

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

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**M.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Merrifield, VA, Employer**

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**Docket No. 17-0613  
Issued: August 7, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 25, 2017 appellant filed a timely appeal from a January 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP.<sup>3</sup>

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<sup>1</sup> Appellant also filed a timely request for oral argument in this case. By order dated July 17, 2017, the Board exercised its discretion and denied her request for oral argument as it would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 17-0613 (issued July 17, 2017).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The application for review (AB-1 Form) reflects that appellant is not appealing from the August 16, 2016 merit decision.

## ISSUE

The issue is whether OWCP properly determined that appellant abandoned her request for an oral hearing before an OWCP hearing representative, which was scheduled for December 14, 2016.

## FACTUAL HISTORY

On June 22, 2016 appellant, then a 53-year-old customer service manager, filed an occupational disease claim (Form CA-2) alleging that she developed emotional stress as a result of constant intimidation, harassment, and threats of being demoted and fired from the employing establishment. She noted that she first became aware of her claimed condition on April 1, 2016 and of its relationship to her federal employment on May 1, 2016. In support of her claim, appellant submitted a narrative statement detailing the employment conditions alleged to have caused her injury. The employing establishment submitted a statement from its branch manager in regard to her allegations.

By development letter dated July 14, 2016, OWCP informed appellant that the evidence of record was insufficient to support her claim. It advised her of the type of medical and factual evidence needed and asked that she respond to the provided questionnaire within 30 days. By separate letter of that, same date, OWCP requested that the employing establishment provide further detail pertaining to appellant's emotional condition claim. No evidence was received within the time allotted.

By decision dated August 16, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the occupational exposure occurred as alleged. The decision was addressed to appellant's address of record.

By appeal request form dated September 1, 2016, appellant requested an oral hearing before an OWCP hearing representative. On the form, she noted a new address. The hearing request was postmarked on September 2, 2016 and received by OWCP on September 7, 2016. Appellant submitted narrative statements, witness statements, and medical evidence in support of her claim.

By letter dated November 14, 2016, OWCP notified appellant that the hearing was scheduled to be held on December 14, 2016 at 12:00 p.m. Eastern Standard Time, and it provided her the location of the hearing. The notice was addressed to appellant at her prior address of record, where the August 16, 2016 decision was mailed.

By decision dated January 6, 2017, OWCP's hearing representative found that appellant had abandoned her hearing request. She found that appellant received written notification of the December 14, 2016 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 her failure to participate.

On appeal, appellant asserts that she had moved from her prior address of record on July 25, 2016 and that she notified OWCP of her change of address on that date.

### **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.<sup>4</sup> 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 days before the scheduled date.<sup>5</sup> OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.<sup>6</sup>

A hearing before the Branch of Hearings and Review can be considered abandoned only under very limited circumstances.<sup>7</sup> With respect to abandonment of hearing requests, Chapter 2.1601.6(g) of OWCP's procedures<sup>8</sup> and section 10.622(f) of its regulations<sup>9</sup> 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.<sup>10</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision.<sup>11</sup>

Following OWCP's August 16, 2016 decision denying her occupational disease claim, appellant timely requested an oral hearing before an OWCP hearing representative. OWCP's Branch of Hearings and Review scheduled an oral hearing for December 14, 2016, but she did not appear. By decision dated January 6, 2017, an OWCP hearing representative found that appellant had abandoned her hearing request and further determined that nothing in the case record

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<sup>4</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

<sup>5</sup> *Id.* at § 10.617(b).

<sup>6</sup> *See S.L.*, Docket No. 17-1273 (issued November 22, 2017); *see also Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>7</sup> *Claudia J. Whitten*, 52 ECAB 483 (2001).

<sup>8</sup> Federal (FECA Procedure Manual), Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

<sup>9</sup> 20 C.F.R. § 10.622(f).

<sup>10</sup> *See supra* note 8.

<sup>11</sup> *N.M.*, Docket No. 07-1432 (issued May 5, 2008).

established that appellant had contacted, or attempted to contact, OWCP either prior to or subsequent to the scheduled hearing to explain her failure to participate.

Section 10.617(b) of OWCP's regulations require OWCP to mail a notice of the time and place of the hearing to appellant at least 30 days before the scheduled date.<sup>12</sup> OWCP has the burden of proving that it mailed a notice of a scheduled hearing to appellant.<sup>13</sup> Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.<sup>14</sup> However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.<sup>15</sup> Also, it is axiomatic that the presumption of receipt does not apply where a notice is sent to an incorrect address.<sup>16</sup>

The record establishes that appellant advised OWCP of her new address on the September 1, 2016 appeal request form. However, OWCP improperly mailed the November 14, 2016 notice of hearing to her former address where the August 16, 2016 decision was mailed.<sup>17</sup> Thus, the Board finds that OWCP failed to meet its burden of proof to establish that it mailed a notice of a scheduled hearing to appellant.<sup>18</sup>

### CONCLUSION

The Board finds that OWCP improperly determined that appellant abandoned her request for a hearing before an OWCP hearing representative, which was scheduled for December 14, 2016. The case will be remanded to provide appellant the opportunity for a hearing.<sup>19</sup>

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<sup>12</sup> 20 C.F.R. § 10.617(b). 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. 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

<sup>13</sup> *Supra* note 6.

<sup>14</sup> See *Michelle Lagana*, 52 ECAB 187 (2000).

<sup>15</sup> See *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-0526 (issued September 14, 2009).

<sup>16</sup> See *Clara T. Norga*, 46 ECAB 473 (1995); *W.A.*, Docket No. 06-1452 (issued November 27, 2006).

<sup>17</sup> 20 C.F.R. § 10.127 provides, a copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. See also *M.R.*, Docket No. 11-0632 (issued September 28, 2011).

<sup>18</sup> *W.S.*, Docket No. 14-0842 (issued July 29, 2014); *George R. Bryant*, Docket No. 03-2241, (issued April 19, 2005).

<sup>19</sup> *R.N.*, Docket No. 07-0608 (issued June 8, 2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 6, 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: August 7, 2018  
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