



OWCP accepted the claim for sprain of left shoulder and upper arm, rotator cuff left; sacroiliitis; localized primary osteoarthritis, shoulder region left; spinal stenosis lumbar region; and lumbosacral radiculitis. Appellant underwent authorized arthroscopic left shoulder surgery on September 21, 2011 and an L3-L4 laminectomy on April 9, 2012.<sup>2</sup> He received compensation benefits.

By decision dated May 16, 2014, OWCP terminated appellant's wage-loss compensation effective that date because it found that he had no residual disability related to his work injury.

On May 22, 2014 appellant timely requested a hearing.

In an August 27, 2014 letter, OWCP notified him that a hearing was scheduled for October 22, 2014 at 2:30 p.m. local time. The record reflects that the notice was mailed to his address of record. However, the record reflects that later the notice was returned on September 15, 2014 for postage. There is no indication that the notification was resent.

Appellant did not appear at the appointed time for the scheduled hearing.

By decision dated December 15, 2014, OWCP found that appellant abandoned his requested hearing. The decision noted that the hearing was scheduled for October 22, 2014, but appellant failed to appear as instructed. The decision also found that there was no indication that appellant contacted OWCP either prior or subsequent to the scheduled hearing to explain his failure to participate.

### **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>3</sup> Unless otherwise directed in writing by the claimant, the 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>4</sup>

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. 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

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<sup>2</sup> Appellant had a separate Claim No. xxxxxx671 and he underwent a right rotator cuff repair in February 2004.

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

<sup>4</sup> *Id.* at § 10.617(b).

record.<sup>5</sup> Where it has been determined that a claimant has abandoned his or her request for a hearing, OWCP's Branch of Hearings and Review will issue a formal decision.<sup>6</sup>

OWCP has the burden of proving that it mailed a notice of a scheduled hearing to a claimant.<sup>7</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>8</sup> However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.<sup>9</sup>

### ANALYSIS

By decision dated May 16, 2014, OWCP terminated appellant's wage-loss compensation effective that date. On May 22, 2014 appellant timely requested a hearing.

In an August 27, 2014 letter, OWCP notified him that a hearing was scheduled for October 22, 2014 at 2:30 p.m. local time. It mailed the notice to appellant's address of record. However, on September 15, 2014, the notice was returned to OWCP by the postal service and there is no indication that the notification was resent to appellant. The record demonstrates that he did not receive the notice of hearing because the notice was returned to OWCP. Obviously the mailbox presumption does not apply. OWCP regulations contemplate that a notice of hearing shall be in writing and that it will be mailed at least 30 days before the scheduled hearing.<sup>10</sup> Therefore, appellant's failure to appear for the scheduled hearing did not constitute abandonment of his hearing request as he did not receive notification of the hearing.

On appeal, appellant contends that he did not receive notice of the scheduled hearing. As explained, the Board finds that OWCP did not properly find that appellant abandoned his request for a hearing. Appellant also argued the merits of his claim; however, the only issue before the Board is the issue regarding the hearing request and whether OWCP properly found that appellant abandoned his request for a hearing.

### CONCLUSION

The Board finds that OWCP did not provide proper notice to appellant of the hearing scheduled for October 22, 2014. The Board finds that OWCP improperly found that he

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<sup>5</sup> *Id.* at § 10.622(f).

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

<sup>7</sup> See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>8</sup> *Michelle Lagana*, 52 ECAB 187 (2000).

<sup>9</sup> *E.C.*, Docket No. 11-510 (issued September 8, 2011); *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-526 (issued September 14, 2009).

<sup>10</sup> See *supra* note 4; *C.O.*, *id.*

abandoned his request for a hearing. The case must be remanded to OWCP for a hearing to be scheduled before an OWCP hearing representative with proper notice provided to all parties.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 15, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision.

Issued: August 3, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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