

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

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<b>A.F., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 14-1078</b>
	)	<b>Issued: August 19, 2014</b>
<b>DEPARTMENT OF LABOR, MINE SAFETY &amp; HEALTH ADMINISTRATION, Warrendale, PA,</b>	)	
<b>Employer</b>	)	
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*Appearances:* *Case Submitted on the Record*  
*Sigmund Kozierachi*, for the appellant  
*Office of Solicitor*, for the Director

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 9, 2014 appellant, through his representative, filed a timely appeal of a March 20, 2014 nonmerit decision of an Office of Workers' Compensation Programs (OWCP) and its hearing representative who found that he abandoned his hearing request.<sup>1</sup> As more than 180 days elapsed from the date of OWCP's last merit decision on August 15, 2013, to the filing of this appeal on April 9, 2014, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction over the nonmerit decision.

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<sup>1</sup> On appeal, appellant and his representative contend that appellant did not attend the hearing because he did not receive notice of a scheduled oral hearing. As the explanation was not before OWCP at the time it issued its March 20, 2014 decision, the Board is precluded from reviewing it for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

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

## **FACTUAL HISTORY**

Appellant, then a 59-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained an emotional condition due to factors of his federal employment.

By decision dated August 15, 2013, OWCP denied appellant's claim finding that the evidence did not establish an emotional condition arising from a compensable factor of employment.

On August 27, 2013 appellant requested an oral hearing before an OWCP hearing representative.<sup>3</sup>

In a January 17, 2014 notice, OWCP's Branch of Hearings and Review scheduled an oral hearing for 9:00 a.m. Eastern time on March 3, 2014. It provided appellant with a toll-free number and passcode for the telephone hearing. OWCP advised him 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 his address of record.

On March 3, 2014 appellant failed to participate in the telephone hearing.

By decision dated March 20, 2014, an OWCP hearing representative found that appellant failed to appear at the hearing and had abandoned his request. OWCP found that there was no evidence that he contacted OWCP prior to or subsequent to the scheduled hearing.

## **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.<sup>4</sup> 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 days before the scheduled date.<sup>5</sup> OWCP has the burden of proving that it mailed notice of a

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<sup>3</sup> The record contains an August 28, 2013 e-mail from appellant to OWCP confirming his request for an oral hearing. The e-mail was copied to Sigmund Kozierachi, appellant's representative, but the record does not document that he was authorized to represent appellant before OWCP at that time.

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

<sup>5</sup> 20 C.F.R. § 10.617(b).

scheduled hearing to a claimant.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### ANALYSIS

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

The record establishes that, on January 17, 2014, in response to appellant's timely request for an oral hearing, the Branch of Hearings and Review mailed an appropriate notice to him of the scheduled hearing to be held on March 3, 2014 at 9:00 a.m. Eastern time by telephone. The hearing notice was properly mailed to his 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.<sup>10</sup> The Board finds that the notice was sent more than 30 days prior to the scheduled hearing date of March 3, 2014. The record establishes that appellant did not appear at the appointed time. Further, appellant did not request a postponement of the hearing prior to March 3, 2014 or explain his failure to appear at the hearing within 10 days of the scheduled hearing. Thus, the Board finds that he abandoned his request for a hearing.

### CONCLUSION

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

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

<sup>7</sup> 20 C.F.R. § 10.622(f).

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

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

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2014  
Washington, DC

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

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

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