

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

M.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
EL PASO HEALTH CARE SYSTEM,
El Paso, TX, Employer**

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**Docket No. 16-1203
Issued: May 23, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 18, 2016 appellant filed a timely appeal from a December 23, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision, dated April 9, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.³

¹ Appellant timely requested oral argument; however, the Board exercised its discretion and denied her request pursuant to 20 C.F.R. § 501.5(a). *See Order Denying Request for Oral Argument*, Docket No. 16-1203 (issued October 21, 2016).

² 5 U.S.C. § 8101 *et seq.*

³ The record includes evidence received after the December 23, 2015 decision. As this evidence was not part of the record when the Branch of Hearings and Review issued its final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On February 10, 2015 appellant, then a 52-year-old licensed vocational nurse, filed a traumatic injury claim (Form CA-1) for a leg/knee injury that allegedly occurred on February 5, 2015 while in the performance of duty.⁴ She claimed that a wheelchair hit her leg. On Form CA-1 appellant's supervisor indicated that appellant was injured in the performance of duty. Appellant continued to work following the February 5, 2015 alleged incident. She submitted medical evidence with a diagnosis of left knee effusion and leg contusion. Appellant reported that she was placing a folded wheelchair in the back of a car when the wheelchair fell back and hit her left knee.⁵

On March 2, 2015 OWCP advised appellant of the need for additional factual and medical evidence in support of her claim. It also requested additional factual information from the employing establishment regarding the location of the alleged injury and whether she was performing her assigned duties at the time of the alleged injury.

In a March 2, 2015 statement, the supervisor indicated that on February 5, 2015 appellant was assisting a veteran/patient by putting his wheelchair in his car. She noted that appellant did not lift the patient, just the wheelchair. The supervisor stated that appellant was "injured at work in the line of her duties...." After the incident/injury, the employing establishment's safety officer reportedly informed the supervisor that helping the veteran in that particular manner was not part of appellant's duties. However, the supervisor explained that such information has not previously been communicated to her staff, at least not in the past few years, and it was not part of their practice at the Las Cruces outpatient clinic. She further indicated that she had since requested a copy of the employing establishment's standard operating procedures, and the safety officer had yet to provide the requested information. The supervisor stated that appellant was helping a veteran when she was injured and, as her direct supervisor, that is what she had asked of appellant.

On March 9, 2015 the employing establishment offered appellant a limited-duty assignment, which she accepted.

OWCP also received additional medical evidence regarding appellant's left knee complaints, including March 12, 2015 diagnostic evidence of a small joint effusion.

⁴ According to Form CA-1, appellant's official duty station was in El Paso, TX. The alleged injury occurred at the employing establishment's community-based outpatient clinic (CBOC) in Las Cruces, NM.

⁵ The record also includes an unsigned Form CA-1 dated February 18, 2015. On this particular form, "Nurse Manager" T.L. represented that appellant was not in the performance of duty at the time of the alleged injury on February 5, 2015. He did not challenge the specifics of the alleged incident, but instead noted that placing a wheelchair into a patient's vehicle was not part of appellant's job description. T.L. further noted that appellant had not followed the facility's policy/procedures, which reportedly prohibited employees from performing any lifting unrelated to patient care.

In a March 13, 2015 e-mail/statement, appellant indicated that she was helping an 80-year-old caregiver and her veteran son place a VA-provided wheelchair in the back seat of their automobile. The wheelchair could not fit in the trunk. Appellant indicated that the caregiver was unable to lift the wheelchair (35 to 50 pounds) into the car, so appellant placed the folded chair in the back seat. She stated that the wheelchair dropped down a little from the back seat into the open car door where she was standing, and it came down on the upper part of her knee. Appellant then lifted the wheelchair up again and secured it with the seatbelt. She explained that she was just trying to help an 80-year-old mother with her veteran son, which was the employing establishment policy when asked for assistance. Appellant further explained that part of her responsibility as a nurse was to teach patients and/or caregivers how to use a wheelchair (or other provided equipment), including how to break it down to place it into a vehicle.

By decision dated April 9, 2015, OWCP denied appellant's traumatic injury claim as she had failed to establish fact of injury. It noted that the employing establishment's safety officer indicated that helping patients put wheelchairs in their vehicles was not in appellant's line of duty. The claims examiner further noted that the employing establishment controverted the claim.

In an appeal request form dated April 16, 2015, postmarked April 23, 2015 and received on April 24, 2015, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She submitted a February 6, 2015 employing establishment report of contact wherein she explained that on February 5, 2015 at approximately 11:00 a.m., she assisted a patient's mother load a wheelchair into the back seat of her car. Appellant further explained that she developed a strain on her left side, lower back, and left leg that evening. She noted that she continued to have pain and discomfort from lifting the wheelchair into the car, and that she had planned to seek medical attention that day. Appellant also indicated that she had reported the incident to her supervisor.

