

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

J.G., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
AMERICAN LAKE VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Tacoma, WA, Employer)

Docket No. 15-1448
Issued: October 2, 2015

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2015 appellant filed a timely appeal from a June 3, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from September 3, 2014, the most recent OWCP merit decision, to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether appellant abandoned his request for a hearing.

On appeal appellant asserts that he misread the date of the scheduled telephone hearing and, when he called the assigned number, he was told he needed an access/pin code number. He

¹ 5 U.S.C. §§ 8101-8193.

maintained that he had notified OWCP of his change of address in December 2014 yet it continued to send his mail to his former address.²

FACTUAL HISTORY

On August 28, 2007 appellant, then a 53-year-old engineering equipment operator, filed an occupational disease claim alleging that he injured his right great toe which became infected and required amputation. OWCP accepted an employment-related aggravation of right great toe osteomyelitis. Appellant underwent partial right great toe amputation on September 14, 2007, returned to modified duty in October 2007, and returned to full duty several weeks later.

In July 2010 appellant informed OWCP that his right toe condition had worsened and he was being treated by the Department of Veterans Affairs. Appellant's supervisor stated that from November 2007 appellant performed his duties with increasing discomfort. He stated that, since February 2010, appellant had experienced highly elevated levels of radiating pain of his right foot, ankle, knee, and hip.

In August 2010 OWCP referred appellant to Dr. David S. Whitney, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 2, 2010 report, Dr. Whitney noted appellant's medical and employment history and identified his complaints of stabbing pain mainly around the area of the amputation. He also reported that appellant suffered right ankle pain with weight bearing, and right hip pain. He described physical examination findings and explained that appellant probably dislocated the dorsal metatarsophalangeal joint of the right great toe in April 2006. This uncorrected deformity caused an infection at the base of the right great toe and this led to the amputation. Dr. Whitney opined that appellant's right hip strain was secondary to abnormal gait from the work injury, and that appellant's ongoing nerve pain and weight-bearing pain were also secondary to the work injury. He indicated that appellant might require surgery to straighten the second and third toes of the right foot. Appellant needed protective footwear on the right, but could work full-time modified duty with no prolonged walking or repetitive climbing. In an attached work capacity evaluation, Dr. Whitney provided physical limitations.

On October 1, 2010 OWCP accepted right great toe osteomyelitis, right hip sprain, and a closed dislocation of the metatarsophalangeal joint right great toe.

Appellant filed a schedule award claim on February 14, 2011. He retired on disability effective April 8, 2011.

By letter dated September 26, 2011, OWCP informed appellant that, based on Dr. Whitney's evaluation, maximum medical improvement had not been reached because additional medical treatment was recommended. Appellant was advised that, if his physician

² The instant claim was adjudicated by OWCP under file number xxxxxx947. OWCP also accepted that on August 17, 2000 appellant sustained a right medial meniscus tear, adjudicated under file number xxxxxx057, and on August 12, 2002 a left ankle strain, adjudicated under file number xxxxxx965. Appellant has a second appeal before the Board regarding file number xxxxxx947, which will be adjudicated separately under Docket No. 15-1784.

thought he was at maximum medical improvement, he should forward a detailed medical report describing his condition.

In a November 29, 2011 report, Dr. Amy Duckworth, a podiatrist, described physical examination findings and diagnosed ulcer, chronic, heel and midfoot on the right; bilateral neuropathy; hammer toe of right second and third digits; and pain in joint of ankle/foot on the right. Dr. Duckworth indicated that surgical options were discussed and requested authorization for right tendoAchilles lengthening (TAL) and amputation of all digits.

OWCP authorized the requested surgery on March 7, 2012. On July 13, 2012 Dr. Duckworth amputated digits two through five of the right foot.

In November 2013 appellant changed his address to a post office box in Winchester, Oregon. This was acknowledged by OWCP on December 6, 2013.

