

FACTUAL HISTORY

On April 16, 2002 appellant, then a 55-year-old locksmith, injured his back when he slipped and fell on a wet floor while in the performance of duty. OWCP accepted appellant's claim for lumbar radiculopathy. In March 2003, he underwent an L5-S1 laminectomy, discectomy and fusion. OWCP paid appellant wage-loss compensation and ultimately placed him on the periodic compensations rolls. For several years, appellant continued to receive wage-loss compensation for temporary total disability. Effective March 23, 2011, OWCP terminated his wage-loss compensation and medical benefits. In a July 7, 2011 decision, a hearing representative of the Branch of Hearings and Review affirmed the termination of wage-loss compensation, but reversed OWCP's decision terminating medical benefits.³

In August 2014, appellant filed a claim for a schedule award (Form CA-7). OWCP received treatment records from the employing establishment, as well as January 11, 2013 treatment records from Dr. Fred H. Geisler, a Board-certified neurosurgeon, who diagnosed lumbar disc degeneration. Additionally, OWCP received a September 29, 2014 report from Dr. Jerrel H. Boyer, a neurosurgeon, who diagnosed lumbar degenerative disc disease, lumbar spinal stenosis, cervical spine degeneration, cervical myelopathy, and cervical spinal stenosis.

OWCP's district medical adviser reviewed the record on February 13, 2015, and found no lower extremity motor or sensory deficits. Consequently, he determined that appellant had zero (0) percent impairment of the lower extremities.

In a February 27, 2015 decision, OWCP denied appellant's claim for a schedule award.

On March 6, 2015 counsel for appellant timely requested a hearing. The Branch of Hearings and Review wrote to appellant on March 6, 2015 acknowledging receipt of the hearing request. On August 27, 2015 it advised both appellant and counsel that a hearing was scheduled for October 7, 2015 at 12:30 p.m. Eastern Time. The Branch of Hearings and Review also provided the toll-free number and passcode. OWCP mailed the notice to appellant at his last known address.

On September 1, 2015 counsel advised the Branch of Hearings and Review that he would not be attending the October 7, 2015 hearing because he no longer represented appellant. He similarly advised OWCP that he no longer represented appellant.

On September 10, 2015 OWCP acknowledged Alan J. Shapiro, Esquire's withdrawal of representation. Additionally, OWCP sent a copy of its September 10, 2015 correspondence to appellant.

Appellant did not appear at the October 7, 2015 oral hearing.

³ The hearing representative found that although the weight of the medical evidence established that appellant could return to his date-of-injury job, the evidence did not demonstrate that his accepted lumbar condition had resolved without residuals. Consequently, the record did not support terminating appellant's medical benefits. OWCP subsequently revisited the issue of appellant's entitlement to wage-loss compensation, but denied modification by decision dated April 5, 2012.

On October 27, 2015 the Branch of Hearings and Review issued a decision finding that appellant had abandoned his request for a hearing, which had been scheduled for October 7, 2015. The decision noted that appellant had been afforded 30-days prior notice of the scheduled hearing, which he had failed to attend. The hearing representative further noted that there was no indication that appellant contacted the Branch of Hearings and Review either before or after the scheduled hearing to explain his absence.

LEGAL PRECEDENT

A claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before an OWCP representative.⁴ Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place and method of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.⁵ 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.⁶ Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.⁷ The “failure of the claimant to request another hearing within 10 days ... shall constitute abandonment of the request for a hearing.”⁸ With the exception of overpayment preresoupment hearings, where it has been determined that a claimant has abandoned his or her right to a hearing, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.⁹

ANALYSIS

On February 27, 2015 OWCP issued a final decision denying appellant’s claim for a schedule award.¹⁰ The Branch of Hearings and Review received a timely request for a hearing regarding the February 27, 2015 schedule award decision, which it acknowledged by letter dated March 6, 2015. Several months later, the Branch of Hearings and Review provided appellant 30-days advanced written notice of his hearing, which was scheduled for October 7, 2015. OWCP mailed the August 27, 2015 notice of hearing to appellant’s address of record, and it has not

⁴ 5 U.S.C. § 8124(b); 20 C.F.R. § 10.616(a) (2014).

⁵ 20 C.F.R. § 10.617(b).

⁶ *Id.* at § 10.622(f).

⁷ *Id.*

⁸ *Id.*

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

¹⁰ As previously noted, the February 27, 2015 merit decision is not currently before the Board. That decision predated appellant’s February 26, 2016 application for review (AB-1) by more than 180 days, and therefore, OWCP’s February 27, 2015 decision is not subject to Board review. *See* 20 C.F.R. § 501.3(e).

since been returned as undeliverable.¹¹ Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.¹² This presumption is commonly referred to as the “mailbox rule.”¹³ It arises when the record reflects that the notice was properly addressed and duly mailed.¹⁴ The current record is devoid of evidence to rebut the presumption that appellant received the Branch of Hearings and Review’s August 27, 2015 notice of hearing.

Appellant did not appear for the October 7, 2015 scheduled hearing, and there is no indication that he requested postponement of the hearing.¹⁵ Moreover, appellant did not submit a written request within the 10-day period following the scheduled hearing explaining his absence and requesting that another hearing be scheduled.¹⁶ The regulations provide that where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.¹⁷

The record establishes that the Branch of Hearings and Review provided appellant at least 30-days advanced written notice of his scheduled hearing. As previously indicated, appellant did not request postponement of the hearing, nor did he attend the October 7, 2015 scheduled hearing. Lastly, appellant did not provide a written explanation for his absence within the 10-day period following the previously scheduled hearing. Under the circumstances, the hearing representative properly found that appellant abandoned his hearing request.

CONCLUSION

The Board finds that appellant abandoned his hearing request before the Branch of Hearings and Review.

¹¹ The Branch of Hearings and Review also sent a copy of the August 27, 2015 notice of hearing to counsel who had filed the March 6, 2015 hearing request. Counsel subsequently advised both OWCP and the Branch of Hearings and Review that he no longer represented appellant. He specifically advised the Branch of Hearings and Review that he would not be present at the October 7, 2015 hearing. On September 10, 2015 OWCP acknowledged Mr. Shapiro’s withdrawal of representation and provided appellant a copy of that letter.

¹² *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* 20 C.F.R. § 10.622(c).

¹⁶ *Id.* at § 10.622(f).

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board