

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

J.A., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
CONTRACT MANAGEMENT AGENCY,
Fort Riley, KS, Employer**

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**Docket No. 17-1036
Issued: August 23, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 11, 2017 appellant filed a timely appeal from a January 30, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision dated May 13, 2016 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

On appeal appellant alleges that he never received a notice informing him that an oral hearing had been scheduled.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 5, 2016 appellant, then 70 years old, filed an occupational disease claim (Form CA-2) alleging that he had contracted lung disease as a result of asbestos exposure during his work as an industrial property management specialist for the employing establishment. By decision dated May 13, 2016, OWCP denied his claim as he failed to establish fact of injury. Specifically, it determined that the evidence was insufficient to establish that the events occurred as alleged. OWCP also noted that it had not received any medical evidence in support of appellant's case.

On May 27, 2016 appellant filed a timely request for an oral hearing before an OWCP hearing representative. By letter dated December 5, 2016, OWCP informed him that his telephonic hearing would be held on January 12, 2017 at 1:00 p.m. (Eastern Standard Time). The notice was mailed to appellant's last known address. He was provided the toll free telephone number to call, as well as an appropriate passcode. However, appellant neither called into the hearing at the appointed time, nor contacted OWCP within the requisite 10 days thereafter.

By decision dated January 30, 2017, OWCP determined that appellant had abandoned his request for an oral hearing before an OWCP hearing representative. It noted that he was properly provided written notice of the hearing 30 days in advance, yet he failed to appear. OWCP further noted that appellant failed to contact OWCP either prior to or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT

Under FECA and its implementing regulations, a claimant who has received a final adverse decision from 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.² 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.³ OWCP has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.⁴

A hearing before the Branch of Hearings and Review can be considered abandoned only under very limited circumstances.⁵ With respect to abandonment of hearing requests, Chapter

² 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

³ *Id.* at 10.617(b). OWCP procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing.

⁴ See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991); see also *K.D.*, Docket No. 11-77 (issued August 18, 2011).

⁵ *Claudia J. Whitten*, 52 ECAB 483 (2001).

2.1601(g) of OWCP's procedures⁶ and section 10.622(f) of its regulations⁷ provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.⁸

ANALYSIS

The Board finds that OWCP properly determined that appellant had abandoned his request for an oral hearing before an OWCP hearing representative.

The record establishes that, on December 5, 2016, in response to appellant's timely request for an oral hearing, OWCP's Branch of Hearing and Review mailed to appellant's last known address, a notice of hearing which was scheduled to be held on January 12, 2017 at 1:00 p.m. (Eastern Standard Time). The Board notes that the notice was sent more than 30 days prior to the scheduled hearing date. 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.⁹

The record establishes that appellant did not appear at the appointed time. Furthermore, he did not request a postponement of the hearing or explain his failure to appear at the hearing within 10 days of the scheduled hearing. Thus, the Board finds that appellant abandoned his request for an oral hearing before an OWCP hearing representative.¹⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

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

⁷ 20 C.F.R. § 10.622(f).

⁸ *See supra* note 6.

⁹ *See A.J.*, Docket No. 16-1636 (issued March 27, 2017).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2017
Washington, DC

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

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

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