In an April 21, 2015 statement, appellant's supervisor confirmed that appellant had been injured at work in the line of duty on February 5, 2015. She noted that appellant was showing a veteran with a new wheelchair how to load it into his vehicle. The supervisor further stated that appellant was within her regular tour of duty and not at lunch when the incident occurred. She reiterated that appellant was helping a veteran when she was injured and, as her direct supervisor, that is what she asked of appellant.

On April 24, 2015 OWCP acknowledged receipt of appellant's hearing request.

On May 13, 2015 the Branch of Hearings and Review received another appeal request form from appellant.⁶ Appellant changed her previous request for an oral hearing to a request for review of the written record.

In a May 20, 2015 statement, appellant noted that the safety officer, T.L., was not her supervisor. She argued that he switched her original February 10, 2015 CA-1 form for the February 18, 2015 CA-1 form. Appellant also argued that her direct nursing supervisor had entered the same form on which her handwritten signature was entered. She explained that her

⁶ The request was postmarked May 7, 2015.

supervisor responded “yes” to question 28 regarding whether the employee was injured in the performance of duty, as opposed to T.L. who responded “no.” Appellant requested that OWCP use the original “unadulterated form” that her supervisor had signed on February 10, 2015.

OWCP also received a position description and an undated statement from a coworker. The coworker confirmed that appellant’s activities of assisting the veteran was part of their work duties.

In a letter dated November 2, 2015, OWCP advised appellant that a telephonic hearing was scheduled for December 8, 2015 at 11:15 a.m. (Eastern Standard Time). It provided her with a toll-free number and passcode for the call.

In a December 23, 2015 decision, the hearing representative found that appellant had abandoned her request for a hearing, which had been scheduled for December 8, 2015. Appellant failed to appear at the designated time and place and, according to the hearing representative, there was no indication in the file that she had contacted OWCP either before or after the scheduled hearing explaining her failure to appear.

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.⁷ The claimant may request either an oral hearing or a review of the written record.⁸ Unless otherwise directed in writing by the claimant, OWCP’s hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.⁹ A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date of the hearing that another hearing be scheduled.¹⁰ Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.¹¹ The claimant’s failure to request another hearing within 10 days shall constitute abandonment of the hearing request.¹²

Once an oral hearing is scheduled and OWCP’s hearing representative has mailed appropriate written notice to the claimant and representative, OWCP will, upon submission of proper written documentation of unavoidable serious scheduling conflicts (such as court-ordered appearances/trials, jury duty, or previously scheduled outpatient procedures), entertain requests from a claimant or his or her representative for rescheduling as long as the hearing can be rescheduled on the same monthly docket, generally no more than seven days after the originally

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

⁸ 20 C.F.R. § 10.615.

⁹ *Id.* at § 10.617(b).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (October 2011).

¹¹ *Id.*

¹² *Id.*

scheduled time. In these instances, rescheduled hearings will usually be held *via* teleconference, and the hearing representative will ensure that the file accurately reflects any action taken to reschedule the hearing. When a request to postpone a scheduled hearing cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly.¹³

ANALYSIS

On an April 16, 2015 appeal request form appellant initially requested an oral hearing with respect to OWCP's April 9, 2015 decision. OWCP received her request on April 24, 2015, and sent an acknowledgment letter that same day. On May 13, 2015 it received another appeal request form from appellant. Instead of the previously requested oral hearing, appellant requested rather a review of the written record. OWCP did not acknowledge receipt of appellant's latest appeal request form.

By letter dated November 2, 2015, OWCP advised appellant that the requested "oral hearing" would be conducted by telephone on December 8, 2015. It provided additional instructions on how and when to call in, including the toll-free access number and pass code. Appellant did not participate in the scheduled December 8, 2015 hearing, nor is there any indication from the record that she contacted OWCP between November 2 and December 23, 2015, when OWCP issued its decision finding that appellant abandoned her hearing request.

Once a request for a hearing has been received, the claimant may request a change in the format from a hearing to a review of the written record by making a written request to the Branch of Hearings and Review.¹⁴ OWCP will grant a request received by the Branch of Hearings and Review within 30 days of: (1) the date OWCP acknowledges the initial hearing request; or (2) the date OWCP issues a notice setting a date for an oral hearing, in cases where the initial request was for, or was treated as a request for, an oral hearing.¹⁵ A request received beyond the above-noted time frames will be subject to OWCP's discretion.¹⁶ The decision to grant or deny a change of format from a hearing to a review of the written record is not reviewable.¹⁷

The Board finds that appellant did not abandon her request for a hearing, as the record reveals that she timely changed her request from an oral hearing to a review of the written record. On May 13, 2015 OWCP received appellant's request for a review of the written record, which was within 30 days of its April 24, 2015 acknowledgment of appellant's initial hearing

¹³ 20 C.F.R. § 10.622(c).

¹⁴ *Id.* at § 10.616(b).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

request.¹⁸ This was, therefore, a timely request. As it did not conduct a review of the written record, the case must be remanded for a merit review and a *de novo* decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 23, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ The subsequent request for a review of the written record was also timely with respect to OWCP's April 9, 2015 merit decision.