

aggravation of degenerative joint disease of the left knee. Appellant stopped work on September 21, 2000 and did not return. OWCP paid appellant wage-loss compensation for total disability from September 22, 2000 to July 29, 2001.

Dr. Thaddeus W. Hume, an attending Board-certified orthopedic surgeon, provided periodic reports February 22, 2002, noting that appellant had remained off work after the September 26, 2000 arthroscopic left knee surgery. He opined that she remained disabled from her date-of-injury position and might require total knee arthroplasty in the future. On April 1, 2002 Dr. Hume requested OWCP to authorize purchase of a wheelchair due to appellant's severe osteoarthritis in both knees. Periodic reports kept her off work due to severe osteoarthritis of both knees.

In a June 19, 2002 report, Dr. Hume opined that appellant had 37 percent permanent impairment of the right lower extremity and 20 percent permanent impairment of the left lower extremity due to severe osteoarthritis of both knees, according to the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) then in effect.

On November 19, 2002 an OWCP medical adviser reviewed Dr. Hume's evaluation and found 35 percent permanent impairment of the right lower extremity and 20 percent permanent impairment of the left lower extremity. He found that appellant had attained maximum medical improvement as of June 19, 2002.

By decision dated January 22, 2003, OWCP issued a schedule award for 35 percent permanent impairment of the right lower extremity and 20 percent permanent impairment of the left lower extremity due to bilateral knee osteoarthritis. The period of the award ran from May 19, 2002 through May 31, 2005.

Following the end of the schedule award, OWCP resumed paying disability compensation from June 1, 2005 through March 18, 2006.² Appellant was paid compensation on the periodic rolls from March 19, 2006 to July 23, 2016. She remained under medical treatment and participated in physical therapy periodically from 2010 through early 2014.

In an April 25, 2014 report, Dr. Robin N. Goytia, an attending Board-certified orthopedic surgeon, diagnosed bone on bone post-traumatic osteoarthritis of both knees. On June 30, 2015 he recommended bilateral total knee arthroplasties.

On July 8, 2015 OWCP authorized Dr. Goytia's request for a total left knee arthroplasty.

² On February 1, 2005 OWCP obtained a second opinion report from Dr. David Vanderweide, a Board-certified orthopedic surgeon, who opined that an accepted bilateral shoulder condition had returned to baseline. By notice dated July 25, 2005 and finalized September 6, 2005, it terminated appellant's compensation effective September 6, 2005, finding that an accepted bilateral shoulder condition had ceased with no residuals. By decision dated February 16, 2006, OWCP's Branch of Hearings and Review reversed the termination and reinstated her compensation benefits. OWCP again terminated appellant's wage-loss compensation by May 20, 2008 decision, finding that she refused an offer of suitable work. By decision dated May 27, 2008, OWCP's Branch of Hearings and Review reversed the May 20, 2008 decision and reinstated her compensation benefits.

In a February 22, 2016 report, an OWCP medical adviser opined that appellant's right knee osteoarthritis was due to nonoccupational causes, including morbid obesity. Dr. Goytia again recommended total right knee arthroplasty on February 24, 2016, emphasizing that appellant's severe osteoarthritis was post-traumatic and not idiopathic in nature.

By decision dated June 16, 2016, OWCP denied appellant's request to authorize a total right knee arthroplasty, as OWCP's medical adviser had opined that the right knee osteoarthritis was due solely to preexisting, idiopathic conditions.

In a July 8, 2016 appeal request form received by OWCP on July 12, 2016, appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. OWCP issued an acknowledgement letter on July 18, 2016.

In a January 5, 2017 letter, OWCP notified appellant that a telephonic oral hearing was scheduled in her case for 2:15 p.m. (Eastern Standard Time) on February 17, 2017. It provided a toll-free call-in number and passcode. OWCP explained that, if appellant no longer desired a hearing, she should request cancellation immediately by writing to the Branch of Hearings and Review.

In a February 3, 2017 letter received by OWCP and imaged into the electronic case record on February 14, 2017, appellant requested that OWCP cancel the oral hearing scheduled for February 17, 2017. She also asked to change her request for an oral hearing to a request for a review of the written record. Appellant submitted a new report from Dr. Goytia dated September 20, 2016, explaining why the requested right knee arthroscopy was necessitated by the accepted injuries.

By decision dated March 10, 2017, OWCP's hearing representative found that appellant had abandoned her request for a hearing, which had been scheduled for February 17, 2017, as she had 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.³ The claimant may request either an oral hearing or a review of the written record.⁴ 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.⁵ A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date of the

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

⁴ *Id.* at § 10.615.

⁵ *Id.* at § 10.617(b).

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 claimant's failure to request another hearing within 10 days shall constitute abandonment of the hearing request.⁸

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 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.⁹

ANALYSIS

On a July 8, 2016 appeal request form, appellant initially requested a telephonic oral hearing with respect to OWCP's June 16, 2016 decision. OWCP received her request on July 12, 2016 and sent an acknowledgment letter on July 18, 2016. In a January 5, 2017 letter, it notified appellant that the hearing was scheduled for February 17, 2017 at 2:15 p.m. and provided a toll-free call-in number and passcode. This letter also explained the procedures for cancelling the hearing.

In a February 3, 2017 letter received by OWCP on February 14, 2017, three days prior to the scheduled hearing, appellant requested that OWCP cancel the scheduled hearing and instead conduct a review of the written record. OWCP did not acknowledge receipt of her letter cancelling the hearing and prepared to conduct the hearing as scheduled. Appellant did not appear for the scheduled February 17, 2017 hearing. OWCP subsequently issued its March 10, 2017 decision, finding that she abandoned her hearing request as she did not participate in the scheduled hearing or contact OWCP either before or after to explain why she failed to appear.

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.¹⁰ OWCP will grant a request received by the Branch of Hearings and

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

⁷ *Id.*

⁸ *Id.*

⁹ 20 C.F.R. § 10.622(c).

¹⁰ *Id.* at § 10.616(b).

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.¹¹ A request received beyond the above-noted time frames will be subject to OWCP's discretion.¹² The decision to grant or deny a change of format from a hearing to a review of the written record is not reviewable.¹³

The Board finds that appellant did not abandon her request for a hearing, as the record reveals that she timely requested cancellation. On February 12, 2017 OWCP received her request to cancel the hearing and conduct a review of the written record. The Board further finds, however, that her February 14, 2017 request for a review of the written record was untimely filed, as it was not received by OWCP within 30 days of the July 18, 2016 acknowledgement letter, or the January 5, 2017 notice of hearing.¹⁴ OWCP therefore must exercise its discretion as to whether to grant appellant's request for a change of format.¹⁵ However, the March 10, 2017 decision finding that appellant abandoned her hearing request did not address her request for a review of the written record. Therefore, the case must be remanded for review and an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for a decision.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 10, 2017 is set aside, and the case remanded for additional action consistent with this decision and order.

Issued: September 6, 2017
Washington, DC

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

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

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