

ISSUE

The issue is whether OWCP's Branch of Hearings and Review properly determined that appellant abandoned his request for a hearing.

FACTUAL HISTORY

On January 27, 2016 appellant, then a 29-year-old custom and border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2016 he was a passenger in an automobile that was involved in a motor vehicle accident, which caused whiplash and injuries to his left elbow and low back. He did not immediately stop work.

Appellant submitted duty status reports (Form CA-17) dated February 1 to 22, 2016 from Dr. Kesturkoppal Muralidhara, a Board-certified family practitioner, who diagnosed lumbar and thoracic strains and advised that appellant could not work. On February 5, 2016 Dr. Muralidhara treated appellant for low back pain. Appellant reported that on January 26, 2016 he was a passenger in a work vehicle that was struck on the side by another work vehicle while patrolling the border wall. He reported having whiplash and intense stabbing and shooting back pain. Dr. Muralidhara diagnosed lumbar disc displacement and thoracic strain. He opined that appellant sustained a work-related thoracic and lumbar injury on January 26, 2016 while he was a passenger in a vehicle that was patrolling the border wall when the vehicle he was in was struck by another vehicle. Dr. Muralidhara advised that appellant was taken off of work.

On February 24, 2016 OWCP accepted appellant's claim for sprain of the ligaments of the thoracic spine.

On March 18 and April 5, 2016 appellant filed claims for compensation, CA-7 forms, for leave without pay for the period beginning March 17, 2016.

Appellant was treated by Dr. Muralidhara on April 6, 2016 for middle and low back pain. He reported being a passenger in a work vehicle that was struck by another vehicle while patrolling the border wall. Appellant indicated that he experienced whiplash with intense stabbing and shooting back pain. Dr. Muralidhara noted a February 2, 2016 magnetic resonance imaging (MRI) scan of the thoracic spine revealed a T10-11 broad-based bulge effacing the ventral thecal sac. A February 2, 2016 lumbar spine MRI scan revealed L5-S1 right paracentral disc herniation effacing the ventral thecal sac. Dr. Muralidhara's diagnoses included thoracic disc bulge and lumbar disc herniation secondary to thoracic strain. He advised that the work-related trauma caused pain, tenderness, decreased range of motion, decreased muscle strength, and difficulty with functional mobility. Dr. Muralidhara opined that appellant was incapacitated for work since March 17, 2016 and that this was supported by findings and diagnostics. Appellant was currently unable to perform at the physical demand level required for his position as a border patrol agent. Dr. Muralidhara advised that appellant's condition has not improved since his injury.

By decision dated May 9, 2016, OWCP denied appellant's claim for compensation for the period beginning March 17, 2016, because the medical evidence of record failed to establish disability from work due to the January 26, 2016 employment injury.

On May 27, 2016 appellant requested a telephone hearing before an OWCP hearing representative. He submitted reports from Dr. Muralidhara dated March 7 to May 27, 2016, who diagnosed work-related thoracic and lumbar strain and L5-S1 disc herniation. Dr. Muralidhara returned appellant to work full time with restrictions.

On January 9, 2017 OWCP notified appellant and his representative that a telephone hearing would be held on February 6, 2017 at 9:00 a.m. (Eastern Standard Time). It instructed him to call the provided toll-free number shortly before the hearing time and enter the pass code to gain access to the conference call. OWCP mailed the January 9, 2017 notice of hearing to the addresses of record for both appellant and his representative.

By decision dated February 21, 2017, OWCP found that appellant had abandoned his request for a hearing. It determined that he received a written notice of the hearing 30 days before the scheduled hearing, but did not appear and that he failed to timely explain his absence from 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.³ 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.⁴ OWCP has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.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. 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.⁶ 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.⁷

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

⁴ 20 C.F.R. § 10.617(b).

⁵ *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

⁶ 20 C.F.R. § 10.622(c).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011); *see also* 20 C.F.R. § 10.622(f).

ANALYSIS

The applicable regulations require OWCP to provide at least 30 days advance written notice of the scheduled hearing date.⁸ The January 9, 2017 hearing notification indicated that a telephonic hearing was scheduled for February 6, 2017, which was less than 30 days from the date of the notice. The Branch of Hearings and Review did not provide appellant at least 30 days advance notice as mandated. Because the January 9, 2017 hearing notification was insufficient, the February 21, 2017 decision is set aside and the case is remanded to the Branch of Hearings and Review in order to schedule another oral hearing.⁹

CONCLUSION

The Board finds that OWCP's Branch of Hearings and Review improperly found that appellant abandoned his requested hearing.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: August 18, 2017
Washington, DC

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

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

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

⁸ 20 C.F.R. § 10.617(b).

⁹ See *R.E.*, Docket No. 09-2247 (issued May 11, 2010).