employee to visit Sacred Heart Hospital. A May 31, 2013 emergency room (ER) report was submitted documenting treatment for the employee's injury.

By letter dated June 6, 2013, OWCP informed the employee that the evidence of record was insufficient to support his claim. The employee was advised of the medical and factual evidence needed and asked that he respond to the provided questions within 30 days.

In support of his claim, the employee submitted a June 13, 2013 note from Dr. Billy C. Weistein, a Board-certified neurologist, who released him back to work with restrictions.

By decision dated July 8, 2013, OWCP denied the employee's claim finding that the evidence did not establish that the May 31, 2013 incident occurred as alleged. It also found that the employee failed to establish a diagnosed medical condition causally related to the alleged employment incident.

On July 8, 2013 the employee requested an oral hearing before an OWCP hearing representative.<sup>4</sup>

By letter dated December 4, 2013, OWCP notified the employee that his hearing would be held on January 14, 2014 at 3:15 p.m. Eastern time. It provided him with a toll-free number to call at that time to be connected to the hearing representative and court reporter.

By decision dated February 3, 2014, OWCP's hearing representative found that the employee abandoned his request for an oral hearing. He noted that the employee received written notice 30 days in advance of the hearing but failed to participate. The hearing

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<sup>4</sup> See *supra* note 1.

representative also found no evidence of record that the employee contacted OWCP either prior or subsequent to the scheduled hearing to explain his failure to appear.<sup>5</sup>

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA provides the right to a hearing before an OWCP hearing representative, stating:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>6</sup>

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>7</sup> Unless 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.<sup>8</sup> OWCP has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.<sup>9</sup>

Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>10</sup> However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.<sup>11</sup> The presumption of receipt does not apply where a notice is sent to an incorrect address.<sup>12</sup>

The authority governing abandonment of hearings rests with OWCP’s regulations, which provide in pertinent part as follows: A claimant who fails to appear at a scheduled hearing may

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<sup>5</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its February 3, 2014 decision. The Board’s jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> 5 U.S.C. § 8124(b)(1).

<sup>7</sup> 20 C.F.R. § 10.616(a).

<sup>8</sup> *Id.* at 10.617(b).

<sup>9</sup> See *Michelle R. Littlejohn*, 42 ECAB 463 (1991); see also *K.D.*, Docket No. 11-77 (issued August 18, 2011).

<sup>10</sup> See *Michelle Lagana*, 52 ECAB 187 (2000).

<sup>11</sup> See *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-526 (issued September 14, 2009).

<sup>12</sup> See *Clara T. Norga*, 46 ECAB 473 (1995); *W.A.*, Docket No. 06-1452 (issued November 27, 2006).

request in writing within 10 days after the date set for the hearing that another hearing be scheduled. 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.<sup>13</sup>

### ANALYSIS

Following OWCP's July 8, 2013 decision denying his traumatic injury claim, the employee requested an oral hearing before an OWCP hearing representative. On December 4, 2013 OWCP notified the employee that his telephone hearing was scheduled for January 14, 2014 at 3:15 p.m. Eastern time. It provided him with a toll-free number and pass code to call in at the time of the hearing. The employee did not request a postponement, failed to call in for the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As all three conditions for abandonment are met, the Board finds that the employee abandoned his request for an oral hearing. The Board will therefore affirm the hearing representative's February 3, 2014 decision.

On appeal, the representative argues that OWCP should have accepted the employee's traumatic injury claim as work related. As noted, the Board does not have jurisdiction to review the July 8, 2013 merit decision denying the employee's traumatic injury claim.<sup>14</sup>

### CONCLUSION

The Board finds that the employee abandoned his request for an oral hearing before an OWCP hearing representative on January 14, 2014.

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<sup>13</sup> 20 C.F.R. § 10.622(f); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011). *See also* *M.F.*, Docket No. 14-128 (issued March 18, 2014).

<sup>14</sup> *Supra* note 2.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 3, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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