

FACTUAL HISTORY

On August 11, 2016 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that same date he sustained a head and right neck injury when he was picking up a heavy sack and experienced head and neck pain. He stopped work and sought medical treatment on the date of injury.

In an August 11, 2016 emergency department report, Dr. Marcilla reported that appellant was working and lifted a heavy item when he experienced pain in his neck radiating down to his right arm. He diagnosed neck strain/sprain and mild cervical radiculopathy.

In an August 11, 2016 attending physician's report, (Form CA-20) Dr. Oscar Marcilla, Board-certified in emergency medicine, reported that appellant injured his neck while lifting a heavy item and diagnosed neck strain. He checked the box marked "Yes" when asked if the condition was caused or aggravated by the employment activity described.

Medical reports, progress notes, duty status reports (Form CA-17), and attending physician's reports (Form CA-20) dated August 15 through October 13, 2016 were submitted from Dr. Lihua Mo, Board-certified in physical medicine and rehabilitation, documenting appellant's treatment for his injuries. In an August 15, 2016 report, Dr. Mo reported that appellant worked as a mail handler and was injured on August 11, 2016 when he was lifting a heavy package at work and experienced acute neck and right shoulder pain. She diagnosed work-related injury on August 11, 2016, sprain and strain of cervical spine, cervical spine disc herniation, cervical radiculopathy, right shoulder sprain and strain, and right shoulder rotator cuff tear. Based on the history and medical data provided by appellant, Dr. Mo opined that his diagnoses were the direct result of the August 11, 2016 injury.

In a September 21, 2016 report, Dr. Kevin Jiang, a Board-certified orthopedic surgeon, reported that appellant was referred for a second opinion after complaining about right shoulder pain that started after a work-related injury on August 11, 2016 when he lifted a heavy mailbag at the employing establishment. He provided findings on physical examination and diagnosed cervical radiculopathy.

In progress notes dated August 29 through September 24, 2016, Dr. Tinghim Leung, a treating chiropractor, documented treatment for cervicalgia, pain in the thoracic spine, and cervicobrachial syndrome.

By decision dated October 27, 2016, OWCP accepted appellant's claim for cervical strain.

Following the acceptance of his claim, appellant submitted diagnostic reports dated August 18, 2015 interpreting magnetic resonance imaging (MRI) scans of the cervical spine and right shoulder and filed a request to expand the accepted conditions.

In an October 17, 2016 report, Dr. Jason Hu, a treating physician, reported that appellant complained of right shoulder pain after a work-related injury on August 11, 2016 when he lifted a heavy mailbag at the employing establishment. He provided findings on physical examination and diagnosed cervical radiculopathy and neck pain.

In medical reports and notes dated November 1 through 10, 2016, Dr. Mo diagnosed work-related injury on August 11, 2016, sprain and strain of cervical spine, and right shoulder labral tear confirmed *via* MRI scan of the right shoulder. She opined that appellant's diagnoses were the direct result of the August 11, 2016 employment injury.

By decision dated December 7, 2016, OWCP denied appellant's claim finding that the evidence of record failed to establish that his diagnosed conditions of cervical radiculopathy, cervical disc herniation, right shoulder strain, and right shoulder labral tear were causally related to the accepted August 11, 2016 employment injury.

On January 11, 2017 OWCP received appellant's January 4, 2017 request for oral hearing before an OWCP hearing representative.

In support of his claim, appellant submitted medical reports, physical therapy notes, imaging studies, and chiropractic treatment notes dated August 11, 2016 through February 1, 2017 from his attending physicians and treatment providers.

By letter dated February 15, 2017, OWCP notified appellant that his hearing would be held on April 5, 2017 at 10:30 a.m. Eastern Standard Time (EST). It provided him with an address where the hearing would take place.

By letter dated March 16, 2017, received by OWCP on March 27, 2017, appellant notified OWCP that he would be unable to attend his oral hearing scheduled for April 5, 2017. He requested review of the written record and noted submission of additional medical evidence in support of his claim, which he attached.

Accompanying his letter, appellant submitted January 12 and March 16, 2017 medical reports from Dr. Mo. Dr. Mo's reports reviewed appellant's work-related injury, medical history, diagnostic reports, physical examination findings, and diagnoses. She discussed these findings and provided an opinion regarding the cause of appellant's work injuries.

By decision dated April 17, 2017, an OWCP hearing representative found that appellant had abandoned his hearing request. He found that appellant received written notification of the April 5, 2017 hearing 30 days in advance, but failed to appear. The hearing representative further determined that nothing in the record established that appellant contacted, or attempted to contact, OWCP either prior to or subsequent to the scheduled hearing to explain his failure to participate. He concluded that appellant had abandoned his hearing request.