Appellant filed a schedule award claim on May 25, 2014. By letter dated June 24, 2014, OWCP informed him that, in support of his claim, he should submit a medical report that included an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ This was to include an opinion as to whether maximum medical improvement had been reached. Appellant submitted a copy of the July 13, 2012 operative note.

By decision dated September 3, 2014, mailed to the Winchester, Oregon address, OWCP denied appellant's schedule award claim. It noted that the record did not contain a medical report sufficiently describing his current condition.

In a request postmarked October 1, 2014, appellant requested a hearing. He maintained that the evidence of record was sufficient to establish entitlement to a schedule award. At that time appellant indicated that he still resided in Winchester, Oregon. On October 6, 2014 OWCP acknowledged receipt of the hearing request. On February 11, 2015 it transferred appellant's claim to the Seattle, Washington, district office.⁴

On February 25, 2015 appellant telephoned OWCP inquiring about his schedule award. He also stated that he had moved to Ashford, Washington. Appellant was advised by OWCP to submit the change of address in writing.

In an April 8, 2015 notice, mailed to appellant's address in Winchester, Oregon, OWCP informed him that a hearing was scheduled at 2:00 p.m. Eastern time, on May 14, 2015. He was given a toll-free telephone number and a pass code and was instructed to call the toll-free number a few minutes before the scheduled time of the hearing and, when prompted, to enter the pass code.

Appellant submitted an April 22, 2015 report in which Dr. Marciano B. Capati, Board-certified in family medicine, described physical examination findings, and diagnosed

³ A.M.A., *Guides* (6th ed. 2008).

⁴ The Seattle district office handles claims from Oregon, Washington, Idaho, and Alaska.

hypertension and calf, hip, and foot pain. A right hip x-ray that day showed no acute fracture or dislocation, and a small area that could reflect previous trauma.

On April 30, 2015 Dr. Steven Teeny, a Board-certified orthopedic surgeon, noted seeing appellant for right hip pain.

By decision dated June 3, 2015, OWCP found that appellant had abandoned his request for a hearing. It found that he received a written notice of the telephone hearing 30 days before the scheduled hearing, but did not appear or explain his absence before or after the scheduled hearing.

LEGAL PRECEDENT

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁵ The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁶ 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.⁷

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 record.⁸ 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.⁹

⁵ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁶ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁷ 20 C.F.R. § 10.617(b); *see R.E.*, Docket No. 13-553 (issued July 25, 2013).

⁸ *Id.* at § 10.622(f).

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

ANALYSIS

On September 3, 2014 OWCP denied appellant's schedule award claim. Appellant timely requested an oral hearing. In an April 8, 2015 letter sent to his address of record, OWCP notified him that a telephone hearing was scheduled for May 14, 2015 at 2:00 p.m., Eastern time. It instructed appellant to telephone a toll-free number and enter a passcode to connect with the hearing representative.

On appeal, appellant maintains that he misread the date of the scheduled telephonic hearing as May 15, 2015 and when he telephoned OWCP on May 15, 2015, he was asked for an access/pin code that had been mailed to him. He stated that he had never received anything like that and was told a hearing could not be held without it.

The Board, however, notes that in his appeal, appellant acknowledged that he had received a letter dated April 8, 2015 that instructed him to call OWCP for his scheduled hearing on May 14, 2015. Appellant instead called on May 15, 2015 and asserts that he was told at that time that he needed an additional pin number which was not provided.

As to his assertion that OWCP has never acknowledged his change of address from Oregon to Washington, the record before the Board, that includes file number xxxxxx947 and subsidiary files xxxxxx057 and xxxxxx965, does not include a written notice of change of address. The acknowledgement letter from OWCP that appellant provided with his appeal identifies a different claim number, xxxxxx944, not the instant claim or its subsidiary files. The copy of the envelope provided shows that appellant's mail was forwarded.

As appellant did not telephone for the hearing at the appointed time, did not request a postponement, or explain his failure to appear within 10 days of the scheduled hearing date of May 14, 2015, the Board finds that he abandoned his request for an oral hearing.

CONCLUSION

The Board finds that appellant abandoned his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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