LEGAL PRECEDENT -- ISSUE 1

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.² Unless otherwise directed in writing by the claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30

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

days before the scheduled date.³ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.⁴

OWCP regulations at 5 C.F.R. § 10.622 provide guidance regarding a claimant's request to postpone a hearing:

“(b) OWCP will entertain any reasonable request for scheduling the oral hearing, but such requests should be made at the time of the original application for hearing. Scheduling is at the sole discretion of the hearing representative, and is not reviewable. Once the oral hearing is scheduled and [OWCP] has mailed appropriate written notice to the claimant, the oral hearing cannot be postponed at the claimant's request for any reason except those stated in paragraph (c) of this section, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip). When the request to postpone a scheduled hearing does not meet the test of paragraph (c) of this section and 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. In the alternative, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.”

OWCP's procedures recognizes that where the request for postponement is received in sufficient time to contact the claimant prior to the scheduled hearing (*i.e.*, 10 days for mailing or through a documented telephone contact), OWCP's hearing representative should advise the claimant that the postponement will not be allowed pursuant to the regulations at 5 C.F.R. § 10.622(b). The claimant would then have the options to withdraw the hearing request, attend the scheduled hearing, reschedule the hearing at an available time within the same docket, opt for a review of the written record by the OWCP hearing representative, or have a telephone hearing, if the OWCP hearing representative wished to grant such a hearing within his or her discretion.⁵

A hearing before the Branch of Hearings and Review can be considered abandoned only under very limited circumstances.⁶ With respect to abandonment of hearing requests, Chapter 2.1601.6(g) of OWCP's procedures⁷ and section 10.622(f) of its regulations⁸ 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

³ 20 C.F.R. § 10.617(b).

⁴ See also *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(f) (October 2011).

⁶ *Claudia J. Whitten*, 52 ECAB 483 (2001).

⁷ FECA Procedure Manual, *supra* note 5 at, Chapter 2.1601.6(g) (October 2011).

⁸ 20 C.F.R. § 10.622(f).

finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.⁹

ANALYSIS

Following OWCP's December 7, 2016 decision denying his traumatic injury claim, appellant requested an oral hearing before an OWCP hearing representative. OWCP scheduled an oral hearing on April 5, 2017 and provided proper notice. By decision dated April 17, 2017, an OWCP hearing representative found that appellant had abandoned his hearing request and further determined that nothing in the record established that appellant had contacted, or attempted to contact, OWCP either prior to or subsequent to the scheduled hearing to explain his failure to participate. The Board finds that this case is not in posture for decision.¹⁰

The record shows that on February 15, 2017 OWCP mailed appropriate notice to appellant scheduling an oral hearing on April 5, 2017 at 10:30 a.m. EST. The record also supports that, by letter dated March 16, 2017, received on March 27, 2017, appellant notified OWCP that he was unable to attend his oral hearing scheduled for April 5, 2017. In lieu of his oral hearing, he requested review of the written record and noted he was submitting additional medical evidence in support of his claim, which he attached to his request. Appellant did not abandon his hearing request, rather he requested that it be converted to a review of the written record. OWCP procedures provide that a finding of abandonment requires that three conditions: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.¹¹ Appellant did notify OWCP of his failure to appear within 10 days of the scheduled hearing date and requested review of the written record. The conditions for abandonment have not been met.¹² Therefore, the Boards finds that OWCP improperly found that appellant abandoned his request for a hearing.¹³

As appellant's request that the April 5, 2017 hearing be converted into a review of the written record was received by OWCP on March 27, 2017, the hearing representative failed to comply with OWCP procedure and evaluate appellant's claim *via* review of the written record. Appellant's March 16, 2017 letter requesting his appeal be converted from an oral hearing to review of the written record was accompanied with January 12 and March 16, 2017 medical reports from Dr. Ho which discussed causal relationship pertaining to his alleged employment injuries. Consequently, he was deprived of his appeal before the Branch of Hearings and Review as there remains an outstanding request for review of the written record.¹⁴

⁹ See *supra* note 7.

¹⁰ *N.M.*, Docket No. 07-1432 (issued May 5, 2008).

¹¹ *Supra* note 7.

¹² *Joselyn I. Stewart*, Docket No. 06-345 (issued May 5, 2006).

¹³ *Id.*

¹⁴ *Jesse F. Abner*, Docket No. 02-1304 (issued June 5, 2003).

The Board, therefore, finds that this case is not in posture for a decision, as appellant's request for review of the written record of OWCP's December 7, 2016 decision is still pending before the Branch of Hearings and Review awaiting a final decision.¹⁵ The case will be remanded to the Branch of Hearings and Review for appropriate action.¹⁶ On remand OWCP should consider new factual and medical evidence submitted, together with the previously submitted evidence of record, to determine the merits of appellant's claim.¹⁷

CONCLUSION

The Board finds that OWCP improperly determined that appellant abandoned his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2017 decision of the Office of Workers Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: November 22, 2017
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

¹⁵ See *supra* note 10.

¹⁶ It is the obligation of OWCP not to delay appellant's request for review of the written record unnecessarily and thereby, jeopardize his right to appeal the merit decision to the Board. FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1601.8 (October 2011).

¹⁷ Given the disposition of the first issue, the second issue is moot.